Department of Immigration and Border Protection

Response to Discussion Paper 'Australian Citizenship - your right, your responsibility'

Submissions of International Law on the Deprivation of Australian Citizenship

Executive summary

1. Proposals to deprive Australians of citizenship which draw upon legislation taken from the United Kingdom (UK) must appreciate the particular international and national background to that legislation. The UK position cannot be transplanted into the local context without appropriate adaptation.
2. An outcome which ensures that former Australian nationals are not rendered stateless would be consistent with international law on preventing statelessness. The deprivation of Australian nationality for dual nationals would be consistent with that objective.
3. The international legal consequences of depriving dual national Australians of their Australian nationality must be understood. Other States may not be obliged to recognise and give effect to the deprivation of Australian nationality by Australia. With respect to both citizenship deprivation and the expulsion of aliens, Australia must also comply with existing international law (on statelessness, nationality and the protection of human rights) in addition to emergent international law concerning the expulsion of aliens.

Introduction

This submission is primarily directed at the issues raised by the following question:

> Should the powers of revocation apply to citizens when the Minister has reasonable grounds to believe that the person is able to become a national of another country or territory under their laws and where it would not leave that person stateless?

This submission will not canvass the policy issues raised by the word 'should'. Instead, the focus will be on the position of single (or mono national) and dual national Australians, the UK experience associated with the proposed test (that is, reasonable basis for belief and ability) and preventing statelessness. The review is not comprehensive.

Subject matter of this Submission

The Discussion paper entitled 'Australian Citizenship - your right, your responsibility' contains the following paragraphs:

> Dual citizenship strengthens the social and economic fabric of our nation. The ability of Australian citizens to also be citizens of other countries gives people more freedom to move in an increasingly globalised world. It has strengthened our links with other nations, including in our region. Dual citizenship recognises there are Australians who have close connections to Australia and to another country as well.
> However, Australian citizenship has never been unconditional. Since 1949, there have been provisions for the automatic loss of citizenship when a dual citizen serves in the armed forces of a country at war with Australia.
> Arguably, Australians who engage in a serious act of terrorism do not deserve to remain Australian citizens. The United States, New Zealand, the United Kingdom, France and many other European

> countries have powers to revoke citizenship on broad national security grounds. Canada has legislation which will come into force in the near future.
> The Government intends to modernise the Australian Citizenship Act to enable the Minister for Immigration and Border Protection to take action in the national interest to revoke the Australian citizenship of dual citizens who engage in terrorism that betrays their allegiance to Australia. These powers would be used against dual citizens who join or support listed terrorist groups such as Daesh, or engage in terrorist acts alone. They would apply to dual citizens who engage in terrorist activities here in Australia or on foreign soil, including that of our friends and allies.
> The Government is also considering enabling the Minister to revoke Australian citizenship where there are reasonable grounds to believe the person is able to become a national of another country under their laws and would not be made stateless, as is the case in UK law. In the UK it is possible to revoke the citizenship of a person who has a legal right of access to the citizenship of another country, even if that right has not been exercised. Any new law would need to be consistent with our international legal obligations not to make a person stateless.
> Measures to broaden the grounds for revocation, while very serious, should be proportionate given the severity of threats to national security. There would be safeguards – including judicial review – to ensure there are appropriate checks and balances on their operation.
> In what circumstances should a holder of Australian citizenship be regarded as having forfeited citizenship?
> Should the powers of revocation apply to citizens when the Minister has reasonable grounds to believe that the person is able to become a national of another country or territory under their laws and where it would not leave that person stateless?
> What limitations and safeguards should apply to laws enabling the revocation of the citizenship of Australians engaged in terrorism?

This submission will address some of the issues raised by this extract. Because the government's views on depriving Australians of citizenship have evolved since this discussion paper was issued, reference will also be made to some of the issues raised by the recently released Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). This submission draws relevant international legal material to the attention of lawmakers.[1]

Nationality defined

Nationality is the quality of being a subject of a particular State. It has been defined as:

> 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'[2]

'Nationality' and citizenship' are generally treated synonymously in this submission unless stated otherwise. 'Citizenship' generally designates persons endowed with full political and personal rights which may not be the case for all 'nationals'. 'Nationality' is traditionally only relevant in the international context, whereas 'citizenship' is more commonly used in a domestic context. Nationality is the link by which a State protects certain rights for the benefit of individuals (such as the right to leave and re-enter one's own country, the right to permanent residence, freedom of movement, the right to vote, to be elected or nominated to public office, the right of access to public services, and the right to diplomatic protection).

[1] See also Inter-Parliamentary Union and UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians,* No 22 (2014).
[2] International Court of Justice, *The Nottebohm Case (Liechtenstein v Guatemala)* (1955) ICJ Rep 4, 23.

An individual may be natural-born or a naturalised mono-national or dual national. A naturalised citizen is someone who was not born a citizen but has become one through the legal process of naturalisation, so that someone with no automatic claim to citizenship can obtain the same rights and privileges as someone who was born a citizen.

International law concerning nationality

The following propositions are well-accepted under international law:

(i) Subject to any particular obligations which might apply, it is for the internal law of each State rather than international law to determine who is and who is not considered to be its national. Questions of nationality are in principle within this 'reserved domain'. However, what is solely within the domestic jurisdiction of a State depends on the development of international relations, and that State may also owe obligations to other States.[3]

Thus the International Court of Justice has held that

> it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality.[4]

Australia has also

> recognised the general principle that each State was free to determine for itself and by virtue of its domestic laws whom it would regard as its nationals and under what conditions citizenship might be acquired or lost.[5]

(ii) While it is for each State to determine who are its nationals, internal or national law must be recognised by other States only insofar as consistent with conventions, customary international law and generally recognised principles of law with regard to nationality.

(iii) The bond of nationality provides the link between international law and individuals. It is through the medium of nationality that individuals enjoy the benefits of international law.

(iv) A notion of allegiance underpins nationality.

(v) From the perspective of international law, the possession of nationality according to internal law is a fact to be proved like any other fact. Furthermore, how nationality is proved is primarily a matter for national law. The evidence includes passports, certificates of nationality or naturalisation and birth certificates. A passport is an identity and travel document which is prima facie evidence of nationality.[6]

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[3] Permanent Court of International Justice, *Advisory Opinion on the Nationality Decrees Issued in Tunis and Morocco (French Zone)* (1923) PCIJ Ser B No 4, 24; International Court of Justice, *The Nottebohm Case (Liechtenstein v Guatemala)* (1955) ICJ Rep 4, 20.
[4] *The Nottebohm Case (Liechtenstein v Guatemala)* (1955) ICJ Reports 20.
[5] Statement by Australian representative Crick, Meeting of the Sixth Committee of the United Nations General Assembly, UN Doc A/C.6134/SR.47 (21 November 1979) 11.
[6] A Muchmore, 'Passports and Nationality in International Law' (2004) 10 University of California Davis Journal of International Law and Policy 301, 317-328.

The deprivation of nationality

Individuals can be deprived of their nationality. Citizenship may be lost through voluntary renunciation (by an individual's words or conduct) and revocation by the State. The 'loss' of nationality is typically a consequence of an individual's voluntary act, whereas 'denationalization' is a State decision of a collective or individual nature. The deprivation of citizenship could be permanent or temporary (such that individuals are not prevented from reapplying). 'Deprivation' can refer to denationalization or the withdrawal of citizenship as well as a denial of access of nationality (eg a refusal to confer citizenship). Nationality might be lost or void ab initio (that is, the person never acquired nationality).

It is left to the discretion of States to determine the grounds on which individuals may be deprived of their nationality. Recognised modes include release, deprivation, expiration, renunciation and substitution.[7]

The grounds for deprivation of citizenship are stated under national law, typically in legislation.[8] For example, under ss 34, 34A, 35, 36, *Australian Citizenship Act 2007* (Cth), citizenship may be lost:

- where an Australian citizen with dual citizenship serves in the armed forces of a country at war with Australia
- fraud or misrepresentation occurred in the application process
- an individual failed to observe residence requirements
- an individual was convicted of a serious offence after applying for but before obtaining Australian citizenship.

Children can also have their citizenship revoked by the Minister if their responsible parents cease to hold Australian citizenship. There are also express protections against statelessness.[9]

The circumstances in which the deprivation of Australian citizenship could occur were described in 1980 as follows:

> Deprivation of Australian citizenship can only occur under section 21 of the Australian Citizenship Act 1948 as amended following a conviction of a person for an offence under section 50 of that Act, in that he knowingly made a false representation or statement, or concealed a material circumstance in connection with the grant of Australian citizenship to him, and the Minister is satisfied that it would be contrary to the public interest for that person to continue to be an Australian citizen.[10]

International law permits States to deprive individuals of nationality. The law of many States provides that certain conduct by individuals results in the deprivation of nationality. Relevant conduct can include:

- entering into foreign civil and military service without the permission of the State of nationality
- permanently departing from the State
- voting in political elections in a foreign State

[7] Robert Jennings and Arthur Watts (ed), *Oppenheim's International Law*, Oxford University Press, Oxford, 9th ed, 2008, [391].

[8] Deprivation of nationality is a serious step such that legislative changes are not likely to be lightly presumed to have that effect: *Shalabi v Attorney-General* (1971) 60 ILR 227.

[9] See further S Pillai 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37(3) Melbourne University Law Review 736, 752-8.

[10] Minister for Immigration and Ethnic Affairs, Senate Debates, 23 May 1980, Vol 85, 2881.

- committing acts of treason
- desertion from the armed forces
- for having made false statements when acquiring nationality
- swearing an oath of allegiance to a foreign country
- prolonged residence abroad (particular in order to avoid public service obligations) and becoming naturalised in a foreign State.

There does not appear to be anything contrary to international law for a State to take action depriving an individual of nationality for these reasons.[11] However, deprivation of citizenship is considered to be a drastic and discredited measure.[12]

International law is generally concerned with whether a person has a nationality, and not with the manner in which a person became stateless. Thus where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national. It is the position under national law that is relevant.[13]

The loss of nationality is essentially governed by national law. However the competence of States in this field may be exercised only within the limits set by international law.[14] The deprivation of nationality does not absolve a State of any human rights obligations owed to individuals on its territory. Latvia, for example, has been held responsible for providing social security support to a long-term resident stateless person.[15]

Statelessness

The right to nationality has been described as a 'basic right for it is nothing less than the right to have rights'.[16] The condition of being without a nationality has thus been described as rightlessness. Where the State is the sole guarantor of rights, citizenship is the right to have rights.[17] This is not to say that stateless individuals do not have any human rights.[18]

A stateless person is defined under the 1954 Convention relating to the Status of Stateless Persons as an individual 'who is not considered as a national by any State under the operation of its law.[19] This definition reflects customary international law.[20] The Convention does not

[11] Robert Jennings and Arthur Watts (ed), *Oppenheim's International Law*, Oxford University Press, Oxford, 9th ed, 2008, [391]. See also UN Secretary General, Memorandum on Nationality Legislation concerning grounds for deprivation of nationality, UN Doc A/CN.4/66 (1953). Large scale denationalisations may not be compatible with international law and may not be recognised by other States.

[12] 'In Soviet times, revocation of citizenship was widely employed as a tool of repression against the regime's 'enemies'. The long history of abuse of executive/administrative discretion in stripping people of their citizenship and sending them into foreign exile discredited the whole concept': G Ginsburgs, 'The "Right to a Nationality" and the Regime of Loss of Russian Citizenship' (2000) 26(1) Review of Central and East European Law 1, 14.

[13] See Article 1(1), Convention relating to the Status of Stateless Persons 1954.

[14] (1999) II(2) *Yearbook of the International Law Commission* 24.

[15] European Court of Human Rights, *Andrejeva v Latvia*, Application No 55707/00, Judgment of 18 February 2009, [88].

[16] *Perez v Brownell* (1958) 356 US 44, 64 per Warren CJ.

[17] H Arendt, *The Origins of Totalitarianism*, London, Ruskin House, 2nd ed, 1958, 279, 293-7.

[18] D Weissbrodt and C Collins, 'The Human Rights of Stateless Persons' (2006) 28 Human Rights Quarterly 245.

[19] Article 1, Convention relating to the Status of Stateless Persons 1954. The definition states the position under customary international law: International Law Commission, Report on the Work of its 58th session, 1 May – 9 June and 3 July – 11 August 2006, UN Doc A/61/10, 49.

[20] International Law Commission, Articles on Diplomatic Protection (with commentaries) (2006).

make any distinction between single (or mono) and dual nationals; the relevant distinction is between those who are nationals and those who are stateless.

