GARDEN COURT CHAMBERS

SIAC: Fair Enough?

An examination of *U3 v SSHD* [2023] and its impact on *Begum*





6pm - 7.30pm

Thursday 2 November 2023

SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC): FAIR ENOUGH?

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Thursday 2 November 2023

The following were referred to by the Speakers during the presentation:-

Statute

- Section 40, British Nationality Act 1981
- s.2 and s.2B Special Immigration Appeals Commission Act 1997

Domestic authorities

- *The Zamora* [1916] 2 A.C. 77 (7 April 1916)
- *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (22 November 1984)
- *Rehman v SSHD* [1999] INLR 5240 (7 September 1999)
- *SSHD v Rehman* [2001] UKHL 47 (11 October 2001)
- *Al-Jedda v Secretary of State for the Home Department* (SC/66/2008) (7 April 2009)
- *SSHD v Abbas* [2017] EWCA Civ 1393 (28 September 2017)
- *P3 v SSHD* (SC/148/2018) (11 February 2021)
- *R3 v SSHD* (SC/150/2018) (19 February 2021)
- *Begum v Special Immigration Appeals Commission & Anor* [2021] UKSC 7 (26 February 2021)
- *SSHD v P3* [2021] EWCA Civ 1642 (8 November 2021)
- *Hussain & Anor v SSHD* [2021] EWCA Civ 2781 (26 November 2021)
- *R (O (a child)) v SSHD* [2022] UKSC 3 (2 February 2022)
- *U3 v SSHD* (SC/153/2018) (4 March 2022)
- *R3 v SSHD* [2023] EWCA Civ 169 (17 February 2023)
- *E5 v SSHD* (SC/184/2021) (3 March 2023)
- *Shyti v SSHD* [2023] EWCA Civ 770 (21 June 2023)
- *U3 v SSHD* [2023] EWCA Civ 811 (14 July 2023)
- *D5, D6, D7 v SSHD* (SC/176/2020, SC/177/2020, SC/178/2020) (13 October 2023)

International authorities

- *Abdulaziz, Cabales & Balkandali v UK* (1985) 7 EHRR 471 (28 May 1985)
- *Chahal v United Kingdom* (23 EHRR 413) (15 November 1996)
- *Al-Skeini v UK* (2011) 53 EHRR 18 (7 July 2011)
- *Abdul Wahab Khan v UK* (2014) 58 EHRR SE15 (28 January 2014)
- *K2 v UK* [2017] ECHR 238 (9 March 2017)
- *Ghoumid & Ors v France* [2020] ECHR 492 (25 June 2020)
- *Usmanov v Russia* [2020] ECHR 923 (22 December 2020)
- *Carter v Russia* [2021] ECHR 766 (21 September 2021)
- *HF & Ors v France* [2022] ECHR 678 (14 September 2022)

Policy

- Chapter 55, Nationality Instructions
- UKVI caseworker guidance, Deprivation of Citizenship (2 October 2023)

Report/Human Rights Blog

- **Independent report on the operation of closed material procedure under the Justice and Security Act 2013**, Sir Duncan Ouseley (November 2022)

- **The Special Advocate – Not Waving but Drowning**, Angus McCullough KC, UK Human Rights Blog (30 October 2023)

The prohibition on arbitrary loss of citizenship: substantive and procedural safeguards

Amanda Weston KC

02 November 2023

The status of article 15(2) in a common law system

- Principle in art 15(2) of the Universal Declaration of Human Rights ("UDHR") is part of customary international law 'CIL'.

- 'Fundamental right' to a nationality protected emphasises the need for sufficient procedural guarantees and safeguards to protect against the risk of arbitrariness and the minimum requirements of a right to an independent review of a deprivation decision by a judicial or administrative body.

- Statutory scheme should be interpreted in a way which does not place India in breach of its international obligations: see [122] of the judgment of Lord Dyson JSC in *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 AC 471.

Impact on domestic/local legal structures

- Article 15(2) of the UDHR operates as a useful tool of the proper interpretation of the domestic statutory scheme and remedies because:

- Article 15(2) functions as a rule of customary international law ("CIL");

- The genesis and status of Article 15(2) is that of a 'fundamental right'

- The content of the prohibition includes aspects of both substantive and procedural safeguards.

