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

Further Comments

by

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Background

1. The comments below follow on from my Opinion of 12 March 2014;[1] they take account of the discussion in the House of Lords on 17 March 2014, various written answers supplied in response to that debate, and the Government's comments on the Joint Committee on Human Rights (Second Report), Twelfth Report of Session 2013-14.

1. Government Response to the Joint Committee of Human Rights (Second Report)

1.1 Readmission

2. In paragraph 10 of the Government's Response, it is claimed that

> 'there is no general entitlement in international law for a State to deport a non-British citizen to the UK. Under Article 1 of the Special Protocol concerning Statelessness 1930, which the UK ratified in 1932 and which came into force in 2004, there is a very limited obligation to readmit former British nationals who became stateless after entering a foreign State.'

3. It is the Government's view that this only applies in limited circumstances, to a limited number of States, will rarely be applicable, and will have limited practical impact.

4. Whatever the scope of this particular treaty, the Government's position on general international law is manifestly incorrect. As Paul Weis noted when writing in 1956, the 'Special Protocol' and each of the other instruments on nationality and statelessness adopted in 1930 contained the following provision:

> 'The inclusion of the above-mentioned principles and rules in the Convention [Protocol] shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.'[2]

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[1] https://www.documentcloud.org/documents/1086878-guy-s-goodwin-gill-legal-opinion-on-deprivation.html.

[2] P. Weis, *Nationality and Statelessness in International Law*, London: Stevens & Sons Ltd., 1956, 56–7.

5. Moreover, at the time of discussions, the ***British delegate*** expressly contended that,

> '... because a kind of contract or obligation results from the granting of a passport to an individual by a State so that when that individual enters a foreign State with that passport, the State whose territory he enters is entitled to assume that the other State whose nationality he possesses will receive him back in certain circumstances.'[3]

6. Weis goes on to add:

> 'If a State were to resort to denationalisation of nationals abroad solely for the purpose of denying them readmission or to prevent their return..., such action taken *in fraudem juris internationalis* would be contrary to international law not only as an abuse of right but as a direct infringement of the sovereign rights of the State of residence, *i.e.* of the right to expel aliens, which follows from its territorial supremacy.'[4]

7. The arguments presented in paragraphs 21-24 of my Opinion of 12 March 2014 therefore hold good. Perhaps, the issue is best understood by asking, 'Would the United Kingdom consider itself bound to accept a denationalised individual in similar circumstances?'

1.2 Jurisdiction

8. In paragraph 12 of its response to the Joint Committee on Human Rights (Second Report), the Government cites the 21 December 2012 decision of the Special Immigration Appeals Commission (SIAC) in *S1 and Others v Secretary of State for the Home Department*,[5] in support of its view that the European Convention on Human Rights, specifically Articles 2 and 3, would not be engaged extraterritorially on the occasion of a person being deprived of their British citizenship while overseas.

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[3] Ibid.

[4] Ibid., 58-9. The above views are repeated *verbatim* in the second edition: Alphen aan den Rijn: Sijthoff & Noordhoff, 2nd edn., 1979, 56-7.

[5] Appeal Nos. SC/106/107/108/109/2012, 21 December 2012.

9. To a large extent, the decision in this case may be skewed, in particular, by the fact that the individuals concerned were resident in the State of their 'other' nationality (statelessness not being an issue), and by the focus of the claim on Articles 2 and 3, namely, the possibility of (UK) protection in a territory over which the UK exercised neither authority nor control. SIAC's judgment does not engage with the jurisdiction question at any length. Reference is made to the ninth edition of *Oppenheim's International Law*, p. 456, §136,[6] for the view that jurisdiction is not a single concept, but no reference is made to that most basic ground of jurisdiction in international law, namely, the nationality principle (ibid., pp. 462-6, §138).