The 1954 Convention only addresses de jure statelessness, that is, the lack of a formal bond between an individual and a State. De facto statelessness, where individuals are unable to enjoy the protection of national authorities or establish their nationality, is not internationally regulated.[21]

De facto statelessness may be effected, for example, by confiscating passports.[22] A ministerial power to grant or withhold the issue of Australian passports can be discretional. If so:

> In exercising his discretion, the Minister for Foreign Affairs takes into account the advice of Australian Government authorities which may include matters concerned with peace, order and good government in respect of both international relations and domestic affairs.[23]

Furthermore:

> [w]hilst it has been the practice of successive Ministers in the exercise of this discretionary power generally not to give reasons in respect of particular cases, it has long been the policy of successive Ministers to withhold passports from persons who are attempting to escape from justice, are the subject of court orders restraining departure, are of unsound mind, are under the age of 17 years and unable to produce the consent of both parents or are the subject of custody or access orders of Australian courts, and those for whom the Minister for Foreign Affairs could not, in the context of Australia's international relations, request other countries to provide free passage, protection and assistance.[24]

Whether effected de facto or de jure, Article 8 of the Convention on the Reduction of Statelessness (considered below) might be considered to state a general duty upon States to avoid statelessness. The deprivation of nationality which causes statelessness has been argued to be prohibited under customary international law.[25] However, there is ongoing uncertainty as to whether effecting statelessness is unlawful under international law or merely undesirable.[26] Revocation of citizenship leading to statelessness is permitted in certain circumstances (eg where citizenship was obtained by fraud). Both the 1954 and the 1961 Conventions have had limited effect because they received a low number of ratifications and lack a proper monitoring or enforcement mechanism.[27]

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[21] *UNHCR and De Facto Statelessness*, UNHCR Legal and Protection Policy Research Series, LPPR/2010/01 (2010). See also C Sawyer, 'Stateless in Europe: legal aspects of de jure and de facto statelessness in the European Union' in C Sawyer and B K Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, Cambridge University Press, Cambridge, 2011, 69. For criticism of the distinction between de jure and de facto statelessness, see P Weis, 'The Convention Relating to the Status of Stateless Persons' (1961) 10 ICLQ 255.

[22] R Kassem, 'Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases' (2014) 82(5) Fordham L Rev 2099.

[23] Minister representing the Minister for Foreign Affairs, Mr Peacock, Senate Debates, 30 May 1978, Vol 77, 2109.

[24] Minister representing the Minister for Foreign Affairs, Senate Debates, 9 November 1978, Vol 79, 1834.

[25] M Bennouna, 'De la reconnaissance d'un "droit a la nationalite" en droit international' in SFDI, *Droit international et nationalite – Colloque de Poitiers*, Paris, Pedone, 2012, 119 at 123.

[26] P Weis, *Nationality and Statelessness in International Law*, Alphen aan den Rijn and Germantown, Maryland, Sijthoff & Noordhoff, 2nd ed, 1979, 162.

[27] F Costamagma, 'Statelessness in the context of State succession: an appraisal under international law', in A Annoni and S Forlati (eds), *The Changing Role of Nationality in International Law*, Routledge, London, 2013, 37 at 39.

Some State Practice on Citizenship Deprivation

(i) *The United States of America*

United States law applies the concept of expatriation. Citizenship loss is the result of voluntary renunciation or deliberate surrender by individuals.[28] The Terrorist Expatriation Act (US) expanded the acts evincing an intention to renounce US citizenship.[29]

(ii) *Canada*

The prerequisite for citizenship revocation in Canada is the past commission of a criminal act.[30] Since 2014 the executive has the power to denationalize birthright and naturalized citizens. A citizen must prove, on a balance of probabilities, that he or she is not a citizen of 'any country of which the Minister has reasonable grounds to believe the person is a citizen'. The Strengthening Canadian Citizenship Act (Bill C-24, 2014) may violate the Canadian Charter of Rights and Freedoms and likely breach Canada's international legal obligations.[31] It has been remarked that a Canadian has greater access to the courts to challenge a parking ticket than the deprivation of citizenship.[32]

(iii) *The UK*[33]

Article 8 of the Convention on the Reduction of Statelessness (1961) 989 UNTS 175 (entered into force 13 December 1975) provides as follows:

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[28] Acts deemed to signal an intention to expatriate included swearing allegiance to a foreign sovereign, a female citizen's marriage to a foreigner, serving in a foreign army, voting in foreign elections, treason, employment by a foreign state and remaining abroad to avoid conscription and desertion. Conduct short of express, voluntary, intentional renunciation could suffice to expatriate: *Vance v Terrazas* (1980) 444 US 252 at 261–63. However, the US Department of State adopts an administrative presumption that performing an expatriating act does not denote an intention to surrender US citizenship: US Department of State, 'Loss and Restoration of US Citizenship', 7 FAM 1214 (2013). Thus it is impossible to lose one's US citizenship against one's will: P Spiro, 'Expatriating Terrorists' (2014) 82(5) Fordham L Rev 2169.

[29] US, Bill S 3327, Terrorist Expatriation Act, 111th Cong, 2010.

[30] For comment, see J Béchard, P Becklumb & S Elgersma, 'Legislative Summary of Bill C-24: An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts', Library of Parliament, Ottawa, 2014.

[31] A Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40(1) Queen's LJ 1; C Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists'' (2014) 39(2) Queen's LJ 551. The Ontario Superior Court concluded '[t]here can be no question that the revocation of citizenship...triggers s 7 of the Charter. A revocation of citizenship engages both liberty interests and security of the person': *Oberlander v Canada (Attorney General)* (2004), 69 OR (3d) 187, [45], [114]. However, in *Hurd v Canada (Minister of Employment and Immigration)* [1989] 2 FC 594 at 606 the Federal Court of Appeal concluded that the deportation of permanent residents on grounds of criminality was not a penal consequence for the purposes of s 11 of the Charter.

[32] M Bellisimo, 'Bill C-24: Amendments to the Canadian Citizenship Act: Citizenship To Be Redefined, Re-Positioned and Re-Evaluated" (20 February 2014), Canadian Immigration Blog (blog), online: <www.bellissimolawgroup.com/2014/02/bill-c-24-amendments-to-the-canadian-citizenship-act-citizenship-to-be-redefined-repositioned-and-re-evaluated.html>.

[33] See generally UK House of Commons Library, 'Deprivation of British Citizenship and Withdrawal of Passport Facilities', SN/HA/6820 (2014); R Thwaites, 'The Security of Citizenship?: Finnis in the Context of the United Kingdom's Citizenship Stripping Provisions' in F Jenkins, M Nolan and K Rubenstein (eds), *Allegiance and Identity in a Globalised World*, Cambridge University Press, Cambridge, 2014, 243.

Article 8
1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
(a) In the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;
(b) Where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
(a) That, inconsistently with his duty of loyalty to the Contracting State, the person:
(i) Has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State;
(b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

When acceding to the 1961 Statelessness Convention, the UK made a declaration under article 8(3) as follows:

'... in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person
(i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.

Before 2002 citizenship deprivation was not automatic. Amendments in 2002 extended the ambit of citizenship revocation to birthright citizens and replaced the test with conduct 'seriously prejudicial to the vital interests' of the UK. Amendments in 2006 were prompted by David Hicks who succeeded in claiming UK citizenship after being captured by the US in Afghanistan and detained at Guantanamo Bay. The UK government immediately revoked his UK citizenship, but the British courts frustrated this gambit in 2005. In 2006, Parliament further diluted the standard for revocation to require only the Home Secretary's subjective belief that deprivation would be 'conducive to the public good'.[34]

The British Nationality Act 1981 (UK) provided as follows:

40 Deprivation of citizenship
(1) In this section a reference to a person's "citizenship status" is a reference to his status as -
(a) a British citizen,
(b) a British overseas territories citizen,
(c) a British Overseas citizen,
(d) a British National (Overseas),
(e) a British protected person, or
(f) a British subject.

[34] C Sawyer, 'Civic Britannicus Sum No Longer?: Deprivation of British Nationality' (2013) 27(1) J Immigration, Asylum & Nationality L 23.

(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of -

(a) fraud,
(b) false representation, or
(c) concealment of a material fact.

(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying -

(a) that the Secretary of State has decided to make an order,
(b) the reasons for the order, and
(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).

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

(a) fraud,
(b) false representation, or
(c) concealment of a material fact.

40A Deprivation of citizenship: appeal
(1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the Asylum and Immigration Tribunal.
(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public -

(a) in the interests of national security,
(b) in the interests of the relationship between the United Kingdom and another country, or
(c) otherwise in the public interest.

(3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c. 41) shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82, 83 or 83A of that Act -

(a) section 87 (successful appeal: direction) (for which purpose a direction may, in particular, provide for an order under section 40 above to be treated as having had no effect),
(b) sections 103A to 103E (review and appeal),
(c) section 106 (rules),
(d) section 107 (practice directions) and
(e) section 108 (forged document: proceedings in private).

Crucially, an individual has a right of appeal to the Asylum and Immigration Tribunal or, where appropriate, to the Special Immigration Appeals Commission (SIAC) which is able to consider both the legality and the merits of the Secretary of State's decision.

Section 40 was construed in *B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616 as follows:

30. Article 8.1 of the 1961 Convention provides (subject to certain specified exceptions): "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."
Section 40(4) of the 1981 Act (set out in Part 1 above) is intended to give effect to this provision in our domestic law.
95 The word stateless in section 40(4) means de jure stateless, not de facto stateless in the sense discussed above: see Fransman's British Nationality Law, third edition, paragraph 25.4 and *Abu Hamza v The Secretary of State for the Home Department* (SIAC, 5th November 2010).
96 The words "if he is satisfied that" in section 40(4) of the 1981 Act do not mean that the Secretary of State's opinion is the yardstick. These words must be construed in a manner which is consistent with

> article 8.1 of the 1961 Convention. In the result therefore the Secretary of State cannot make an order depriving a person of British citizenship if the consequence will be to render that person de jure stateless.

B2 had been stripped of UK citizenship and placed in detention awaiting removal to Vietnam which did not recognize him as one of its nationals and could not be forced to take him back. In such circumstances the Court considered 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.[35]

For completeness, the British Nationality (General) Regulations 2003 (UK) provides as follows:

> 10 Notice of proposed deprivation of citizenship
> (1) Where it is proposed to make an order under section 40 of the Act depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given -
>
> (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.
>
> (2) If a notice required by section 40(5) of the Act is given to a person appearing to the Secretary of State or, as appropriate, the Governor or Lieutenant-Governor to represent the person to whom notice under section 40(5) is intended to be given, it shall be deemed to have been given to that person.
> (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;
> (b) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent, and
> (c) in any other case on the day on which the notice was delivered.
>
> 11 Cancellation of registration of person deprived of citizenship
> Where an order has been made depriving a person who has a citizenship status by virtue of registration (whether under the Act or under the former nationality Acts) of that citizenship status, the name of that person shall be removed from the relevant register.
>
> 12 Cancellation of certificate of naturalisation in case of deprivation of citizenship
> Where an order has been made depriving a person who has a citizenship status by virtue of the grant of a certificate of naturalisation (whether under the Act or under the former nationality Acts) of that citizenship status, the person so deprived or any other person in possession of the relevant certificate of naturalisation shall, if required by notice in writing given by the authority by whom the order was made, deliver up the said certificate to such person, and within such time, as may be specified in the notice; and the said certificate shall thereupon be cancelled or amended.

Additionally of note is that Chapter 55 of the UK's Visas and Immigration nationality instructions (2014) provides guidance on deprivation (s 40) and nullity. A number of administrative documents have been prepared, including a deprivation questionnaire, a sample investigations letter, a notice of decision to deprive, a notice of decision not to deprive, a deprivation order, a letter to be issued with such an order, and a letter notifying an individual that an appeal was successful.[36]

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[35] *B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616, [92].
[36] See https://www.gov.uk/government/publications/chapter-55-deprivation-section-40-and-nullity-nationality-instructions.

In *Secretary of State for the Home Department v Al-Jedda* the Home Secretary unsuccessfully argued that al-Jedda (a naturalized UK citizen) was eligible to reclaim his former Iraqi citizenship as of right and that his failure to do so made him the author of his own statelessness. However, the UK Supreme Court affirmed that the prohibition on creating statelessness was violated when the Home Secretary issued an order for revocation and the individual did not, at that moment, possess another nationality.[37] As a matter of statutory construction, the question was whether the person already held another nationality at the date of the order, not whether they were entitled to one or might acquire one. The Court also noted that, by enacting the prohibition on deprivation of citizenship on 'public good' grounds if it renders someone stateless, 'Parliament went further than was necessary in order to honour the UK's existing international obligations.'[38]

Al-Jedda prompted further amendments to the British Nationality Act 1981 (UK) during 2014. The Home Secretary is empowered to render naturalized citizens stateless (beyond cases of fraud) if, inter alia, the person 'has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom' and the Secretary of State believes on reasonable grounds that the individual is able to acquire citizenship elsewhere. These provisions were intended to implement the UK's declaration to the 1961 Convention under national law. They are retrospective, such that the Secretary of State may take account of conduct before the section came into force. The provision also authorizes the imposition of statelessness on birthright citizens.

