



Citizenship Deprivation in the United Kingdom

Statelessness and Terrorism

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Abstract

The United Kingdom has amended its nationality legislation in order to make it easier for the state to exercise citizenship deprivation powers. The new powers target citizens who have engaged in behaviours labelled by the UK executive as not conducive to the public good. Statelessness operates as the outer limit of the government's capacity to transform citizens into foreigners and plays an important role in limiting the exercise of executive powers.

Keywords

citizenship deprivation – statelessness – national security – terrorism

1 Introduction

This contribution discusses the growing role played by statelessness in opposing citizenship deprivation orders taken by the UK executive on grounds of national security. The power of the Secretary of State for the Home Department to deprive British citizens of their status has taken centre stage among the statutory grounds of loss of citizenship, as the deprivation provisions have been substantially amended in 2002 and 2006. The reasons for which British citizens may lose their status have been widened and applied against an increasing number of persons.¹ These changes were operated at a time when

¹ There is no official information on the exact number of persons deprived of citizenship since 2002. Prior to 2002, the last case of citizenship deprivation was documented in 1974. According to data obtained by the Bureau of Investigative Journalism, between 2002 and February 2013, 21 persons were stripped of UK citizenship. See, C. Wood and A. Ross, 'Medieval Exile:

the meaning of the duty of loyalty associated with the notion of citizenship was questioned as a result of the engagement of the UK government in the fight against terrorism in the aftermath of the 9/11 terrorist attacks. Simultaneously, UK citizenship was increasingly presented as a privilege that needed to be earned by newly naturalized citizens and British citizens by birth, alike.² The new citizenship deprivation powers target citizens who are considered to have breached their duty of loyalty by engaging in behaviours labelled by the executive as not conducive to the public good, and generally related to terrorism and national security. Statelessness has come to play an important part in the process of getting rid of 'bad' citizens since it operates as the outer limit of the government's capacity to transform citizens into foreigners.

2 The Legal Framework of Citizenship Deprivation in the UK

The overhaul of the British rules on nationality started with the adoption of the *Nationality, Immigration and Asylum Act 2002*³ that amended Section 40 of the *British Nationality Act 1981* and made citizenship deprivation applicable also to British citizens by birth.⁴ Section 40(2) expanded the powers of the Secretary of State to deprive someone of citizenship if he was 'satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory.' Section 40(4) restricts this power to cases where the person would not become stateless as a result of loss of British citizenship, suggesting that the measure is applicable only in respect

The 21 Britons stripped of their citizenship' (The Bureau of Investigative Journalism, 26 February 2013) <<http://www.thebureauinvestigates.com/2013/02/26/medieval-exile-the-21-britons-stripped-of-their-citizenship>> accessed 20 October 2013.

- 2 D. Kiwan, 'A Journey to Citizenship in the United Kingdom' (2008) 10 *International Journal on Multicultural Societies* 60; H. Majid, 'Protecting the Right to Have Rights: The Case of Section 56 of the Immigration, Asylum and Nationality Act 2006' (2008) 22 *Immigration, Asylum and Nationality Law* 27; M. Everson, 'Subjects' or 'Citizens of Erewhon'? Law and Non-Law in the Development of a 'British Citizenship' (2003) 7 *Citizenship Studies* 57.
- 3 The *Nationality, Immigration and Asylum Act 2002* [United Kingdom of Great Britain and Northern Ireland], 2002 Chapter 41, 7 November 2002 (referred to as 'the 2002 Act'). The Act brought amendments to the *British Nationality Act 1981*, but did not repeal it.
- 4 Until 2002, registered or naturalized British citizens could have their citizenship withdrawn by an act of the executive on the following grounds: (1) if citizenship had been obtained by fraud, misrepresentation or concealment of a material fact; (2) were disloyal to the Queen; (3) had assisted the enemy in time of war; (4) in the past five years, had been sentenced to at least twelve months imprisonment in any country.

of dual nationals. The prohibition of creating statelessness stems from UK's obligations under Article 8(1) of the 1961 Convention on the Reduction of Statelessness, which provides that a state party shall not deprive a person of its nationality if such deprivation would render him stateless.⁵

