Arbitrary deprivation of nationality Submission of the Immigration Law Practitioners' Association to the UN Office of the High Commissioner for Human Rights

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government bodies, including UK Border Agency, consultative and advisory groups among others.

In this submission ILPA contends that the deprivation of British citizenship is arbitrary, as the term is understood in international law, in circumstances, now increasingly common, where a person is deprived of his/her nationality while s/he is outside the UK and is not permitted to return to the UK for an appeal against the deprivation both

(1) because of the lack of procedural protection and

(2) because whether or not a person can be present at the hearing of his/her appeal against deprivation depends on whether s/he was in the UK or outside it at the time of the deprivation.

This must be viewed against the backdrop of the broader question as to whether the discretion given to the Secretary of State to deprive a person of their British citizenship is so wide as to render the deprivation arbitrary. That is not a question we discuss in detail here, but we should be happy to provide further information if required.

Arbitrary deprivation in the UK context: the applicable international law

ILPA recalls the comments of the UN Human Rights Council on deprivation of nationality by the UN Human Rights Council, drawing on, *inter alia*, General Comments No. 16[1] and 27[2] of the UK Human Rights Committee:[3]

[1] Human Rights Committee, General Comment 16, (Twenty-third session, 1988), **U.**N. Doc. HRI/GEN/1/Rev.6 at 142 (2003): "…arbitrary interference" can also extend to interference provided for under the law. The introduction of 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."

[2] See also General Comment 27, (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999).

[3] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34.

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

The Council went on to observe:

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

44. The International Law Commission … clarified that the term "effective" was intended to stress the fact that an opportunity had to be provided to permit meaningful review of relevant substantive issues; it could thus be understood in the same sense as in article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, where the same word is used.[4]

The situation in the UK

The lack of procedural guarantees and the consequentially arbitrary nature of the deprivation take the following form:

- Whether a person can be present at his/her appeal depends on whether s/he happened to be in the UK at the time service of the decision to make an order depriving him/her of citizenship. In the UK domestic context this means that the UK authorities may – and have –manipulated the point of service of deprivation documents to coincide with an individual's temporary absence from the UK.
- Service can take place at the 'last known address' in the UK meaning that much time can elapse before notification is in fact received.
- A person deprived of their British citizenship while outside the UK may be at risk in the country of their only other nationality or the allegations made by the UK upon which deprivation is founded may put them at risk of persecution or ill treatment from state and/or non-state actors.
- A person deprived of their nationality may have no rights or entitlements in the country in which they find themselves at the point of the deprivation. They may have no funds and no entitlement to support. If at risk in the

[4] *Op.cit.* The reference to the International Law Commission is to the *Yearbook of the International Law Commission*, 1999, vol. II (2), p.38. The relevant draft article, Article 17, is concerned with the succession of States and contains the phrase "effective administrative or judicial review" which is glossed by the Commission as follows: " The adjective "effective" is intended to stress the fact that an opportunity must be provided to permit meaningful review of the relevant substantive issues." See also the European Convention on Nationality Article 12; UN Convention on the Rights of the Child Article 8(2), and Human Rights Council, resolutions 7/10 and 10/13.

country of their only other nationality, they may have nowhere else to go. Not every country in the world is a signatory to the 1951 UN Convention Relating to the Status of Refugees with its prohibition on *refoulement* and such countries may not respect *non-refoulement* as a principle of customary international law.

- A person abroad, let alone stranded abroad in a third country or an unsafe country of origin, faces hurdles in instructing and communicating securely with legal representatives, gathering evidence and placing this before the court and giving evidence.
- Procedures before the Special Immigration Appeals Commission (SIAC) already do not satisfy the standards of an effective review described by the International Law Commission and the introduction of the additional procedural obstacles set out above may render the appeal right ineffective.

The standard for deprivation of British citizenship

A person can be deprived of their British citizenship, whether they hold this from birth or have naturalised as a British citizen, on the grounds that it would be conducive to the public good to do so[5], provided that so to deprive them does not leave them stateless[6]. This standard, which is the same as that which applies when deciding whether or not to deport a foreign national from the UK, was introduced in 2006, replacing the test that the person had done something "seriously prejudicial to the vital interests of the UK[7]". That test in its turn was introduced in 2002 and drew on the language of the 1997 European Convention on Nationality[8] which, at that time, the UK Government aspired to ratify[9], an aspiration subsequently shelved[10]. It is arguable that the width of discretion given to the UK Secretary of State renders the deprivation arbitrary. The width of discretion now given to the UK Government arguably renders deprivation under UK law arbitrary. While there is a right of appeal on the merits of the decision, [11] the intensity of scrutiny is undermined by the courts' reviewing the exercise of such wide discretion.