The *Immigration Act 2014* (UK), s 66 (assented to on 14th May 2014) provides as follows:

> 66 Deprivation if conduct seriously prejudicial to vital interests of the UK
> (1) In section 40 of the British Nationality Act 1981 (deprivation of citizenship), after subsection (4) insert—
> "(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory."
>
> (2) In deciding whether to make an order under subsection (2) of section 40 of the British Nationality Act 1981 in a case which falls within subsection (4A) of that Act, the Secretary of State may take account of the manner in which a person conducted him or herself before this section came into force.
>
> (3) After section 40A of the British Nationality Act 1981 insert -
> "40BReview of power under section 40(4A)
> (1) The Secretary of State must arrange for a review of the operation of the relevant deprivation power to be carried out in relation to each of the following periods -
>
> (a) the initial one year period;
>
> (b) each subsequent three year period.
>
> (2) The "relevant deprivation power" is the power to make orders under section 40(2) to deprive persons of a citizenship status in the circumstances set out in section 40(4A).
> (3) A review must be completed as soon as practicable after the end of the period to which the review relates.

[37] *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62.
[38] Ibid, [22].

(4) As soon as practicable after a person has carried out a review in relation to a particular period, the person must-

(a) produce a report of the outcome of the review, and

(b) send a copy of the report to the Secretary of State.

(5) The Secretary of State must lay before each House of Parliament a copy of each report sent under subsection (4)(b).

(6) The Secretary of State may, after consultation with the person who produced the report, exclude a part of the report from the copy laid before Parliament if the Secretary of State is of the opinion that it would be contrary to the public interest or prejudicial to national security for that part of the report to be made public.

(7) The Secretary of State may -

(a) make such payments as the Secretary of State thinks appropriate in connection with the carrying out of a review, and

(b) make such other arrangements as the Secretary of State thinks appropriate in connection with the carrying out of a review (including arrangements for the provision of staff, other resources and facilities).

(8) In this section -

"initial one year period" means the period of one year beginning with the day when section 40(4A) comes into force;

"subsequent three year period" means a period of three years beginning with the first day after the most recent of -

(a) the initial one year period, or

(b) the most recent subsequent three year period."

Section 66 was inserted by the UK Secretary of State just prior to the bill's third reading in the House of Commons. The House of Lords established a committee and expressed concern that a person would be left stateless. The House of Commons rejected the Lords' proposed amendments but substituted two of their own. A requirement to review the operation of the deprivation power was also inserted.

(a) Some implications under international human rights law

The conclusions of the House of Lords House of Commons Joint Committee on Human Rights on this legislation were as follows:[39]

> We accept the Government's argument that, in strict legal terms, enacting the power in clause 60 to deprive a naturalised citizen of their citizenship even if it renders them stateless does not involve any breach by the UK of its obligations under the UN Conventions on Statelessness.
>
> 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. We recommend that the Bill be amended to make it a precondition of the making of an order by the Secretary of State that, in the circumstances of the particular case, the deprivation is compatible with the UK's obligations under international law.
>
> We welcome the Government's acceptance that a deprivation order should not be made without taking full account of the impact on the whole family unit, and with regard to the best interests of any child affected. To ensure that the best interests of the child are treated as a primary consideration, as required by Article 3 UNCRC, we recommend an amendment to the Bill which requires the Secretary of State to take into account the best interests of any child affected when deciding whether to make a deprivation order under the new power.
>
> *Adequacy of safeguards against arbitrariness*
>
> We welcome the Government's indication that it would adopt a proportionality approach to deciding whether or not to exercise the new power in clause 60 to deprive of citizenship. However, we note that the Government does not want to rule out the possibility that deprivation of citizenship leaving a person stateless is necessary in the interests of the economic well-being of the country. It is

[39] UK House of Lords House of Commons Joint Committee on Human Rights, Legislative Scrutiny: Immigration Bill (Second Report), Twelfth Report of Session 2013–14, HL Paper 142 (26 February 2014), 3-6.

hard to imagine the circumstances in which such a serious measure could ever be necessary and proportionate for such a purpose. We recommend that the Bill be amended to make it a precondition of an order that the deprivation of citizenship is a necessary and proportionate response to the conduct in question.

Retrospectivity

Changing the law with retrospective effect is recognised to be an exceptional step which requires weighty justification; and all the more so when the effect of such retrospectivity is to enable particular individuals to be deprived of the benefit of court judgments in their favour. These considerations are even weightier where the provision which is being given retrospective effect is a sanction in respect of previous conduct. We are not persuaded that there are sufficiently weighty reasons to justify the new power being made retrospective, and we recommend that the Bill be amended so as to prevent it having retrospective effect.

Fair hearing

In our view it is clear that an appeal to SIAC will not be a fair hearing unless the AF disclosure obligation applies, so that the Secretary of State is legally required to disclose to the individual concerned sufficient information to enable him to give effective instructions to his special advocate. So long as the legal framework does not make such provision, the UK will be in breach of Article 8(4) of the Statelessness Convention. We recommend that the Bill be amended to ensure that the AF disclosure obligation applies in all appeals against orders made by the Secretary of State under the proposed new power.

Access to a practical and effective remedy

We welcome the Government's clarification that appeals to the Special Immigration Appeals Commission against deprivation of citizenship under the new power will not be subject to the proposed residence test for eligibility for legal aid, even where the appeal is brought from outside the UK, and we ask the Government to confirm that the same applies in relation to appeals to the First Tier Tribunal. We also recommend that, in order to ensure that the right of appeal is practical and effective, the legal framework provides that the time for lodging an appeal only begins to run either when the individual has actually received the notification or when the Secretary of State can demonstrate that she has taken all reasonable steps to bring the decision to the individual's attention, whichever is the earlier.

In the absence of legal aid, we do not consider that an out of country appeal against deportation on the grounds that it is in breach of the right to respect for private and family life is a practical and effective remedy for the purposes of Article 8 ECHR and Article 13 in conjunction with Article 8.

Several additional conclusions and recommendations are also worth noting as follows:

28. Since the Government is essentially relying on the terms of Article 8(3) of the 1961 Convention to justify repealing a subsequent provision which is more conducive to the reduction of statelessness, we asked the Government whether there is an implied international law duty not to increase statelessness. The Government's response is that Article 13 of the 1961 Convention cannot be read as detracting from Article 8, which expressly permits States to retain the right to deprive a person of their nationality on certain grounds. It also invokes the observations of the Court of Appeal and the Supreme Court that the current UK law goes further than is required as a matter of international law.

29. We accept the Government's argument that, in strict legal terms, enacting the power in clause 60 to deprive a naturalised citizen of their citizenship even if it renders them stateless does not involve any breach by the UK of its obligations under the UN Conventions on Statelessness. The new power will lead to an increase in statelessness, which represents a significant change of position in the human rights policy of the UK, which has historically been a champion of global efforts to reduce statelessness. It does not per se, however, put the UK in breach of any of its international obligations in relation to statelessness.

38. 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...

39. We also recommend that the Bill be amended to make it a precondition of the making of an order by the Secretary of State that, in the circumstances of the particular case, the deprivation is compatible with the UK's obligations under international law.

The following probing amendment is intended to focus debate on this issue:

Page 47, line 40, insert—

"and (d) in the circumstances of the particular case the deprivation of citizenship is consistent with the UK's obligations under international law."

45. We do not accept the Government's argument that, generally speaking and in the absence of exceptional circumstances, a decision to deprive a naturalised citizen of their citizenship while they are physically in the territory of another State does not engage the individual's Convention rights under Articles 2, 3 and 8 ECHR because they are outside the UK's jurisdiction for ECHR purposes. 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.

46. The effect of the ECHR applying to all deprivation of citizenship decisions is to reinforce the requirements contained in other treaties. These are that nationality must not be taken away arbitrarily, but must be in accordance with the law; that the power must be regulated by a legal framework which ensures that the power is not exercised arbitrarily or in a discriminatory manner, but only where necessary and proportionate; and that there must be a practically effective right of access to a court and a fair hearing in the determination of the lawfulness of the deprivation, including its compatibility with other international obligations.

62. We welcome the Government's indication that it would adopt a proportionality approach to deciding whether or not to exercise the new power in clause 60 to deprive of citizenship. However, in our view the importance of the concepts of necessity and proportionality as safeguards against arbitrariness is such that we recommend that they are included on the face of the Bill as conditions which have to be satisfied before the Secretary of State makes a deprivation order. In our view this could make a real practical difference in particular cases. We note, for example, that the Government does not want to rule out the possibility that deprivation of citizenship leaving a person stateless is necessary in the interests of the economic well-being of the country, whereas it is hard to imagine the circumstances in which such a serious measure could ever be necessary and proportionate for such a purpose. The following amendment would give effect to this recommendation:

Page 47, line 41, after sub-paragraph (b) insert—

"(c) the deprivation of citizenship is a necessary and proportionate response to such conduct"

69. It is a well established feature of our constitutional arrangements that there is no constraint on Parliament changing the law prospectively where it disagrees with an interpretation of the law reached by even the highest court in the land. Changing the law with retrospective effect, however, is recognised to be an exceptional step which requires weighty justification; and all the more so when the effect of such retrospectivity is to enable particular individuals to be deprived of the benefit of court judgments in their favour.

70. These considerations are even weightier where the provision which is being given retrospective effect is a sanction in respect of previous conduct. In such cases, legal certainty is especially important, so that individuals are aware of the possible consequences of their conduct. That is why there is an absolute prohibition on retrospective criminal penalties. While we do not suggest that deprivation of citizenship is equivalent to a criminal penalty, it is nevertheless a very serious sanction for previous conduct, particularly where it leaves the individual stateless, and therefore akin to a penalty, making the presumption against retrospectivity even stronger.

71. We are not persuaded that there are sufficiently weighty reasons to justify the new power being made retrospective, and we recommend that the Bill be amended so as to prevent it having retrospective effect.

The following amendment would give effect to this recommendation:

Page 48, line 1, after "Secretary of State" leave out "may take account of the manner in which a person conducted him or herself before this section came into force."

(b) Some implications with respect to the preventing statelessness

There is a question whether these reforms comply with the UK's obligations under the 1961 Statelessness Convention.[40]

Professor Goodwin-Gill has concluded that

[40] For the view that these reforms do not comply, see Open Society Justice Initiative, 'Opinion on Clause 60 of UK Immigration Bill & Article 8 of United Nations Convention on Reducing Statelessness', Open Society Foundations (5 March 2014), <www.opensocietyfoundations.org/sites/default/files/briefing-clause60-03112014.pdf>.

> 9. Given the United Kingdom's declaration under Article 8(3)(a) and its non-ratification of the 1997 European Convention, the United Kingdom might not appear to be in breach of its international obligations, merely by virtue of the fact that the law was changed to permit deprivation of citizenship resulting in statelessness.
> 49. If the power to deprive of citizenship is to be retained, then it should be limited to those cases in which the individual in question already possesses another effective nationality.[41]

However, there may be other international legal consequences. In particular, a State cannot refuse to readmit an individual whom it stripped of his or her nationality whilst abroad; to do so would be in breach of its obligations towards the receiving State. Professor Goodwin-Gill makes the following points:

(i) Any State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom. If the UK were to refuse re-admission, and if no other country had expressed its willingness to receive that person, the UK would be in breach of its obligations towards the receiving State.

(ii) Although the current state of international law may permit the deprivation of citizenship resulting in statelessness, at least in its 'internal form', certain limitations on this competence follow when the act of deprivation takes on an external or extraterritorial form. In light of the above considerations, this would seem to imply, among others, that:
   (a) No order of deprivation, and no cancellation of passports or documents attesting to citizenship should be permitted with regard to any person not physically present in the UK;
   (b) No person deprived of their British citizenship should be removed or threatened with removal unless another State has formally agreed to admit that person, and the person concerned is willing to go to that State;
   (c) No order of deprivation should be made unless full account has been taken of family considerations, including the best interests of any children and their status in the UK;
   (d) Due process requires an effective remedy and meaningful review of any order of deprivation. In particular, this requires that an appeal or review have suspensive effect, particularly in view of the concerns which courts have expressed regarding out of country appeals.
   (e) Any State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the UK. If the UK were to refuse re-admission, and if no other country had expressed its

[41] Goodwin-Gill G, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law: Opinion', 12 March 2014, <http://www.ilpa.org.uk/resources.php/25900/ilpa-briefings-for-immigration-bill-house-of-lords-committee-stage-3-march-2014>. See also Goodwin-Gill G, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law', revised draft of a paper presented at a Seminar at Middlesex University, 14 February 2014 <http://www.parliament.uk/documents/joint-committees/humanrights/GSGG-DeprivationCitizenshipRevDft.pdf>; Goodwin-Gill G, 'Deprivation of Citizenship resulting in Statelessness and its Implications in International Law – Further Comments', 6 April 2014 <http://www.ilpa.org.uk/resources.php/26116/ilpa-briefing-for-the-immigration-bill-house-of-lords-report-7-april-2014-deprivation-of-citizenship>; Goodwin-Gill G, 'Deprivation of Citizenship resulting inStatelessness and its Implications in International Law: More Authority (if it were needed. . .)', 5 May 2014 <http://www.parliament.uk/documents/joint-committees/human-rights/GSGGDeprivationCitizenship-MoreAuthority.pdf>.