As a novelty, the 2002 Act introduced the right to appeal a citizenship deprivation order.⁶ However, the Secretary of State can certify that the decision to deprive was based, wholly or partially, in reliance to information that he believes should not be made public in the interests of national security or of the relationship between the United Kingdom and another country or otherwise, in the public interest. In this case, the appeal is heard by the Special Immigration Appeals Commission (SIAC) and not by an ordinary court.⁷ SIAC operates with a system of open and closed judgments. The open judgments contain only information that is not considered sensitive by the executive, a fact that affects the transparency of the decision making process. Initially, appeals had a suspensive effect, to the extent that a citizenship deprivation order could not be made while an appeal was pending or while there was a possibility to launch an appeal within the statutory time limits.⁸ Since 2004, appeals no longer have suspensive effect, which in practice means that the person is deprived of citizenship when the order is made and that this is also the moment in relation to which one has to establish the existence of statelessness.⁹ The scope of the 2004 changes was to allow for deprivation of citizenship and deportation procedures to take place concurrently. In practice, as a result of a citizenship deprivation order the person concerned becomes a third country national subject to immigration control and to other measures applicable in respect of foreigners, such as exclusion from the UK orders or

5 UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, <<http://www.refworld.org/docid/3ae6b39620.html>> accessed 20 October 2013.

6 British Nationality Act 1981, s 40A. The right to appeal was introduced as a result of UK's intention to ratify the European Convention on Nationality, adopted under the auspices of the Council of Europe.

7 British Nationality Act 1981, s 40(a)2. SIAC was initially set up to hear cases of deportation in which the decision is based on sensitive information that cannot be reviewed by the ordinary courts, nor fully disclosed to the parties. D. Bonner and R. Cholewinski, 'The Response of the United Kingdom's Legal and Constitutional Orders to the 1991 Gulf War and the Post -9/11 'War' on Terrorism', in E. Guild and A. Baldaccini (eds.) *Terrorism and the Foreigner* (Leiden: Brill 2007) 123-175.

8 Section 40 A(6) British Nationality Act 1981.

9 Schedule 2 to the Asylum and Immigration Act 2004.

detention.¹⁰ If the second nationality is that of an EU Member State, the person would be subjected to a different legal regime,¹¹ but up to now most citizenship deprivation orders involve persons whose second nationality was not that of an EU state. There are cases where the Secretary of State has made a citizenship deprivation order while the person concerned was outside of the UK, followed by an exclusion order that prevented the person from re-entering the UK. Since exclusion orders are not open to appeal, a person who wishes to contest his citizenship deprivation has to pursue such an appeal from abroad.¹²

Citizenship deprivation powers were further expanded with the adoption of the *Immigration, Asylum and Nationality Act 2006*.¹³ Although the proposal of the 2006 Act was introduced before the 2005 London bombings, its adoption by the UK Parliament was clearly under the influence of the terrorist attacks. Immediately after the attacks, the British Prime Minister announced a twelve-point plan of anti-terror measures that included citizenship deprivation and a list of unacceptable behaviours that constitute grounds for deportation and exclusion from the UK. In respect of citizenship deprivation, the 2006 Act expanded again the power to deprive under Section 40(2) since the Secretary of State may make such an order if he is satisfied that such deprivation of citizenship is 'conducive to the public good'. The prohibition of creating statelessness as a result of such an order and the right to appeal were retained.

The UK government clarified that it intended to use the list of unacceptable behaviours as grounds for citizenship deprivation.¹⁴ This is important since

10 *G1 v SSHD* [2010] EWCA Civ 867; *L1 v SSHD*, SC/100/2010, date of judgment 3 December 2010. Exclusion orders cannot be made in respect of UK citizens.

11 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158.

12 *G1 v SSHD* [2012] EWCA Civ 867. In this case, the court decided that the right to an in-country appeal has to be guaranteed by legislation and that the 2004 changes have expressly removed such possibility.

13 *Immigration, Asylum and Nationality Act 2006* [United Kingdom of Great Britain and Northern Ireland], 2006 Chapter 13, 30 March 2006 (referred to as 'the 2006 Act').