Why is CIL important?

- The prohibition on arbitrary deprivation of citizenship enshrined in Article 15(2) UDHR is a relevant source of law on the basis that it is a rule of CIL. CIL is in play because:
- "there is a strong presumption in favour of interpreting the law of signatory states (whether common law or statute) in a way which does not place the state in breach of an international obligation": *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, §27 (Lord Hoffmann)
- This strong presumption exists because domestic law should ordinarily develop in harmony with international obligations: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, §241
- CIL is part of the common law: authorities reviewed in *R v Jones (Margaret)* [2007] 1 AC 136, [2006] UKHL 16

Basic principle – impact of CIL on local law in a common law system

At the very least, the "*presumption … is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt*":

Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, [2016] AC 1355, §§146-150

This principle applies to both the *substantive* and *procedural* law.

Genesis of the prohibition in 15(2)

- When it was adopted by the UN General Assembly in 1948, the UDHR laid down “a common standard of achievement for all people and all nations”

- India, was itself instrumental in introducing the concept of arbitrariness into Article 15(1) with the language in Article 15(2) that encapsulates the prohibition (i.e., “No one shall be arbitrarily deprived of his nationality”): see Proposed Amendments to the Draft Declaration of Human Rights’, UN Doc. E/CN.4/99, 24 May 1948, p. 4 (Article 15).

- The Indian representative expressed the view that the right not to be deprived of nationality was “the fundamental right”:3rd Committee, 3rd Session, Summary Record of the 60th Meeting, UN Doc. E/CN.4/SR.60, 4 June 1948, p. 4 (Mrs Mehta, India). [Query relationship between this statement and Part III Constitution of India.]

Discrimination as an aspect of arbitrariness

- All of the principal global human rights treaties implicitly recognize the prohibition by proscribing discrimination on various grounds in respect of the right to nationality see International Convention on the Elimination of All Forms of Racial Discrimination (CERD) article 5 right.

- "*without distinction as to race, colour, or national or ethnic origin, to equality before the law.*"

- Convention on the Nationality of Married Women (1957) 309 UNTS 65, Articles 1-2; tion (1965) 660 UNTS 195, Article 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women (1979) 1249 UNTS 13, Article 9(1); Convention on the Rights of the Child (1989) 1577 UNTS 3, Article 8(1). ICCPR (1966) 999 UNTS 171, Article 24(3).

- See also article 14 Constitution of India, vouchsafing equality before the law to all 'persons' as opposed to 'citizens' (although constitutionality of the Foreigners' Tribunals arrangements outside scope of this presentation.)

International consensus

- The UN has regularly as an international governmental organisation confirmed the prohibition against the arbitrary deprivation of nationality, including by way of resolutions of the General Assembly, the Human Rights Council and its predecessor the UN Commission on Human Rights:

- UNGA, Resolution 50/152, UN Doc. A/RES/50/152, 9 February 1996, §16; UN Commission on Human Rights, 'Resolution on Human Rights and Arbitrary Deprivation of Nationality', 1997/36, 11 April 1997, preamble; see also §2; UN Commission on Human Rights, 'Resolution on Human Rights and Arbitrary Deprivation of Nationality, 2005/45, 19 April 2005, preamble; see also §2; UN HRC, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/RES/13/2, 24 March 2010; UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012.

International confirmation

- The prohibition has also been examined and upheld by the International Law Commission: ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries)' (1999) II(2) YBILC ("ILC Draft Articles on Nationality"), p. 37 (Article 16); ILC, 'Draft Articles on the Expulsion of Aliens (with commentaries)' (2014) II(2) YBILC, p. 32 (Article 8), commentary §1.

- Article 15(2) of the UDHR was introduced by the UK and India on the basis that it was a "**general principle**" and a "**fundamental right**" (§10 above) and was unanimously adopted. Although non-binding, the UDHR's "fundamental principles" (such as this one) are recognised to be customary in nature.

International recognition of the principle

- The prohibition has been recognised as customary by international courts: see Case of *Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights, Judgment, 28 August 2014, Ser. C, No. 282 ("Case of Expelled Dominicans"), §253 (referencing the "fundamental right of the human person" established by instruments including the UDHR); see also *Anudo Ochieng Naudo v United Republic of Tanzania*, African Court on Human and Peoples' Rights, Judgment, 22 March 2018 ("*Naudo v Tanzania*"), §76 (regarding the status of the UDHR as customary generally in the context of Article 15(2)).