> willingness to receive that person, the UK would be in breach of its obligations towards the receiving State. There is considerable potential for damage to the UK's international relations.

Australia did not avail itself of the opportunity to lodge a reservation to the treaty at the time of its signature, ratification or accession to the 1961 Convention in 1973. One possible question is whether it may do so now.[42] However, the orthodox position would be that the international legal position for Australia is different from that of the UK, such that Australia is unable to take advantage of any reservation to Article 8 of the Convention in the same way as the UK. Because the national law of the UK has been tailored to the position of that State under international law, it cannot be unthinkingly transplanted into Australian law without appropriate adaptation to local conditions and the international legal position for Australia.

The Treatment of Dual Nationals[43]

Whether an individual is a national of another State typically requires consideration to be given to evidence concerning the nationality laws of that State. For example, in 2011 the Home Secretary deprived Mr Pham of his British citizenship under s 40(2) of the British Nationality Act 1981 because she suspected that he was involved in terrorist activities. Vietnamese officials declined to acknowledge that Mr Pham was a national of Vietnam. In *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* [2015] UKSC 19, the central issue was whether the Secretary was precluded from making an order depriving the appellant of his British citizenship because to do so would render him stateless. This turned on whether he was a person considered to be a national by Vietnam 'under the operation of its law' within the meaning of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons. Lord Carnwath (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed) stated (at [38]):

> ...I would accept that the question arising under article 1(1) of the 1954 Convention in this case is not necessarily to be decided solely by reference to the text of the nationality legislation of the state in question, and that reference may also be made to the practice of the government, even if not subject to effective challenge in the courts.[44]

Also to be taken into account is the consequences of the act of rendering an individual stateless or mono-national. The impact on the rights of other States includes issues with respect to admission, deportation, or compliance with international law (eg obligations to combat terrorism). The international responsibility of Australia can be engaged.

Although an individual may have another nationality, there is a question whether a third State is obliged to recognise or give effect to Australia's action in depriving a dual national of Australian nationality. An Australian judge of the International Court of Justice, Judge Read, considered the relations between States which are occasioned by the admission of non-citizens as follows:

> Nationality and diplomatic protection are closely interrelated. The general rule of international law is that nationality gives rise to a right of diplomatic protection. Fundamentally the obligation of a State to accord reasonable treatment to resident aliens and the correlative right of protection are based on the

[42] Article 17(2) provides that no other reservations shall be 'admissible'.
[43] See generally A Boll, *Multiple Nationality and International Law*, Martinus Nijhoff, 2007.
[44] See also Lord Mance to the same effect at [71] (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed).

> consent of the States concerned. When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission. That does not mean that it can deny the alien's national status or refuse to recognize it. But by refusing admission, the State prevents the establishment of legal relationships involving rights and obligations, as regards the alien, between the two countries. On the other hand, by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national.
> As a result of the admission of an alien, whether as a permanent settler or as a visitor, a whole series of legal relationships come into being. There are two States concerned, to which I shall refer as the receiving State and the protecting State. The receiving State becomes subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State and the individual, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations vis-à-vis the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation. This network of rights and obligations is fundamentally conventional in its origin – it begins with a voluntary act of the protecting State in permitting the individual to take up residence in the other country, and the voluntary act of admission by the receiving State. The scope and content of the rights are, however, largely defined by positive international law. Nevertheless, the receiving State has control at all stages because it can bring the situation to an end by deportation...
> ...When a series of legal relationships, rights and duties exists between two States, it is not open to one of the States to bring the situation to an end by its unilateral action.[45]

Thus a receiving State has the right to terminate the non-citizen's stay by deporting him or her to the State which issued the passport and of the State of nationality's obligation to admit its citizens expelled from other States.

If Australia's main or sole purpose was to exercise the power to deprive naturalised citizens of citizenship while they were outside Australia, then there is the prospect that this engages Australia's international obligations to the State who admitted the Australian citizen to its territory.

The following view has been expressed:

> The mere fact, however, that nationality falls in general within the domestic jurisdiction of a State does not exclude the possibility that the right of the State to use its discretion in legislating with regard to nationality may be restricted by duties which it owes to other States...Legislation which is inconsistent with such duties is not legislation which there is any obligation upon a State whose rights are ignored to recognize. It follows that the right of a State to legislate with regard to the acquisition and loss of its nationality and the duty of another State to recognize the effects of such legislation are not necessarily coincident.[46]

The deprivation of citizenship 'affects the right of other States to demand from the State of nationality the readmission of its nationals...its extraterritorial effect would be denied as regards the duty of admission'.[47] This means that, whether denationalisation occurs before an individual leaves a State or afterwards, the duty to permit residence or to readmit a former national persists:

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[45] *The Nottebohm Case (Liechtenstein v Guatemala)* (1955) ICJ Reports 4, 34-49, 46-48 (Dissenting Opinion of Judge Read).
[46] I Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford, 7th edn, 2008, 386.
[47] P Weis, *Nationality and Statelessness in International Law*, Alphen aan den Rijn: Sijthoff & Noordhoff, 2nd edn., 1979, 125, 126.

> The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.[48]

Furthermore:

> In the case of denationalisation, the doctrine of the survival of the duty of readmission after the loss of nationality follows, in fact, from the principle of territorial supremacy: this supremacy might be infringed by such unilateral action in so far as that action would deprive other States of the possibility of enforcing their recognised right to expel aliens supposing that no third State, acting in pursuance of its legitimate discretion, was prepared to receive them.[49]

Additional issues of international law may arise if action is taken to deprive dual nationals of Australian citizenship while they are in Australia. Whatever conduct made an Australian unworthy of citizenship would presumably make him or her equally unworthy of citizenship elsewhere. The other country may also deprive the individual of its nationality with a view to avoiding its obligations to accept them upon expulsion, thereby leaving an individual stateless within Australia.

The deprivation of Australian nationality would also have consequences under Australian law.[50] For example, the immigration status of a stateless person in Australia could become unclear. It may not be possible to deport such individuals, such that they remain in Australia, and thereby not addressing the national security concern sought to be addressed. Deprivation of citizenship might be characterised as demonstrating a lack of confidence in Australia's criminal justice system for addressing national security threats.

(a) The ability to acquire another nationality

An individual may be able to acquire another State's nationality. Among the considerations include that, even if eligible for citizenship, an individual may have to be physically present within a State to lodge an application. According to the European Court of Human Rights, a failure to apply for citizenship is not a reasonable ground for depriving a group of aliens of their residence permits. Such treatment is discriminatory and in violation of the rights to private life and family life.[51] The issue has arisen for consideration in several UK and Canadian cases.

(i) Hilal al-Jedda

Iraqi-born Hilal al-Jedda was naturalized as a UK citizen. The Home Secretary deprived him of citizenship while he was outside the UK believing him to be an Iraqi citizen. The UK contended that constitutional amendments automatically and retroactively restored his Iraqi citizenship even though he had not applied for it and did not want it. Alternatively, al-Jedda was stateless because of his own failure to apply for Iraqi citizenship.

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[48] Ibid, 55.
[49] Ibid, 57.
[50] For example, Australian nationals who simultaneously possess another nationality can be treated as aliens, for example, for the purposes of election to Federal Parliament: *Sue v Hill* [1999] HCA 30; 199 CLR 462.
[51] *Kuric v Slovenia*, Application No 26828/06, Judgment of 26 June 2012, [357], [359]-[361], [386], [390], [393].

The UK Supreme Court rejected the government's arguments. Al-Jedda was not automatically Iraqi under Iraqi law at the moment the UK deprived him of UK citizenship. The fact that he could potentially reclaim Iraqi citizenship did not alter the fact that the Home Secretary's decision rendered him stateless.
Lord Wilson (with whom Lord Neuberger, Lady Hale, Lord Mance and Lord Carnwath agreed), stated the following:

...This appeal seeks to raise the question: if at the date of the Secretary of State's order it were open to the person to apply for citizenship of another state and if that application would necessarily be granted, is it her order which would make him stateless or is it his failure to make the application which would do so?
...The Secretary of State invites the court to determine the appeal on a premise. It is that on 14 December 2007 the respondent could have applied to the Iraqi authorities for restoration of his Iraqi nationality; that under Iraqi law he then had a right to have it restored to him; and that its restoration would have been effected immediately.
...[31] Although the word "satisfied" therefore adds nothing to it, the Secretary of State's argument still remains that section 40(4) requires the "active" or "real" cause of any statelessness to be identified. The word in the subsection is "make" and the argument is that, although no doubt a number of factors contributed to "making" the respondent stateless on 14 December 2007 (including, presumably, even his initial loss of Iraqi nationality by acquisition of British nationality in 2000), the subsection requires identification of the factor which "actively" or "really" made him stateless, namely (if such it was) his failure to secure immediate restoration of his Iraqi nationality. The argument is said to reflect a properly purposive construction of the subsection: where a ground for making a deprivation order exists, why disable the Secretary of State from making it in circumstances in which it remains open to the person so easily and so immediately to avoid becoming stateless? Does the law (asks Mr Swift) allow him to complain of a state of affairs of his own "making"?
[32] I reject this argument. Section 40(4) does not permit, still less require, analysis of the relative potency of causative factors. In principle, at any rate, the inquiry is a straightforward exercise both for the Secretary of State and on appeal: it is whether the person holds another nationality at the date of the order. Even that inquiry may prove complex, as the history of these proceedings demonstrates. But a facility for the Secretary of State to make an alternative assertion that, albeit not holding another nationality at the date of the order, the person could, with whatever degree of ease and speed, re-acquire another nationality would mire the application of the subsection in deeper complexity. In order to make his argument less unpalatable to its audience, Mr Swift, as already noted, limited it to the re-acquisition of a former nationality, as opposed to the acquisition of a fresh nationality. But, with respect, the limitation is illogical; if valid, his argument would need to extend to the acquisition of a fresh nationality. Yet a person might have good reason for not wishing to acquire a nationality available to him (or possibly even to re-acquire a nationality previously held by him).
...[34] On 20 February 2012 the United Nations High Commissioner for Refugees issued "Guidelines on Statelessness No 1", HCR/GS/12/01, in which he addressed some of the effects of the authoritative definition of a stateless person in article 1(1) of the 1954 Convention. Para 43 of his guidelines, entitled "Temporal Issues", has been incorporated, word for word, into the Home Office guidance on "Applications for leave to remain as a stateless person" dated 1 May 2013, referred to at para 13 above. The guidance provides:

> "3.4 ... An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures have not been completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have not been completed, the individual is still a national for the purposes of the stateless person definition."

The Secretary of State's own guidance eloquently exposes the fallacy behind her appeal.[52]

[52] *Secretary of State for the Home Department v Al -Jedda* [2013] UKSC 62.

The judgment of Lord Justice Richards in *Al-Jedda v Secretary of State for the Home Department (Rev 2)* [2012] EWCA Civ 358 at [117]-[124] is also illuminating:

In my judgment, the relevant factors come down strongly in favour of the view that the Iraqi courts would find the appellant's situation to be covered by Article 10.3, not by Article 10.1, and that the restoration of his Iraqi nationality depends on his meeting the conditions of Article 10.3, including the making of an application for its restoration. Article 10 does not operate to restore it to him automatically. Despite their differences of view about Article 10, the experts were at least agreed that it requires an application to be made. That is also the clear view of Iraq's Director General of Nationality, and it accords with the practice of the General Directorate of Nationality. The language of the provisions supports it. It also sits comfortably with the 2006 Constitution, Article 18(3)A of which, as SIAC themselves held, requires a person who has had his citizenship withdrawn to make a "demand" to have it reinstated. It is unnecessary to decide whether any application, once made, has to be granted if the basic conditions are fulfilled or whether there exists a residual discretion to refuse it. What matters is that an application has to be made if Iraqi nationality is to be restored.

Accordingly, in the absence of any application by the appellant, Article 10 has not operated to restore Iraqi nationality to him.

By the respondent's notice the Secretary of State raises an argument that was advanced before SIAC but did not need to be decided by them owing to their conclusion that the appellant's Iraqi nationality had been restored to him automatically. It is said that even if the restoration of the appellant's Iraqi nationality depended on his making an application for the purpose, such an application could be made and would be bound to succeed; and in consequence it was not the Secretary of State's decision to deprive him of his British nationality that made him stateless, but his own failure to apply for the restoration of his Iraqi nationality; or at least, in the terms of section 40(4) of the British Nationality Act 1981, the Secretary of State was entitled in the circumstances not to be satisfied that the order would make him stateless.