14 Mr. McNulty in House of Commons Standing Committee E (pt 1), col 254. The list includes actions such as writing, producing, publishing or distributing material, public speaking, including preaching, running a website, using a position of responsibility such as teacher, community or youth leader to express views which the government considers to foment terrorism or seek to provoke others to terrorist acts, justify or glorify terrorism, foment other serious criminal activity or seek to provoke others to serious criminal acts, foster

there is no statutory definition of the new ground for deprivation, 'conducive to the public good'. The concept itself is borrowed from immigration law where it is used in the context of the deportation of non-nationals. The power to deport non-nationals is directly related with the power of the state to regulate the entry and stay of aliens. In international law, it is generally asserted that no similar power is to be exercised over one's own citizens, as this difference in treatment is one of the elements that distinguish citizens from aliens. There are no principles of international law that legitimize the expulsion of own nationals. Moreover, a state decision to deprive one of citizenship with the sole aim of expelling the person concerned would amount to arbitrary deprivation of citizenship, which is prohibited under international law. The fact that UK nationality legislation puts dual nationals, whose citizenship status is open to review via deprivation powers, on a par with expellable non-nationals is equally problematic in light of the liberal principle that all citizens are equal before the law, regardless of how they have acquired their citizenship.¹⁵

As a result of these changes, a person faced with a citizenship deprivation order can appeal on two grounds: he can either contest the order's conduciveness to the public good or show that the order made him stateless. Up to now, most appeals have dealt with subsection 40(4) of BNA 1981, which prevents such an order to be made if the person becomes stateless. This choice can be explained by the lack of a statutory definition of the material scope of 'conducive to the public good', the low level of proof required for making such an order, and more generally, the judiciary's reluctance to scrutinize executive measures taken on national security grounds, and even more so in terrorism cases. Since statelessness prevents the loss of British citizenship, its scope and the criteria used to determine its existence have taken central stage during appeal procedures to citizenship deprivation orders.

3 Contesting Citizenship Deprivation Orders: Statelessness and the Courts

Appeals brought before SIAC and the higher appeal courts have forced the judiciary to interpret the nationality laws of several states in order to assess

hatred which may lead to intra-community violence in the UK and advocate violence in furtherance of a particular belief.

15 M. Gibney, 'A Very Transcendental Power: Denaturalisation and the Liberalisation of Citizenship in the United Kingdom' (2013) 61 *Political Studies* 637.

whether the appellants had been rendered stateless as a result of losing British citizenship. In determining whether a person is made stateless by a citizenship deprivation order, UK courts have confirmed that the competent authority to decide this issue is the judiciary and not the Secretary of State, who only needs to be satisfied that the person is not made stateless by his order.

In the Abu Hamza case, SIAC had to determine if the applicant had lost Egyptian nationality, an issue complicated by the fact that the Egyptian executive enjoyed extensive powers in this area of law, and took as a matter of general practice decisions that were kept secret. The Secretary of State started citizenship deprivation procedures against Abu Hamza, a radical cleric with links to Al Qaeda, in 2002, but his appeal was stayed for several years and the statelessness issue came to be decided only in 2010. Although SIAC argued that there is no internationally or generally agreed standard of proof, it found that statelessness refers to '*de jure*' statelessness within the meaning of Article 1(1) of the 1954 UN *Convention relating to the Status of Stateless Persons*.¹⁶ This article defines a stateless person as a person who is not considered as a national by any State under the operation of its law. This approach to statelessness was seen as having 'the advantage of aligning domestic law with the UK's international obligations.'¹⁷ The burden of proof was found to rest on the appellant, who must show on the balance of probabilities that the order made him stateless. The determination of this issue normally depends upon an 'analysis of the nationality laws and public acts of a foreign state or states, facts readily capable of being established on balance of probabilities'.¹⁸ As such, 'the Secretary of State and SIAC are not concerned with the reasonableness of the laws of a foreign state or of decisions made under them to deprive a person of his nationality, but with their effect. If the effect is to deprive a person of nationality and that person has no nationality other than British, he may not be deprived of his British citizenship.'¹⁹ A remarkable aspect of the case is that the issue of statelessness was decided based on non-disclosed evidence given by several expert witnesses. These sources suggested that Abu Hamza had most likely been stripped of his Egyptian nationality by an unpublished decree. As a result, the Secretary of State could not deprive him of British citizenship.