International recognition of CIL principle

- and UN bodies: Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009 ("01/2009 UNSG Report"), §48; UNHCR 2020 Guidelines, §85 (referring to the "strong international consensus that the right to nationality, and relatedly, the prohibition of arbitrary deprivation of nationality are fundamental principles of international law").

- The UN General Assembly, in particular, has characterised it as a "fundamental principle of international law": UNGA, Resolution 50/152, UN Doc. A/RES/50/152, 9 February 1996, §16. in a resolution which, having been adopted without objection, constitutes important evidence of both State practice and opinio juris.

Minimum requirements of the principle

- Decision/process (resulting in loss of nationality) carried out in pursuance of a legitimate purpose;
- Provided for and in accordance with the law – both statute and common law principle (including CIL) – compatibility with statute law insufficient to meet prohibition on arbitrariness in CIL (otherwise states could simply legislate around the principle and courts construe legislation inconsistently with CIL)
- Necessary;
- Proportionate – rational nexus with legitimate purpose and no more than is necessary to achieve legitimate purpose and
- In accordance with **procedural safeguards.**
- **Further reading:** http://real.mtak.hu/29148/1/Deprivation of nationality_Molnar_HYIEL 2014.pdf

Minimum content of procedural safeguards

- The UN has frequently underlined States' obligation to observe "minimum procedural standards" which are "essential to prevent abuse of the law" whether or not statelessness is involved: 12/2009 UNSG Report, §§43 and 63; UN HRC, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/RES/13/2, 24 March 2010, §10; UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012, §10.

- There are two minimum requirements: first, the State must issue reasons for its deprivation decision in writing, and secondly, the State must grant the individual concerned a right to an **independent review of that decision by a judicial or administrative body:** 01/2009 UNSG Report, §67; ie "**the right to a fair hearing by a court or other independent body**" ILC Draft Articles on Nationality, p. 38 (Article 17). This reflects the CIL position (as does Art 12 of the European Convention on Nationality).

Minimum content of a fair, independent review

1) A fair and effective hearing requires a "meaningful review of the substantive issues": Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009 ("01/2009 UNSG Report") para 57 approving ILC Draft Articles on Nationality, p. 38 (Article 17), commentary, §2

(2) The individual concerned must have, at the very least, sufficient information "meaningfully" to contest the facts and arguments of the State in court: UNHCR2020Guidelines,§74 and see Eritrea-Ethiopia Partial Award,§71 ("In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review."

(3) The decision-making process must be independent and objective: UNHCR 2020 Guidelines, §74

(4) The individual must be entitled to participate effectively in the proceedings. This usually entails the individual's personal participation (i.e., by arguing his/her case "in front of a court or other independent body"). It also, at a minimum, requires participation in conditions of safety and security, and without intimidation: UNHCR 2020 Guidelines, §74 ("contest the facts and arguments … in front of a court or other independent body"); *Naudo v Tanzania*, , §79 ("allowing the concerned to defend himself before an international body").

(5) In cases involving the individual's possession of another nationality, the State should first seek to obtain written confirmation of such other nationality from the other State concerned: UNHCR 2020 Guidelines, §§81 and 103.

(6) The effect of the State's deprivation determination should be suspended until the appeal process has concluded: 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc/ A/HRC/25/28, 19 December 2013 ("2013 UNSG Report"), §33

Useful documents

- UNHCR Guidelines 2020 https://www.refworld.org/docid/5ec5640c4.html
- Institute for Statelessness and Inclusion PRINCIPLES ON DEPRIVATION OF NATIONALITY AS A NATIONAL SECURITY MEASURE https://files.institutesi.org/PRINCIPLES.pdf
- UN HRC, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/RES/13/2, 24 March 2010 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/127/96/PDF/G1012796.pdf?OpenElement
- UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012 https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/11/PDF/G1215311.pdf?OpenElement
- Anudo Ochieng Naudo v United Republic of Tanzania, African Court on Human and Peoples' Rights, Judgment, 22 March 2018 https://africanlii.org/afu/judgment/african-court/2018/5

Thank you

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