I am prepared to assume that if an application were made for the restoration of the appellant's Iraqi nationality it would be bound to succeed, though the point is by no means free from doubt. I also put to one side the objections raised by Mr Hermer as to the practicality of the appellant making an application at all: he submitted that an application would have to be made by the appellant in person, and for that purpose the appellant would have to enter Iraq legally and would therefore require a visa, which would lie in the discretion of the State and could be refused on national security grounds.

I would reject the Secretary of State's argument for the straightforward reason that section 40(4) requires the Secretary of State (and, on appeal, the court) to consider the effect of the order made under section 40(2): would the order make the person stateless? If Iraqi nationality was not restored to the appellant automatically under the Iraqi legislation considered above, he was not an Iraqi national at the time of the order: his only nationality at that time was British nationality. The effect of the order would therefore be to make him stateless. That would be the effect of the order irrespective of whether he could previously have acquired another nationality had he chosen to do so, or whether he could do so in the future.

In the course of submissions on this issue we were referred to the discussion of statelessness in SIAC's open judgment of 5 November 2010 in *Abu Hamza v Secretary of State for the Home Department* (Appeal No: SC/23/2003, BAILII: [2010] UKSIAC 23/2005). Having considered the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction Statelessness, SIAC stated at [5]:

> "The obvious, and, we are satisfied, only proper conclusion is that Parliament intended that the Secretary of State should not make a deprivation order in respect of a person who is not considered as a national by any state under the operation of its law – the definition in Article 1.1 of the 1954 Convention. Such an interpretation has the advantage of aligning domestic law with the United Kingdom's international obligations. As to the burden and standard of proof, we are satisfied that the burden is on the Appellant and that he must prove that he would be made stateless on the balance of probabilities."

None of that was in dispute before us. I am satisfied that in this case the appellant has proved to the requisite standard that at the time of the Secretary of State's order he was not considered as a national by the State of Iraq under the operation of Iraqi law, even though it would have been open

to him and would still be open to him to make an application for the restoration of Iraqi nationality under that law. There is no suggestion that he was considered as a national by any other State save the United Kingdom. In those circumstances the order depriving him of his British citizenship plainly made him stateless.
For the reasons I have given I would allow the appeal and quash the Secretary of State's order depriving the appellant of his British nationality.

(ii) Deepan Budlakoti

Deepan Budlakoti was born in Ottawa and possessed a Canadian birth certificate and two Canadian passports. An investigation concluded that he was not a citizen because he was born to employees of the Indian High Commissioner and not entitled to citizenship. India did not regard him as an Indian citizen and would not issue a travel document to him. He is effectively stateless. Litigation is continuing.[53] In particular, Budlakoti sought a declaration that he was a Canadian citizen.
At first instance, the Honourable Justice Phelan made these observations:

[40] On the issue of whether the Respondent has taken any action to render the Applicant stateless, the Respondent has done nothing to deprive the Applicant of his Canadian citizenship. The Applicant's position is based on the erroneous assumption that the Applicant initially had Canadian citizenship.
[41] Whether the Applicant has Indian citizenship or is entitled to Indian citizenship is not a matter which this Court can decide. At the very minimum there is no expert evidence on Indian law and the Applicant's entitlements to Indian citizenship. The law relied on by the Applicant relates to revocation of citizenship and is not applicable or persuasive in these circumstances.
[42] On the issue of violation of the Applicant's rights, the Applicant claims violations of sections 6 and 7 of the Charter.
[43] With respect to s 6 rights, the Applicant's position is dependent on his being a Canadian citizen. In Solis v Canada (Minister of Citizenship and Immigration) (2000), 2000 CanLII 15121 (FCA), 186 DLR (4th) 512 (FCA), 96 ACWS (3d) 455, Justice Rothstein, then on the Court of Appeal, confirmed that for s 6 Charter rights to be engaged, the person must be a citizen.
[44] Having concluded that the Applicant has not established his Canadian citizenship, there can be no violation of s 6 Charter rights.[54]

The Federal Court of Canada said this:

[47] But the Minister urges us to find that those issues cannot yet be raised by way of judicial review. He says the appellant has administrative avenues by which he can avoid being stateless: he can try to obtain citizenship either in India or in Canada. According to the Minister, the appellant has refrained from pursuing those avenues and he must pursue them first.
[48] I agree with the Minister. The appellant does have other adequate and effective forums for relief that, in these circumstances and as a matter of law, he must pursue first.
[49] On the state of the evidence before us, India is an adequate and effective forum for the appellant. The appellant has considerable connection with India. The Board found he was born to two Indian nationals while they were working for officials with the Indian High Commission. This raises the apprehension that the appellant could be a national of India by birth and that he may apply for Indian national status or citizenship. Many states grant national status or citizenship in circumstances such as these. If Indian authorities grant the appellant national status or citizenship, any alleged statelessness would disappear.
[50] On the record before us, the appellant has not shown any legal or practical obstacle to acquiring national status or citizenship in India. Nothing has been placed before us that would suggest that a person born in Canada to two Indian nationals working for officials with the Indian

[53] *Budlakoti v Canada (Citizenship and Immigration)* [2014] FCJ No 912 (QL).
[54] *Budlakoti v Canada (Citizenship and Immigration)* [2014] FC 855.

> High Commission cannot apply for Indian national status or citizenship or that, as a legal matter, India would deny the appellant national status or citizenship.
> [51] In attempting to prove statelessness for later administrative or legal proceedings, the appellant conceded at the hearing of the appeal that the best proof that India will not grant national status or citizenship is for him to apply to the Indian authorities and be refused. But the appellant has never applied to those authorities.
> [52] And nothing prevents the appellant from pursuing a grant of Canadian citizenship under subsection 5(4) of the Citizenship Act. Indeed, for some time now, the appellant has been able to invoke the ground of "special and unusual hardship" in that subsection by requesting that the Minister provide him with a certificate of citizenship under section 12 of the Citizenship Act: see also section 10 of the Citizenship Regulations, S.O.R./93-246 for some procedural guidance. In argument before us, both parties admitted that subsection 5(4) is a potential avenue for the appellant to pursue.
> [55] Therefore, on the record before us, the appellant can legally and practically apply for national status or citizenship in India and in Canada. But he has declined to do so.
> [69] The appellant must first try to obtain citizenship from the Indian and Canadian authorities. Those avenues have been practically and legally available to him for years. Yet he has refrained from pursuing them. Now he should pursue them.
> [72] I would only say this: the declaration the appellant seeks in this case would achieve the same effect as a mandamus order against the Minister requiring him to recognize the appellant as a Canadian citizen even though he has never been given the chance by way of application to consider the matter, not even a bit. This goes way beyond the existing jurisprudence.[55]

Some international legal considerations for Australia

In the consideration of legislation pertaining to the deprivation of citizenship, regard should be had to compliance with international law, and particularly with respect to the following matters.

(i) *Avoiding the arbitrary deprivation of nationality*

The arbitrary deprivation of nationality violates international law.[56] The prohibition of this practice is a principle of customary international law.[57] The arbitrary deprivation of nationality, especially on discriminatory grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status', constitutes a violation of human rights and fundamental freedoms.[58]

The Human Rights Committee explained that 'the right to enter his own country' (in Article 12(4), International Covenant on Civil and Political Rights (ICCPR)) protects a citizen against forced exile or from being denied return:

> The scope of 'his own country' . . . is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The

[55] *Budlakoti v Canada (Citizenship and Immigration)* [2015] FCA 139.
[56] For example, the arbitrary deprivation of nationality could amount to persecution for the purposes of establishing refugee status: H Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64 ICLQ 1; S Gillan, 'Refugee Convention: Whether Deprivation of Citizenship Amounts to Persecution' (2007) 21 Journal of Immigration, Asylum and Nationality Law 347.
[57] UN Human Rights Council, Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, UN Doc A/HRC/13/34 (2009).
[58] Human Rights Council Resolution 10/13 (26 March 2009).

> language of Article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons . . . In no case may a person be arbitrarily deprived of the right to enter his or her own country.[59]

The UN Human Rights Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. Arbitrariness applied to all State action (legislative, administrative and judicial) and that interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances.[60]

In *Nystrom v Australia*, the Human Rights Committee found that the deportation of a Swedish national by Australia to Sweden was arbitrary. The individuals 'own country' was Australia 'in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden'. Furthermore, 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[61]

The arbitrary deprivation of nationality includes all forms of withdrawal of nationality except voluntary renunciation. Arbitrariness addresses standards of justice and due process considerations, as well as non-discrimination. In order not to be arbitrary, the deprivation of nationality must:

- conform to domestic law
- comply with specific substantive standards of international human rights law, in particular the principles of
    - proportionality (that is, the least intrusive measure to achieve the desired result, and proportionate to the interest to be protected)
    - non-discrimination or equality (that is, a decision not made on the basis of race, colour, sex, descent, national or ethnic origin etc)
- comply with specific procedural standards of international human rights law, such as
    - due process; for example:
        - a decision in writing
        - subject to effective administrative or judicial review
- serve a legitimate aim consistent with the objectives of international human rights law.

Denationalization done arbitrarily, including on discriminatory grounds, is prohibited under international law and constitutes a severe violation of human rights, particularly where it results in statelessness. The arbitrary deprivation of nationality impacts on the enjoyment of human rights by

[59] UN Human Rights Committee, General Comment 27, Freedom of Movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [20]-[1].
[60] UN Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement), UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1993, [21].
[61] *Nystrom, Nystrom and Turner v Australia*, Communication No 1557/2007 (18 July 2011) [7.5]-[7.6]. See also *Warsame v Canada*, Communication No 1959/2010 (21 July 2011) [8.4]-[8.6]. For a different view, see *Stewart v Canada*, Communication No 538/1993 (1 November 1996) [12.4]; *Toala et al v New Zealand*, Communication No 675/1995 (2 November 2000).

- putting affected persons in a disadvantageous situation by impeding the full enjoyment of their human rights; and
- putting such persons in a situation of increased vulnerability to human rights violations.

Two reports of the UN Secretary-General state as follows:

> 56. The right of every individual to a nationality is clearly regulated in international human rights law, which provides for the explicit recognition of that right. International human rights law also explicitly provides for the prohibition of arbitrary deprivation of nationality.
> 57. International human rights law provides that the right of States to decide who their nationals are is not absolute and, in particular, States must comply with their human rights obligations concerning the granting and loss of nationality.
> 58. International human rights law clearly establishes the obligation of all States to respect the human rights of all individuals without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. States therefore have the obligation to ensure that all persons enjoy the right to nationality without discrimination of any kind, and that no one is denied or deprived of their nationality on the basis of discriminatory grounds.
> 59. Deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality. Exceptions to this general principle should be construed narrowly.
> 63. States are expected to observe minimum procedural standards in order to ensure that decisions concerning the acquisition, deprivation or change of nationality do not contain any element of arbitrariness. In particular, States should ensure that a review process can be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State and the relevant international human rights standards.[62]

And:

> 19. Persons who have been arbitrarily deprived of their nationality may also face legal constraints in relation to their access to an effective remedy, in particular in relation to the right to challenge administrative or judicial decisions affecting them...
> 20. Therefore, a range of procedural safeguards should be adopted to guarantee access to justice in decisions relating to the rights of non-nationals and stateless people, as well as in any decision on the deprivation of nationality itself. Where the initial decision has failed to take all factors into account, the ability to challenge this decision will present a chance to review the decision, taking into account the principles of proportionality and non-discrimination. Without effective access to justice, persons who have been arbitrarily deprived of their nationality are hindered from seeking a remedy and redress for any subsequent human rights violations suffered...
> 47. Arbitrary deprivation of nationality leads the affected persons to become non-citizens with respect to the State that deprived them of their nationality. Arbitrary deprivation of nationality, therefore, effectively places the affected persons in a more disadvantaged situation concerning the enjoyment of their human rights because some of these rights may be subjected to lawful limitations that otherwise would not apply, but also because these persons are placed in a situation of increased vulnerability to human rights violations.[63]

Revocation of citizenship for offences committed by dual nationals but not mono-nationals could arguably be arbitrary where it sanctioned different punishments for the same misconduct based on criterion unrelated to the nature of the offence or the offender's culpability.

(ii) *Have regard to human rights obligations*

[62] Human Rights Council, Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, UN Doc A/HRC/13/34 (2009).
[63] Human Rights Council, Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, UN Doc A/HRC/19/43 (2011).

The ability of States to regulate issues of nationality is influenced by obligations arising under international human rights law. The Inter-American Court of Human Rights, for example, considers that nationality has evolved from a State attribute to 'a conception of nationality which, in addition to being the competence of the State, is a human right'.[64] It has moreover stated that:

> The right to a nationality provides the individual with a minimum measure of legal protection in international relations, through the link his nationality establishes between him and the State in question; and second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all his political rights as well as those civil rights that are tied to the nationality of the individual.[65]

Several human rights may constrain a State's power to effect the deprivation of citizenship, such as:

(i) the right to family and private life.[66] The position of family members (especially the best interests of children) must be considered.