16 *Abu Hamza al-Masri v SSHD*, SIAC, SC/23/2003, date of judgment 5th November 2010, para. 5. See also, UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, <<http://www.refworld.org/docid/3ae6b3840.html>> accessed 20 October 2013.

17 *Abu Hamza al-Masri v SSHD*, para.5.

18 *Ibid.*

19 *Abu Hamza al-Masri v SSHD*, para. 6.

SIAC's approach to determining statelessness seemed in line with UNHCR's position on the issue and its guidelines.²⁰ The guidelines underline that establishing whether an individual is not considered a national under the operation of a state's law is a mixed question of fact and law. Moreover, in practice this may lead to a different conclusion than the one derived from a purely objective analysis of the application of nationality law. According to the guidelines, the reference to law in the definition of statelessness in Article 1(1) of the 1954 Convention covers situations where the written law is substantially modified when it comes to its implementation in practice.²¹ SIAC followed this approach in the *B2* case²² where it had to interpret Vietnamese nationality legislation. The British executive was seeking to deprive B2 of citizenship due to his alleged involvement in terrorism related activities. Based on partly closed material, SIAC decided that the Vietnamese nationality legislation was on purpose ambiguous: despite the fact that formally Vietnamese courts had jurisdiction over nationality disputes, in fact the government took whatever decisions it wished. Since the Vietnamese government did not consider B2 as one of its citizens, SIAC had to decide that he could not be stripped of UK citizenship without being made stateless.²³

SIAC's decision was overturned upon appeal to the extent that B2 was considered *de facto* stateless, a legal category that according to the 'Prato Conclusions' is not defined in any legally binding international instrument.²⁴ The appeal court motivated its decision by arguing that 'if the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterize the individual as *de jure* stateless.'²⁵ The UK court's disregard for the UNHCR guidelines and the generally accepted definition of statelessness has far reaching consequences for B2 who has been stripped of

20 UN High Commissioner for Refugees (UNHCR), Expert Meeting - The Concept of Stateless Persons under International Law ('Prato Conclusions'), May 2010, available at: <<http://www.refworld.org/docid/4ca1ae002.html>> accessed 20 October 2013; UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01, available at: <<http://www.refworld.org/docid/4f4371b82.htm>> accessed 20 October 2013.

21 UNHCR, Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, paras. 16-17.

22 *B2 v SSHD*, SC/114/2012, date of judgment 29th June 2012.

23 Ibid, paras. 18-19.

24 Prato Conclusions (n 20) para. 8.

25 *B2 v SSHD* [2013] EWCA Civ 616, para. 92.

UK citizenship and placed in legal limbo. His status in the UK is that of an alien placed by the UK executive in detention awaiting removal to a country that does not recognize him as one of its nationals and cannot be forced to take him back.

4 Conclusions

The UK rules on citizenship deprivation have been increasingly relaxed in order to allow the government to fight against suspected terrorists by depriving them of their UK citizenship. Where national security and terrorism are at stake, statelessness has proven to be the only potentially effective ground for contesting the power of the UK executive to take away citizenship. British courts have confirmed that they are the ultimate adjudicator as to whether a person is made stateless as a result of a citizenship deprivation order but their engagements with what constitutes statelessness under the 1954 Convention have led to mixed results. This outcome relates to the dissatisfaction expressed by the appeal court in the *Al-Jedda* case when it had to uphold the prohibition of creating statelessness despite the fact that the citizenship deprivation order had been found conducive to be public good.²⁶ This position points towards the problematic relation between statelessness, alleged involvement in terrorism and the difficulty of thinking in terms of every person's right to a nationality rather than the overriding importance of state security. The misinterpretation of the definition of stateless person in the B2 case is equally worrisome for the correct implementation of the safeguards against statelessness contained in the 1954 and 1961 UN Conventions.

26 *Al-Jedda v SSHD* [2010] EWCA Civ 358, paras. 124-131.