10. SIAC makes much of the primarily territorial notion of jurisdiction and the 'exceptional cases' referred to in the jurisprudence of the European Court of Human Rights. However, by ignoring context, the Commission misleads itself into concluding that acts affecting nationals when they are overseas do not fall within any of the exceptional categories, and that therefore the necessary jurisdictional link is not established. The Commission's basic error lies in its failure to see that acts affecting nationals abroad are precisely *not* exceptional, and that the State's jurisdiction in international law extends as a matter of *right*. The 'exceptions' referred to by SIAC (§23) may not exist, but neither do they need to, and the jurisdiction link is there, even if the factual circumstances (the sovereignty of another State and no authority or control exercised by the UK) entailed no obligation on the part of the United Kingdom to secure the particular Convention rights in issue.[7]

11. The issues highlighted in paragraphs 25-28 of my Opinion of 12 March 2014 are therefore very much 'live' ones.

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[6] R. Jennings & A. Watts, *Oppenheim's International Law*, vol. 1, 9th edn., London: Longman, 1992.

[7] SIAC's reasoning is also not assisted by its speculation about what 'might' or 'must... have been' the facts in the *East African Asians case* (§26), or what 'might' have been the issues in the European Court of Human Rights decision in *Genovese v Malta* (§27).

2. Home Office letter of 25 March 2014 to Baroness Smith of Basildon

12. During debate in the House of Lords on 17 March 2014,[8] Lord Taylor of Holbeach undertook to reply in writing to questions asked by Baroness Smith of Basildon, and his letter of 25 March 2014 attempts to do so.

13. It contains a surprising, indeed glaring error. In summarising the background to deprivation of citizenship, Lord Taylor writes:

> 'Under the British Nationality Act 1981, the power to deprive and to render stateless was expanded to *all* citizens, not just naturalised citizens – in other words, those who are British-born can also be deprived of their citizenship in certain circumstances under the law *as it currently stands*. The power to deprive was qualified in 2002 so that a person could not be rendered stateless on grounds other than that they had acquired their naturalisation by fraud or deception... The current proposal, in restricting the ability to render someone stateless to naturalised citizens only, therefore has considerable historical precedents – and indeed is *more* restricted than the provisions which obtained from 1981 until 2002.' (Emphasis in original)

14. Admittedly, there is some temporal confusion here, but regrettably this account of the British Nationality Act provisions on deprivation of citizenship is, again, manifestly incorrect. Section 40 of the 1981 Act expressly limited deprivation of citizenship to those who had acquired it by *registration or naturalisation*; it did *not* apply to natural-born citizens.[9]

15. The legislative history is correctly summarised in paragraphs 5-7 of my Opinion of 12 March 2014; deprivation of citizenship was extended to natural-born citizens only in 2002, on which occasion the Government also introduced the language of 'privilege' in substitution for that of 'right', which many may have thought to be the nature of citizenship.

16. Later in his letter, Lord Taylor refers to Clause 60 as 'doing no more than giving effect to our existing international obligations'. This is hardly an accurate description of the proposed provision, for there is no obligation binding on the

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[8] H.L. Deb.,17 March 2014, cols. 40-67.

[9] Section 40, British Nationality Act 1981, Ch. 61 (30 October 1981).

United Kingdom to deprive anyone of their citizenship, let alone to make them stateless. By contrast, there are indeed many obligations binding on the United Kingdom to take effective steps to investigate and prosecute 'terrorist acts', in particular, where those suspected are linked by nationality to the State in question.[10]

17. Moreover, international law prescribes the general obligation which the United Kingdom owes to any State which has admitted a UK citizen, in good faith reliance on a UK passport, to readmit that person, irrespective of any measure of 'deprivation'.

3. Legality of deprivation of citizenship in international law

18. During the course of debate and subsequently, the Government's argument for the legality of deprivation of citizenship appears to have been limited almost entirely to whether deprivation resulting in statelessness is permissible under Article 8 of the 1961 Convention on the Reduction of Statelessness.

19. It may indeed be lawful within the terms of that agreement, although contrary arguments exist.[11] However, the consequences of the act of rendering an individual stateless are very likely to have an impact on the rights of other States (for example, in relation to admission, deportation, or compliance with obligations to combat terrorism), and on that account to engage the international responsibility of the United Kingdom. None of these issues appears to have been taken into account.

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[10] See paragraphs 29-36 of my Opinion of 12 March 2014.

[11] Ibid., paragraphs 8-9.