(ii) The right to freedom from cruel and unusual treatment or punishment.

In 1944, United States Army private Albert Trop, a native-born American, escaped from a military stockade at Casablanca and willingly surrendered a day later. A general court martial convicted Trop of desertion and gave him a dishonorable discharge. His application for a passport was rejected under Section 401(g), 1940 Nationality Act (US) which gave military authorities in these circumstances complete discretion to decide who among convicted deserters shall continue to be Americans and who shall be stateless. The US Supreme Court by majority concluded that expatriation constituted cruel and unusual punishment because citizenship revocation for misconduct had a punitive character. The Chief Justice (with whom Justices Black, Douglas and Whittaker agreed) wrote that:[67]

> Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war, the citizen's duties include not only the military defense of the Nation, but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone, the judgment in this case should be reversed.

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[64] Inter-American Court of Human Rights, Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84 (19 January 1984), [32], [33].
[65] Inter-American Court of Human Rights, *Castillo Petruzzi* (30 May 1999), [100].
[66] For example, the erasure of names from a register of permanent residents for individuals who failed to obtain citizenship and were rendered stateless involved an interference with family life which was not 'in accordance with the law' as required by article 8(2) of the European Convention on Human Rights: European Court of Human Rights, *Kuric v Slovenia* (2013) 56 EHRR 20, [339], [346]. The arbitrary denial of citizenship can also violate the right to respect for private life: Human Rights Committee, *Karassev v Finland*, Application No 31414/96 (12 January 1999).
[67] *Trop v Dulles* (1958) 356 US 86, 92–93, 110–11.

We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious...

[T]he impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment...

When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

Mr Justice Brennan issued a concurring opinion as follows:

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years, we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What, then, is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society, it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious anti-social behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for, unless coupled with banishment, the sanction leaves the offender at large. And, as a deterrent device, this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications.

The African Commission on Human and Peoples' Rights has found the repetitive expulsion from one State without the right to enter another State, caused by the State of nationality's failure to recognize the applicant's nationality, to constitute inhuman or degrading treatment

in addition to violating the human rights to family life, freedom of movement, to leave and to return to one's own country, property, and equality of access to the public service.[68]

(iii) *Respect the right to non-discrimination in the enjoyment of human rights*

The principle of non-discrimination is a feature common to many international human rights instruments. States are obliged to respect and ensure to all individuals the rights recognized in those conventions, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. The principle of non-discrimination has a solid legal basis in both treaty law and international jurisprudence and can be considered to be a norm of international law that admits no derogation.

Although nationality is not explicitly listed among the prohibited grounds for discrimination, it falls within 'other status' under Article 2 of the International Covenant on Civil and Political Rights.[69] Therefore, if States distinguish between citizens and non-citizens in the protection of civil and political rights, such law or practice may be subject to scrutiny and could be found to violate the principle of non-discrimination.[70]

Article 9 of the Reduction of Statelessness Convention provides:

> A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

The interaction between non-discrimination on political grounds and the definition of a 'terrorist act' under Australian law should be noted:[71]

> terrorist act means an action or threat of action where:
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the action is done or the threat is made with the intention of:
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
> (ii) intimidating the public or a section of the public.

If only naturalised citizens are affected by a government measure then a power may be discriminatory and incompatible with the right not to be discriminated against in relation to nationality. On the other hand, a distinction may not be discriminatory where dual or multiple citizens would, but mono-citizens would not, be affected as a consequence of citizenship revocation. Mono-citizens and dual (or multiple) citizens could be said not to be 'similarly situated' with respect to a particular burden.

(iv) *Ensure procedural fairness*

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[68] African Commission on Human and Peoples' Rights, *John K Modise v Botswana*, Communication No 97/93 (2000).
[69] Human Rights Committee, Communication No 196/1985, *Gueye et al v France* (3 April 1989), [9.4].
[70] Communications No 586/1994, *Adam v Czech Republic* (23 July 1996) and No 1533/2006, *Ondracka v Czech Republic* (31 October 2007).
[71] s 100.1, *Criminal Code Act 1995* (Cth).

The deprivation of citizenship and expulsion decisions are typically accompanied by certain procedural safeguards. For example, Chapter VI of the Citizens Directive (200458/EC) addresses free movement restrictions imposed on grounds of public security. Article 31(1) requires that there should be a right of appeal against expulsion decisions. Several other international instruments as annexed address this issue.

Two important considerations relevant to procedural fairness are the availability of judicial review and the principle of proportionality. For example, the applicant in *Rottmann v Freistaat Bayern* [2010] ECR I-1449 had automatically lost Austrian nationality when he moved to Germany and acquired nationality there by naturalisation, but he was subsequently deprived of the latter nationality because it was obtained by deception. The European Court of Justice affirmed a principle that it was for each member State 'having due regard to Community law' to lay down the conditions for the acquisition and loss of nationality (at [39]). However, 'in situations covered by European Union law, the national rules concerned must have due regard to the latter' (at [41]). The Court then indicated that:

> 48 The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court ... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law...
> 56 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.
> 57 With regard, in particular, to that last aspect, a member state whose nationality has been acquired by deception cannot be considered bound, pursuant to article 17EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his member state of origin.
> 58 It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his member state of origin.

A right to review may be departed from only if compelling reasons of national security so require. However, access to judicial review may depend on whether an individual is within or outside the jurisdiction and, if outside, whether appeals processes can still be activated. Citizenship deprivation orders have been made while the individual was outside the UK, followed by an exclusion order preventing them from re-entry. For example:

> the Secretary of State's decision to deprive the appellant of his citizenship was clearly one that had 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 train.[72]

Since exclusion orders are not appealable, a person challenging his citizenship deprivation has to pursue an appeal from abroad.[73] In *R (G1) v Secretary of State* the Secretary of State

[72] *L1 v SSHD* [2013] EWCA Civ 906.
[73] *G1 v SSHD* [2012] EWCA Civ 867 determined that the right to an in-country appeal had to be legislatively guaranteed.

had made an order under s 40(2) depriving the appellant of British citizenship on the ground that to do so would be conducive to the public good.[74] The appellant was also excluded from the UK on the basis that he was involved in terrorism-related activity. This meant that the appellant could only conduct his statutory appeal from outside the country. The following arguments were rejected:

- that Parliament impliedly extinguished the Crown's common law or prerogative power to exclude a person from the UK pending his appeal against the decision under s.40(2) of the 1981 Act to deprive him of his citizenship status (at [17]).
- That the Secretary of State's decision to exclude him from the UK was so procedurally unfair as to be legally insupportable under both the common law and European Union law (at [28]).
- That a court should direct the Secretary of State to facilitate his return to the UK in order to progress his appeal (at [25]).

Lord Justice Rix observed (at [59]):

> ...where, as in this case, the appellant has himself already left the country of his own volition, for the reasons given by Laws LJ I see no requirement of domestic or EU law which can mandate his entry to this country for the purpose of pursuing his appeal to SIAC. It may not be as satisfactory for the appellant as an in-country appeal but it is nevertheless an effective remedy, and the appellant has no one to blame but himself if he is not in a position either to conduct his appeal in country, or to argue by way of judicial review that it would be unlawful to remove him from this country pending his appeal.

Other Judges have expressed concern by the prospects of out of country appeals:

> 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.[75]

Similarly:

> ...an appellant who has to pursue an appeal while he is out of the country faces considerable disadvantages, particularly in the context of an appeal to SIAC….Parliament has authorised a procedure which deprives appellant in SIAC of a fundamental right – to see the whole of the case against them – to which they would otherwise be entitled as a matter of fairness under the common law.[76]

And finally:

> The fact is that, especially but not only when credibility is in issue, the pursuit of an appeal from the outside the United Kingdom has a degree of unreality about it….the reason why the Home Office is insistent on removal pending appeal wherever the law permits is that it is in the great majority of cases the end of the appeal.[77]

Additionally relevant is the burden of proof. The burden has been put on individuals to establish that they would be made stateless according to the civil standard (on the balance of probabilities). For example, Abu Hamza acquired Egyptian nationality at birth and was granted British citizenship. The Secretary of State gave notice under s 40(5) of his decision to

[74] *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867.
[75] *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333.
[76] *E1 v SSHD* [2012] EWCA Civ 357.
[77] *BA (Nigeria) v SSHD* [2009] EWCA Civ 119.

make an order under s 40(2) depriving him of British citizenship. The UK Special Immigration Appeals Commission commented as follows:

> 3. It is common ground that the only nationality other than British which he has ever held is Egyptian, so that if, as he contends, he is no longer an Egyptian citizen, the effect of the order would be to make him stateless. It is not his case that he has renounced his Egyptian citizenship. Accordingly, the determinative question on this aspect of his appeal is: has he been deprived by the Egyptian state of his Egyptian nationality?
> 5. It was necessary for the Appellant to establish on balance of probabilities that he would be made de jure stateless by the order. As to the burden and standard of proof, we are satisfied that the burden is on the Appellant and that he must prove that he would be made stateless on the balance of probabilities. The prohibition on making a deprivation order if it would make a person stateless is an exception to the general power of the Secretary of State to make the order, if the conditions set out in s40 are satisfied. Conventional statutory construction requires that a person who seeks to establish the existence of an exception to a general power must prove it. The issue is one of fact. Accordingly, it is susceptible to proof on balance of probabilities. SIAC so held in Al Jedda v SSHD 23 May 2008, paragraph 4, a proposition which the appellant accepted in his appeal to the Court of Appeal at (2010) EWCA Civ 212, paragraph 3. In the majority of cases, determination of the issue will depend principally 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. In a small number of cases, of which this is one, determination of the issue is not at all straight forward; but that is no reason for lowering the standard of proof. S40(4) requires the Secretary of State to be "satisfied" that the order would make a person stateless, not that there is a reasonable likelihood that it would do so. There is no internationally agreed or generally accepted standard by which the issues should be determined. Neither the language of the relevant conventions nor the general practice of states and international organisations requires the standard to be equated with that which applies in cases concerning the 1951 Convention Relating to the Status of Refugees. (For that reason, the concession made by the Secretary of State in Darji v SSHD (2004) EWCA (Civ) 1419 at paragraph 12 is inapplicable in this case). Finally, as our analysis of the material in this case demonstrates, it is possible, even in a difficult and unusual case, to apply the conventional civil standard of proof without injustice.
> 6. The Secretary of State and SIAC is 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. In the ordinary case, as we have observed, it will be apparent from the laws and public acts of the foreign state whether a national of that state has been deprived of nationality; but there are circumstances in which they will not provide a conclusive or even satisfactory answer. A state's laws may confer very wide discretionary powers on the executive. They may give legal effect to executive decisions which are not made public. In such circumstances, the Secretary of State, if she has the relevant materials, and SIAC, in any event, must determine whether the foreign state has, under operation of its law, effectively deprived the person of nationality. That is the issue which we must determine in this case.
> 22. For the reasons given, we are satisfied on balance of probabilities that if a deprivation order were to be made, the Appellant would be made stateless. The conclusions which we have reached in the closed judgment supplement, but do not contradict, that conclusion. Accordingly, this appeal is allowed.[78]

According to the Human Rights Committee, the remedy at the disposal of the alien expelled must be an effective one:

> An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require.[79]

(v) *respect standards on the expulsion of aliens/former dual nationals*

[78] *Hamza v Secretary of State for the Home Department* [2010] UKSIAC 23/2005.
[79] Human Rights Committee, General Comment 15, The position of aliens under the Covenant (1986), UN Doc HRI/GEN/1/Rev.1 (1994) at 18, [10].

As a result of a citizenship deprivation order an individual becomes a third country national subject to immigration controls and to other measures applicable to foreign nationals/aliens, including expulsion or detention. Following a review of UK caselaw, one writer commented:

> 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.[80]

Australia's policy relating to the deportation of individuals convicted of criminal offences was stated in 1980 as follows:

> I. The Commonwealth of Australia is entitled to determine who is to be permitted to remain in Australia and to receive the benefits of acquiring or continuing membership of the community. This is recognised in domestic law as it is in international law.[81]

A UN Special Rapporteur, Mr Kamto, has considered the question of expelling dual nationals following the loss of one nationality. He considers that[82]

> 17. In the case of dual nationality, it is a question of knowing which of the two States is the State of dominant nationality of the person facing expulsion. If the expelling State is the State of dominant nationality of the person in question, then in principle and logically, the State cannot expel its own national, by virtue of the rule of non-expulsion by a State of its own nationals.
> 22. In the view of the Special Rapporteur, when the person concerned has two equally dominant nationalities and there is no risk of statelessness arising from his or her expulsion to the other State where he or she also has nationality, expulsion can be envisaged only in two hypothetical cases:
> (a) The expelling State allows the person concerned to retain its nationality: in this case it should be able to expel the person to the other State of nationality only with its consent;
> (b) The expelling State deprives the person of its nationality, thereby transforming him or her into an alien: in this case the ordinary law on the expulsion of aliens applies, since the expelled person becomes a person with a single nationality, now possessing only the nationality of the receiving State.