The procedure for deprivation

While there is a right of appeal against *a decision* to make an order to deprive a person of their British citizenship[12] ILPA is aware (see the Freedom of Information Act request appended hereto) that more *actual* deprivations of nationality (following on from the decisions to deprive) are taking place while the person so deprived is outside the UK than while the person is inside the UK. Deprivations are being

[5] British Nationality Act 1981, section 40(2) as amended by section 56 of the Immigration, Asylum and Nationality Act 2006.
[6] British Nationality Act 1981, s 40(2).
[7] Section 40(3) of the British Nationality Act 1981 as inserted by s 4(1) of the Nationality, Immigration and Asylum Act 2002 from 1 April 2003 (SI 2003/754).
[8] ETS 166.
[9] *Hansard* HC Standing Committee E, cols 60-61 (30 April 2002); see also *Hansard,* HL vol 637 cols WA172-WA173 (8 July 2002 WA).
[10] Minister of State, Standing Committee E, 7th sitting, 27 October 2005 am, col. 272.
[11] British Nationality Act 1981, section 40(2) as amended by section 56 of the Immigration, Asylum and Nationality Act 2006.
[12] British Nationality Act 1981, section 40(2) as amended by section 56 of the Immigration, Asylum and Nationality Act 2006.

accompanied by exclusion orders and airline alerts so that the person is unable to return to the UK to pursue an appeal against the deprivation.

The reason that it is possible to leave a person stranded outside the UK is a change to UK law in 2006[13]. The case with which international observers are probably most familiar is that of Mr Abu Hamza. He was served with a notice of intention to deprive him of his British citizenship but he remained a British citizen throughout the proceedings. In the event, in November 2010 the Special Immigration Appeals Commission, which hears immigration cases with national security concerns, determined that he could not be deprived of his British citizenship because so to deprive him would make him stateless, as he had already been stripped of his Egyptian citizenship.

The law under which Mr Abu Hamza's case was determined has been changed. The Asylum and Immigration Act 2004 Schedule 2 repealed s 40A(6) of the British Nationality Act 1981, which had provided that an *order depriving* a person of his/her British nationality could *not* be made in respect of a person during the period in which an appeal against a notice of a *decision* to deprive that person of citizenship could be brought or was pending. The repeal came into effect on 4 April 2005[14] Subsequent to that date, a person notified of the decision to deprive and then actually deprived of their British citizenship does not have that citizenship during their appeal. If their appeal is successful, their British citizenship is reinstated.

When one consults the Explanatory Notes to the 2004 Act these state:

> *"121.Paragraph 4 (British Nationality Act 1981). This provision has the effect … that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently."*

There is no mention of the implications of the change for those deprived of their nationality while outside the UK. Indeed, statements made during the passage of the 2004 Act through parliament referred to the change as 'minor and technical.[15]

The case of Mr L1 illustrates the effect of the change.[16] This case was heard before the Special Immigration Appeals Commission, which deals with national security cases. Mr L1 was a refugee from Sudan who had come to the UK in 1991 and naturalised as a British citizen in 2003. On 3 July 2010 he left with his family for a summer holiday with relatives in Sudan. The judge in the Special Immigration Appeals Commission observed

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

[13] *Ibid.*
[14] SI 2005/565.
[15] The Lord Rooker, HL 3rd reading of the Asylum and Immigration Treatment of Claimants Etc. Bill session 2003-2004, 06 07 04 cols 782-784.
[16] L1 v Secretary of State for the Home Department, SC/100/2010 , available at http://www.siac.tribunals.gov.uk/Documents/L1_StrikeOutJudgment_031210.pdf

train. For a deprivation order to have effect, notice of her intention to make it had

He referred to a "planned and specially choreographed set of steps."

Regulation 10 of the British Nationality (General) Regulations 2003[17] provides:

> *"(1) Where it is proposed to make an order under s40 of the Act depriving a person of a citizenship status, the notice required by s40(5) of the Act to be given to that person may be given –*
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> > *(a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;*
> >
> > *(b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.*
> >
> > …
>
> *(3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given –*
> > *(a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent."*

On 7 July 2010 a notice under s40(5) British Nationality Act 1981, signed personally by the Secretary of State on 7 July 2010, informed him that she intended to have an order made to deprive him of his British citizenship under s40(2) on the ground that it was conducive to the public good to do so. Not knowing his address in Sudan, the Secretary of State sent that Order to his UK address. The Special Immigration Appeals Commission held that this was good service. On 12 July 2010 (five days later) an official of the UK Border Agency, acting on behalf of the Secretary of State, signed an order depriving the Appellant of his British citizenship. On that same day, additionally, the Secretary of State personally decided that L1 should be excluded from the United Kingdom because his presence was not considered conducive to the public good. Thus he found himself in Sudan, the country he had fled in 1991, with no nationality or citizenship other than that of Sudan.