The International Court of Justice has confirmed the requirement for conformity with law as a condition for the lawfulness of an expulsion:

> It follows from the terms of the two provisions cited above [Article 13, International Covenant on Civil and Political Rights and Article 12(4), African Charter on Human and Peoples' Rights] that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with 'the law', in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law.[83]

The Democratic Republic of the Congo had failed to give reasons which might provide 'a convincing basis' for expulsion. That Court concluded that the arrest and detention of Mr Diallo with a view to expulsion was arbitrary. It found

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[80] S Mantu, 'Citizenship Deprivation in the United Kingdom Statelessness and Terrorism' (2014) 19 Tilburg Law Review 163, 167.
[81] Minister for Immigration and Ethnic Affairs, Comm Rec, 31 January 1980, 97-8.
[82] International Law Commission, Fourth report on the expulsion of aliens by Mr Maurice Kamto, Special Rapporteur, UN Doc A/CN.4/594 (2008).
[83] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2010) ICJ Rep 639, [65].

> the decree itself was not reasoned in a sufficiently precise way ... but that throughout the proceedings, the Democratic Republic of the Congo has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. ...Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

Zambia has also been found to have violated the right of an alien to receive information by failing to inform him of the reasons for his expulsion. The fact

> that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (article 9 (1)).[84]

One additional consideration is an international body's power to review compliance with internal (or national) law. In 1977 Sweden expelled a Greek political refugee suspected of being a terrorist. She argued before the Human Rights Committee that the expulsion decision had not been taken 'in accordance with law'. The Committee considered that the interpretation of national law was essentially a matter for the courts and authorities of the State party concerned. Hence

> it was not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question [had] interpreted and applied the internal law correctly in the case before it …, unless it [was] established that they [had] not interpreted and applied it in good faith or that it [was] evident that there [had] been an abuse of power.[85]

Even if expulsion by reason of dual nationality is not objectionable, the arbitrary nature of expulsion can be. For example, in the *Ethiopia v Eritrea Case*, a Claims Commission considered that revoking the nationality of dual nationals was permissible if not done arbitrarily or discriminatorily. The Commission held that the persons had acquired dual Ethiopian and Eritrean nationality. Ethiopia did not violate international law by denationalizing those citizens who had become dual nationals by acquiring Eritrean nationality. However, the expulsion from Ethiopia of dual nationals by the local authorities for security reasons, and the expulsion of many others against their will, was arbitrary and contrary to international law.[86] The Claims Commission stated that:

> [I]nternational law limits States' power to deprive persons of their nationality. In this regard, the Commission attaches particular importance to the principle expressed in Article 15, paragraph 2, of the Universal Declaration of Human Rights, that "no one shall be arbitrarily deprived of his nationality." In assessing whether deprivation of nationality was arbitrary, the Commission considered several factors, including whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances.[87]

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[84] African Commission on Human and Peoples' Rights, *Amnesty International v Zambia* (1998-99) [32], [33].
[85] Human Rights Committee, *Anna Maroufidou v Sweden*, Communication No 58/1979 (9 April 1981) [10.1].
[86] Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, Partial Award, *Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, The Hague, 17 December 2004, [40], [43], [45]-[46], [79]-[80]; (2005) 44 ILM 601. For comment, see W Kidane, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague' (2007) 25 Wisconsin International Law Journal 23.
[87] Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, Partial Award, *Civilians Claims, Eritrea's Claims 15, 16, 23 and 27-32, between the State of Eritrea and the Federal Democratic Republic of Ethiopia,* The Hague, 17 December 2004, [60].

A State is not relieved of all of its international legal obligations simply by depriving individuals of nationality and holding them indefinitely in detention until they can be expelled. An alien cannot be indefinitely detained while awaiting expulsion.[88] Persons deprived of nationality must be granted the necessary documents allowing them to re-enter their country of habitual residence before deporting them. States must be able to show 'that they pursued the matter vigorously or endeavoured to enter into negotiations with the . . . authorities [in question] with a view to expediting its [travel document] delivery'.[89] If this cannot be guaranteed, the expelling State must suspend deportation and detention with a view to deportation and must regularize their stay in its territory.[90]

The continued detention of a non-citizen where there is no real prospect of expulsion constitutes a violation of the right to liberty.[91] In order to avoid arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification. The continued detention for a period of four years of a person as an unlawful non-citizen because Australia did not demonstrate that there were no less invasive means of achieving the same ends given their particular circumstances has been held to be arbitrary.[92] The Human Rights Committee has expressed concern about the prolonged detention pursuant to immigration laws of non-citizens suspected of committing terrorist-related offences, with fewer guarantees than in the context of criminal procedures.[93] The Committee against Torture has also indicated that States should take measures to ensure that the detention of non-citizens is used only in exceptional circumstances or as a last resort, and only for the shortest possible time.[94]

One of the principal (and perhaps only) purpose of a citizenship deprivation power is to enable the removal of individuals deemed to be dangerous and a risk to national security. It may in practice be difficult to deport a person who has been deprived of their citizenship and left stateless while present in Australia. However, exercising the power while individuals are abroad, thereby rendering them stateless whilst in the territory of another State, may not be compatible with Australia's international obligations. The other State may be entitled to deport the former Australian citizen back to Australia, which would be required to re-admit them.

The UN International Law Commission works for the 'progressive development of international law and its codification'. It consists of highly qualified experts in international law elected by States. Its draft articles may be submitted to international conferences for adoption as treaties. This work constitutes valuable evidence of State practice and is

[88] Although preferable, the US Supreme Court has interpreted US law as not requiring the prior consent of a receiving country when the US expelled an alien: *Jama v Immigration and Customs Enforcement* (2005) 543 US 335. The US had not sought prior consent because the receiving State, Somalia, lacked a functioning government. The Court refrained from examining international law.
[89] European Court of Human Rights, *Amie v Bulgaria*, Application No 58149/08, Judgment of 12 February 2013, [77]; *Kim v Russia*, Application No 44260/13, Judgment of 17 July 2014, [50], [53].
[90] European Court of Human Rights, *Kim v Russia*, Application No 44260/13, Judgment of 17 July 2014, [74].
[91] Human Rights Committee, Communications No 560/1993, *A v Australia* (3 April 1997); No 900/1999, *C v Australia* (28 October 2002); No 1014/2001, *Baban et al v Australia* (6 August 2003); No 1069/2002, *Bakhtiyari v Australia* (29 October 2003); No 1050/2002, *D and E v Australia* (11 July 2006); Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, *Shams et al v Australia* (20 July 2007).
[92] Communication No 1442/2005, *Yin Fong v Australia* (23 October 2009).
[93] Human Rights Committee, Concluding Observations: United States of America, UN Doc CCPR/C/USA/CO/3/Rev.1, [19].
[94] Committee against Torture, Concluding Observations: Hungary, UN Doc CAT/C/HUN/CO/4, [9].

influential in guiding the future practice of States and the jurisprudence of international courts and tribunals.

In 2014 the International Law Commission finalised draft articles addressing the expulsion of aliens.[95] A Special Rapporteur has also provided an authoritative commentary on their interpretation.[96]

Australia's general comments on these articles should be noted:[97]

> To the extent that the draft articles are declarative of existing rules of international law in respect of the expulsion of aliens, Australia considers that the work of the International Law Commission on consolidating the international law in this area will usefully serve as a guide for States in implementing international obligations as well as for the development of domestic law and policies.
> For its part, Australia is committed to providing a legal system that is predictable, transparent and respectful of human rights and dignity in its treatment of aliens. Australia commends the inclusion of draft articles that reflect these principles. In this regard, we welcome in particular draft article 14, paragraph 1, on the treatment of aliens with humanity and with respect for human dignity, and draft article 12, paragraph 1, which promotes the voluntary departure of aliens subject to expulsion.
> In some respects, however, Australia considers that the draft articles advance new principles that do not reflect the current state of international law or the practice of States.

These draft articles provide as follows:

> Article 2 Use of terms
> For the purposes of the present draft articles:
> (a) "expulsion" means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;
> (b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.
>
> Article 3 Right of expulsion
> A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.
>
> Article 4 Requirement for conformity with law
> An alien may be expelled only in pursuance of a decision reached in accordance with law.
>
> Article 5 Grounds for expulsion
> 1. Any expulsion decision shall state the ground on which it is based.
> 2. A State may only expel an alien on a ground that is provided for by law.
> 3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.
> 4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.

Australia commented on Article 5 as follows:

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[95] International Law Commission, Expulsion of Aliens: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on Second Reading, UN Doc A/CN.4/L.832 (2014).
[96] See eg Commentary by the Special Rapporteur, Report of the International Law Commission, UNGAOR, 67th Sess, Supp No 10, UN Doc A/67/10 (2012).
[97] International Law Commission, Expulsion of Aliens: Comments and Observations received from Governments, UN Doc A/CN.4/669 (2014).

Australia is concerned that the draft articles do not pay sufficient heed to national security concerns. For example, draft article 5, paragraph 1, could usefully benefit from a national security limitation to the requirement that States provide grounds for any expulsion decision.

With respect to Article 5, the Special Rapporteur indicated that:

(4) Paragraph 3 sets out general criteria for the expelling State's assessment of the ground for expulsion. The assessment shall be made in good faith and reasonably, in the light of all the circumstances. The gravity of the facts, the conduct of the alien in question and the current nature of the threat to which the facts give rise are mentioned as among the factors to be taken into consideration, where relevant, by the expelling State. The criterion of "the current nature of the threat" mentioned in fine is particularly relevant when the ground for expulsion is a threat to national security or public order.
(5) The purpose of draft article 5, paragraph 4, is simply to recall the prohibition against expelling an alien on a ground contrary to the expelling State's obligations under international law. The prohibition would apply, for example, to expulsion based on a ground that was discriminatory in the sense of draft article 14 below. It should be specified that the expression "to its obligations under international law" does not mean that a State may interpret such obligations in a restrictive manner, to avoid other obligations under international law that are opposable to it.

The draft articles continue as follows:

Article 7 Rules relating to the expulsion of stateless persons
The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Article 8 Deprivation of nationality for the purpose of expulsion
A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

The commentary to Article 8 states:

(3) It should be clarified, however, that draft article 8 does not purport to limit the normal operation of legislation relating to the grant or loss of nationality; consequently, it should not be interpreted as affecting a State's right to deprive an individual of its nationality on a ground that is provided for in its legislation. Similarly, draft article 8 does not relate to situations when an individual voluntarily renounces his or her nationality.

The draft articles also state:

Article 14
Prohibition of discrimination
The expelling State shall respect the rights of the alien subject to expulsion without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

Article 19 Detention of an alien for the purpose of expulsion
1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.
(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.
2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.
(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

> 3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.
> (b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Articles 9 and 10 of the International Covenant on Civil and Political Rights specify certain safeguards relating to the deprivation of liberty. The International Court of Justice has recognized that Article 9(1) and (2) is not confined to criminal proceedings:

> they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.[98]

The commentary to draft article 19 states:

> (6) The important issue of the length of detention, which poses difficult problems in practice, is the subject of draft article 19, paragraph 2, which comprises two subparagraphs. Subparagraph (a) is general in scope and sets out the principle that the detention of an alien with a view to his or her expulsion is subject to time limits. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out and cannot be of excessive duration.

The European Court of Human Rights considers that detention must only be for as long as expulsion is necessary:

> 113. The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f) (art. 5-1-f) (see the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 19, para. 48, and also the Kolompar v. Belgium judgment of 24 September 1992, Series A no. 235-C, p. 55, para. 36).[99]

The draft articles continue as follows:

> Article 22 State of destination of aliens subject to expulsion
> 1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.
> 2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

Relevant in this context is Article 12(4) of the International Covenant on Civil and Political Rights. As noted above, the UN Human Rights Committee has indicated that:

> The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including

[98] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2010) ICJ Rep 639, [77].
[99] *Chahal v United Kingdom* (1996) 23 EHRR 413.

but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.[100]

The draft articles continue:

Article 23 Obligation not to expel an alien to a State where his or her life would be threatened
1. No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
2. A State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Article 24 Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment
A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee considers that:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[101]

Furthermore, a State's decision

should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of.[102]

Crucially, the draft articles provide for certain procedural rights:

Article 26 Procedural rights of aliens subject to expulsion
1. An alien subject to expulsion enjoys the following procedural rights:
(a) the right to receive notice of the expulsion decision;
(b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;
(c) the right to be heard by a competent authority;
(d) the right of access to effective remedies to challenge the expulsion decision;
(e) the right to be represented before the competent authority; and
(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.
2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.
3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.
4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.