Mr L1's case was about whether his appeal was in time or out of time. He lost and was held to have appealed too late. But even had he appealed in time, he would not have been permitted to return to the UK to pursue his appeal.

In the case of *G1 v Secretary of State for the Home Department*[18], also a Sudanese case, the difficulties of pursuing an appeal from abroad were weighed by the Tribunal and the Court of Appeal. They did not find such procedural unfairness as negated the right of appeal. We suggest however that the circumstances they describe illustrate that, whatever the conclusion in the individual case, there is a risk that the

[17] SI 2003/548.
[18] [2012] EWCA Civ 867.

procedures will give rise to such procedural unfairness as to render the deprivation arbitrary:

> *"9...The Defendant suggests that he can give instructions and evidence by Skype or television link, for which there are adequate facilities in Khartoum: see the letter from the British Embassy of 1 July 2011. The Claimant has obtained an opinion from an apparently well informed expert that to do so would put him at risk of becoming of adverse interest to the Sudanese security service, NISS, an occurrence which would put his safety at risk: see the reports of 21 May and 8 July 2011 of Peter Verney. Further, the Claimant's skilful and conscientious solicitors maintain that they cannot fulfil their professional duties to him adequately unless they are able to speak to him face to face and in confidence…It is neither possible nor necessary for me to resolve these differences. They can be circumvented if the Claimant can travel to a safe third country, in or from which he can give instructions and from which he can give evidence by television link….*
>
> *10. The live question is whether the Claimant can travel to a safe third country. For that, he will require a Sudanese identity document and passport. …If there is a legal principle which requires that the Claimant can give evidence in a manner which permits SIAC to hear and observe him which, for the reasons expressed above, I doubt, it must, as a matter of principle, be for the Claimant to demonstrate that that course is not open to him."*[19]

Since the 1997 Special Immigration Appeals Commission Act, representation in national security cases of those subject to immigration controls has been both by lawyers of the appellant's own choosing and by a special advocate, whose role is defined in section 6 of that Act as to represent the interests of the appellant in any proceedings before the Commission *from which the appellant or his legal representative is excluded*. This procedure is one by which the State can keep secret from an individual and his or her legal representative oral or written evidence, on which the State intends to rely against that individual. The procedure is initiated by the State. If initiated, the court or tribunal is required to ensure that certain material (e.g. documents or a witness' oral evidence) is kept secret from the individual or his or her legal team. In these circumstances, the court or tribunal may appoint a "special advocate" to represent the interests of the individual. A special advocate is permitted to see the material that is kept secret from the individual and his or her legal representative. However, the special advocate may not speak to the individual or legal representative after seeing the material, unless granted permission to do so (by the State); and, if permitted to speak to the individual or legal representative, may not disclose the content of the secret material. In practice, special advocates rarely do speak to the individual or legal representative after seeing the secret material.

One reason for this relates to the requirement that the special advocate must be granted permission to do so. To be granted permission, the special advocate must explain to the State the reasons why he or she wants to speak to the individual or legal representative. Giving such an explanation may disclose to the State how the individual's case is to be presented. In other words, seeking permission may increase the prejudice against the individual. The individual is already excluded from any

[19] Mr Justice Mitting in the Special Immigration Appeals Commission in G1's case, cited by the Court of Appeal.

knowledge of significant elements of the State's case against him or her. The State would also be given greater knowledge of the case that the individual intends to present.

In the on-going case of S1 and others, a family of four, all of whom were British citizens by birth, have been deprived of their British Citizenship while outside the UK. They claim that they are entirely unable to engage with the substance of the national security case against them because to do so would place them at serious risk of arbitrary killing, detention and torture in their current location. The UK position is that the there is no liability of the UK for the adverse human rights consequences which flow from a decision to deprive a person of British citizenship while the person is outside the UK. S1 & others claim that the risks to them would be entirely addressed by permitting them to return to the UK for the purpose of pursuing their appeals in safety. The UK's position is that if they did so, the UK would be unable to effect their removal as they would rely on article 3 European Convention on Human Rights (ECHR). In this way the UK has sought to avoid responsibility for the adverse human rights consequences of its actions.

The risks of arbitrary deprivation of nationality are perhaps best illustrated by a case that was not a deprivation case, but an immigration case *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333. There is no reason why exactly the same situation could not arise in a case of deprivation of citizenship as arose in MK's case.