[100] Human Rights Committee, General Comment 27, Freedom of movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [20].
[101] Human Rights Committee, General Comment 20, Article 7 (1992), UN Doc HRI/GEN/1/Rev.1 (1994) at 30.
[102] Human Rights Committee, *Maksudov et al v Kyrgyzstan*, Communications 1461/2006, 1462/2006, 1476/2006 and 1477/2006 (31 July 2008), [12.4].

Australia commented as follows:

> Draft article 26 extends a range of procedural rights to aliens who are unlawfully in the territory of a state party for more than six months. Some of these procedural rights lack a foundation in international law and significantly extend the obligation under article 13 of the international covenant on civil and political rights, placing a heavy burden on host states, particularly developing and least developed countries. The approach of the draft articles in this context also departs from the existing distinction in international law between persons who are lawfully and unlawfully in a State's territory.

An individual facing expulsion has the right to submit the reasons against his or her expulsion, except where 'compelling reasons of national security otherwise require'. Article 13 of the International Covenant on Civil and Political Rights states that:

> [a]n alien lawfully in the territory of a State Party to the present Covenant … shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion.

The same right is to be found in Article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, which provides that:

> [a]n alien lawfully in the territory of a State … shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled.[103]

Article 13 of the International Covenant on Civil and Political Rights does not expressly grant an alien a right to be heard. However, the Human Rights Committee has taken the view that an expulsion decision adopted without the alien having been given an opportunity to be heard may raise questions under article 13 of the Covenant:

> The Committee is also concerned that the Board of Immigration and the Aliens Appeals Board may in certain cases yield their jurisdiction to the Government, resulting in decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant.[104]

The draft articles also state:

> Article 29 Readmission to the expelling State
> 1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.
> 2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Australia commented on Article 29 as follows:

> Australia notes that a number of the draft articles would benefit from further precision or clarification. For example, Australia notes that draft article 29, paragraph 1, is unclear as to what bodies the International Law Commission regards as 'competent authorities' and would appreciate clarification to

[103] Annexed to General Assembly Resolution 40/144 (13 December 1985).
[104] Human Rights Committee, Concluding Observations on Sweden, UN Doc CCPR/C/79/Add.58 (1 Nov 1995) [88].

> ensure that this refers to a competent authority in the expelling State. Without further clarification on this point Australia is not in a position to form a view as to whether this draft article is consistent with existing international law.

The draft articles also provide:

> Article 31 Diplomatic protection
> The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

Further to that article, were Australia to strip Australian nationality from a dual national, Australia may become susceptible to claims of diplomatic protection brought by the State of nationality. In particular, Article 36 of the Vienna Convention on Consular Relations provides that:

> Article 36 Communication and contact with nationals of the sending State
> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.[105]

The International Court of Justice considers that State authorities are required:

> to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect ... Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights 'without delay'.[106]

Stephen Tully
6 St James' Hall Chambers
30 June 2015

[105] Vienna Convention on Consular Relations 1963.
[106] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2010) ICJ Rep 639, [95].

Convention relating to the Status of Stateless Persons 1954 (extracts)

Article 1 - Definition of the term "stateless person"
1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.
2. This Convention shall not apply:
(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
(iii) To persons with respect to whom there are serious reasons for considering that:
(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
(c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

Article 3 - Non-discrimination
The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.

Article 12 - Personal status
1. The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence...

Article 31 - Expulsion
1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Convention on the Reduction of Statelessness 1961 (extracts)

Considering it desirable to reduce statelessness by international agreement,

Article 5
1. If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.

Article 8
1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
(a) In the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality;
(b) Where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
(a) That, inconsistently with his duty of loyalty to the Contracting State, the person:
(i) Has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State;
(b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

Article 9
A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

Article 13
This Convention shall not be construed as affecting any provisions more conducive to the reduction of statelessness which may be contained in the law of any Contracting State now or hereafter in force, or may be contained in any other convention, treaty or agreement now or hereafter in force between two or more Contracting States.

Selected Extracts from International Instruments

Convention on Certain Questions Relating to the Conflict of Nationality Law (1930) 179 LNTS 89.

Article 1

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.

Harvard Draft Convention on Nationality 1930 (1929) 23 AJIL Spec Suppl No 13

Article 1

(a) 'nationality' is the status of a natural person who is attached to a state by the tie of allegiance...

Article 2

Except as otherwise provided in this Convention, each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a state to confer its nationality is not unlimited.

Special Protocol Concerning Statelessness (1973) TS No 112 (not in force)

Article 1.

If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:
(i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or
(ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof. In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984)

Article 1 – Procedural safeguards relating to expulsion of aliens

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
to submit reasons against his expulsion,
to have his case reviewed, and
to be represented for these purposes before the competent authority or a person or persons designated by that authority.
An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

International Covenant on Civil and Political Rights (1966)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. [...]

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 12
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13
An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 24
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 26
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Universal Declaration of Human Rights 1948,

Article 9
No one shall be subjected to arbitrary arrest, detention or exile.

Article 13
(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 15
Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Convention on the Rights of Persons with Disabilities (2006)

Article 18 - Liberty of movement and nationality
1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
(a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
(c) Are free to leave any country, including their own;
(d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.
2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Article 25

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:
(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance; ...
4. Given the need to protect the best interests of the children referred to in paragraph 1(a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.
8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.
9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 29

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Convention on the Rights of the Child (1989)

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Article 16

1. [...]
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular: (...)
(iii) The right to nationality;

Convention on the Nationality of Married Women (1957)

Article 1

Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.

Article 2

Each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.

Article 3

1. Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged
naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.
2. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

African Charter on the Rights and Welfare of the Child (1990)

Article 6: Name and Nationality

1. Every child shall have the right from his birth no a name.

2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth. he is not granted nationality by any other State in accordance with its laws.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Article 6: Marriage
States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:
[...]
d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
[...]
g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;

Covenant on the Rights of the Child in Islam (2005)

Article 7: Identity
A child shall, from birth, have right to a good name, to be registered with authorities concerned, to have his nationality determined and to know his/her parents, all his/her relatives and foster mother.
States Parties to the Covenant shall safeguard the elements of the child's identity, including his/her name, nationality, and family relations in accordance with their domestic laws and shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory.
The child of unknown descent or who is legally assimilated to this status shall have the right to guardianship and care but without adoption. He shall have a right to a name, title and nationality.

American Declaration of the Rights and Duties of Man (1948)

Article XIX
Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

American Convention on Human Rights (1969)

Article 1: Obligation to Respect Rights
1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. [...]

Article 20: Right to Nationality
1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 22: Freedom of Movement and Residence
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

Arab Charter on Human Rights (2004)

Article 26
2. No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion is prohibited under all circumstances.

Article 29
1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.
3. Non one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country.

African Charter on Human and Peoples Rights (1981)

Article 12
Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995)

Article 24
1. Everyone shall have the right to citizenship.
2. No one shall be arbitrarily deprived of his citizenship or of the right to change it.

Resolution of the Asian African Legal Consultative Organization on "Legal Identity and Statelessness" (2006)

3. Encourages the Member States to review nationality legislation with a view to reducing and avoiding statelessness, consistent with fundamental principles of international law;
4. Also encourages the Member States to raise awareness about the problem of statelessness and to actively cooperate in the identification of problems of statelessness paying particular regard to establishing identity and acquiring relevant documentation for women, children and families in instances of displacement, migration or trafficking;
5. Urges Member States in general and those Member States, which have the presence of stateless persons in particular, to take the necessary legal and institutional measures to ameliorate the precarious situation of stateless persons;
6. Invites Member States to consider the possibility of acceding to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness to address the plight of stateless persons in an effective way;

Convention on Certain Questions relating to the Conflict of the Conflict of Nationality Laws 1930 (extracts)

BEING CONVINCED that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only;
RECOGNISING accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality;

Article 1
It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2
Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Article 5
Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

European Convention on Nationality (1997) 37 ILM 47 (entered into force 1 March 2000).

The member States of the Council of Europe and the other States signatory to this Convention,
Considering that the aim of the Council of Europe is to achieve greater unity between its members;
Bearing in mind the numerous international instruments relating to nationality, multiple nationality and statelessness;
Recognising that, in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals;
Desiring to promote the progressive development of legal principles concerning nationality, as well as their adoption in internal law and desiring to avoid, as far as possible, cases of statelessness;
Desiring to avoid discrimination in matters relating to nationality;
Aware of the right to respect for family life as contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
Noting the varied approach of States to the question of multiple nationality and recognising that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality;
Agreeing on the desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals;
Considering it desirable that persons possessing the nationality of two or more States Parties should be required to fulfil their military obligations in relation to only one of those Parties;
Considering the need to promote international co-operation between the national authorities responsible for nationality matters,
Have agreed as follows:

Chapter I – General matters

Article 1 – Object of the Convention

This Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality, to which the internal law of States Parties shall conform.

Article 2 – Definitions

For the purpose of this Convention:
"nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin;
"multiple nationality" means the simultaneous possession of two or more nationalities by the same person;
"child" means every person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier;
"internal law" means all types of provisions of the national legal system, including the constitution, legislation, regulations, decrees, case-law, customary rules and practice as well as rules deriving from binding international instruments.

Chapter II – General principles relating to nationality

Article 3 – Competence of the State

Each State shall determine under its own law who are its nationals.
This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.

Article 4 – Principles

The rules on nationality of each State Party shall be based on the following principles:
everyone has the right to a nationality;
statelessness shall be avoided;
no one shall be arbitrarily deprived of his or her nationality;
neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Article 5 – Non-discrimination

The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.
Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Chapter III – Rules relating to nationality

Article 6 – Acquisition of nationality

Each State Party shall provide in its internal law for its nationality to be acquired ex lege by the following persons:

children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party, subject to any exceptions which may be provided for by its internal law as regards children born abroad. With respect to children whose parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law;

foundlings found in its territory who would otherwise be stateless.

Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted:

at birth ex lege; or

subsequently, to children who remained stateless, upon an application being lodged with the appropriate authority, by or on behalf of the child concerned, in the manner prescribed by the internal law of the State Party. Such an application may be made subject to the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application.

Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.

Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons:

spouses of its nationals;

children of one of its nationals, falling under the exception of Article 6, paragraph 1, sub-paragraph a;

children one of whose parents acquires or has acquired its nationality;

children adopted by one of its nationals;

persons who were born on its territory and reside there lawfully and habitually;

persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18, that period to be determined by the internal law of the State Party concerned;

stateless persons and recognised refugees lawfully and habitually resident on its territory.

Article 7 – Loss of nationality ex lege or at the initiative of a State Party

A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:

voluntary acquisition of another nationality;

acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;

voluntary service in a foreign military force;

conduct seriously prejudicial to the vital interests of the State Party;

lack of a genuine link between the State Party and a national habitually residing abroad;

where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled;

adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.

A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.

A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.

Article 8 – Loss of nationality at the initiative of the individual

Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.

However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad.

Article 9 – Recovery of nationality

Each State Party shall facilitate, in the cases and under the conditions provided for by its internal law, the recovery of its nationality by former nationals who are lawfully and habitually resident on its territory.

Chapter IV – Procedures relating to nationality

Article 10 – Processing of applications

Each State Party shall ensure that applications relating to the acquisition, retention, loss, recovery or certification of its nationality be processed within a reasonable time.

Article 11 – Decisions

Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing.

Article 12 – Right to a review

Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law.

Article 13 – Fees

Each State Party shall ensure that the fees for the acquisition, retention, loss, recovery or certification of its nationality be reasonable.

Each State Party shall ensure that the fees for an administrative or judicial review be not an obstacle for applicants.

Chapter V – Multiple nationality

Article 14 – Cases of multiple nationality

A State Party shall allow:

children having different nationalities acquired automatically at birth to retain these nationalities;

its nationals to possess another nationality where this other nationality is automatically acquired by marriage.

The retention of the nationalities mentioned in paragraph 1 is subject to the relevant provisions of Article 7 of this Convention.

Article 15 – Other possible cases of multiple nationality

The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether:

its nationals who acquire or possess the nationality of another State retain its nationality or lose it;

the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality.

Article 16 – Conservation of previous nationality

A State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.

Article 17 – Rights and duties related to multiple nationality

Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.

The provisions of this chapter do not affect:

the rules of international law concerning diplomatic or consular protection by a State Party in favour of one of its nationals who simultaneously possesses another nationality;

the application of the rules of private international law of each State Party in cases of multiple nationality.

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 OJ EU L 158/77 (30/4/2004) (extracts)

Chapter VI Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27 General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.
3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28 Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29 Public health

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Article 30 Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.
3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31 Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
– where the expulsion decision is based on a previous judicial decision; or
– where the persons concerned have had previous access to judicial review; or
– where the expulsion decision is based on imperative grounds of public security under Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32 Duration of exclusion orders
1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. The Member State concerned shall reach a decision on this application within six months of its submission.
2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33 Expulsion as a penalty or legal consequence
1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.
2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.