Mr MK is a refugee from Tunisia, who had been living in Manchester for several years with his wife and daughters. He was extradited to Italy in 2008, further to a European Arrest Warrant. What happened subsequently to MK is described in a 26 August 2010 judgment of the High Court in a judicial review.[20] He was acquitted of all charges in Italy save one, possession of a false document. It was common ground in the 2010 judicial review that this charge did not relate to terrorist activities. Nonetheless, the Secretary of State cancelled his leave and sought to block his return to the UK on the ground that his exclusion from the United Kingdom would be conducive to the public good, the very same test as is applied in nationality law cases.

Mr MK was facing onward *refoulement* from Italy to Tunisia, something the UK courts[21] had identified would not happen, which was significant in their decision to permit extradition in the first place[22] as they had determined that if returned to Tunisia, Mr MK would be at risk of torture, as indeed others had been tortured before him.[23] An application to the European Court of Human rights prior to extradition had also failed[24] but on 9 July 2010 MK sought and

[20] See *R(Khemiri) v SSHD* [2010] EWHC 2363 Admin.

[21] District Judge Evans, Judgment 20 May 2008 and see *Mohamed Salah Ben Hamadi Khemiri, Habib Ignaoua, Ali Ben Zidane Chehidi v. The Court of Milan Italy* [2008] EWHC 1988 (Admin) Judgment 28 July 2008. And see the subsequent application: R *(Ignaoua et ors v Judicial Authority of the Courts of Milan; The Serious and Organised Crime Agency &the Secretary of State for the Home Department.* [2008] EWHC 2619 (Admin) available at http://www.bailii.org/ew/cases/EWHC/Admin/2008/2619.html

[22] See *R(Khemiri) v SSHD* [2010] EWHC 2363 Admin.

[23] See ILPA's evidence to the Joint Committee on Human Rights Enquiry into Extradition Policy of 21 January 2011, available at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

[24] On 7 October 2008, the Registrar of the 4th Section of the European Court of Human rights stated that the Court found that it would be open to the applicants to make an application, including one under rule 39, against Italy, if it appeared that they would be surrendered from Italy in breach of their rights he was extradited to Italy and that Italy would abide by its obligations under the Convention.

obtained an indication from the acting President of the European Court of Human Rights Second Section, under Rule 39 of the Rules of Court, that he should not be returned to his country of nationality. Without this, it is likely that he would have been in Tunisia before the UK Courts could determine that as a matter of statutory construction that leave was extended for such relatively short period as would enable the individual wishing to do so to make arrangements, to return to the UK to pursue an appeal against the cancellation in-country[25]. The Court of Appeal in G1 found no such similar point of statutory construction in nationality law cases.

As the judge in Mr MK's case succinctly summarised:

> *"It is, I think, clear, and indeed common sense, so indicates, that there are considerable disadvantages to be faced by an appellant if he has to pursue an appeal while he is out of the country. This is particularly the case where his evidence is crucial, as is obviously the position here, and is more apparent in an appeal to SIAC where national security issues are concerned and where the matters relied upon may, to an extent, be unknown to the appellant."*

Mr MK:

- has had at all times the benefit of lawyers ready to act, in the UK, overseas and at the level of European Court of Human Rights to protect his rights;
- has challenged his extradition in the UK prior to that extradition;
- has benefited from an intervention by the European Court of Human Rights designed to prevent onward *refoulement* from the country in which he found himself stranded; and
- was extradited to a country that is a State party to the European Convention on Human Rights and the Dublin Convention of the European Union.

It is not difficult to envisage nationality law cases in which these factors are not present and risks to the person deprived of their British citizenship at any given time thereby exacerbated. Human rights considerations, and in particular considerations under Article 8 ECHR (right to respect for private and family life) often loom large in expulsion cases.
Clause 35 of the Crime and Courts Bill currently before the UK parliament is designed to reverse the effect of the judgment of the Court of Appeal in Mr MK's case.

Conclusion

National security is perceived as a reason to ignore safeguards that provide for a fair trial, not least of the question of whether the person facing deprivation of their nationality is a national security risk at all. In the UK cases, the test for deprivation of nationality is very low. Furthermore, the closed material procedures in the Special Immigration Appeals Commission, in which national security cases are heard, have been described by the UK parliament's Joint Committee on Human Rights as follows:

> *"After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be*

[25] *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333.

left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them. "[26]

Add to this potent cocktail that the individual deprived of his/her nationality is outside the jurisdiction, with no possibility of return, and there is a potent cocktail for a procedure that is *anything but effective and can properly be characterised as arbitrary*.

There is further the question of whether, in 2004, Parliament was not apprised of the true intention of the Executive to make use of the amendment removing the suspensory right of appeal, not to allow concurrent deportation proceedings but to permit the UK to obtain further procedural advantage by summary exclusion of British citizens from the UK before the lawfulness of the decision to deprive could be examined by a court or Tribunal.

Adrian Berry

Chair

ILPA

14 February 2013

[26] Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.