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Political Context and Meaning of British Citizenship: Cancellation as a National Security Measure

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Abstract

This article places the court cases on cancellation of British citizenship in the context of the wider socio-political debates on citizenship. The political context demonstrates several potential arguments linking citizenship with rights which could have informed the court cases. However, an observable trend is that while some of the decisions flag various substantive rights, most fail to expand upon them. A formal, legal approach to determination of foreign nationality laws and statelessness is evident in the cases rather than a discussion of rights and belonging. This illustrates how legal formalism operates to exclude important aspects of the meaning and content of British citizenship. By avoiding close scrutiny of the rights framework in the national security context the current cases support a minimal view of citizenship as loyalty in exchange for protection. This is reminiscent of the concept of subjecthood from the days of Empire. The article argues that intense proportionality review of the differential enjoyment of substantive rights would be far more revealing of the meaning and content of British citizenship.

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Key Words

British Citizenship, deprivation, Article 14, discrimination, proportionality, cancellation of citizenship

Introduction

As a national security measure, cancellation of citizenship is a current global trend. In France after the deadly terrorist attacks on Paris of November 2015 there was a proposal to amend the constitution in order to facilitate the cancellation of French citizenship of suspected terrorists. Similar proposals have already been adopted by Canada and been considered by the Netherlands, Australia, and other countries (Macklin, 2014 and de Groot and Honohan, 2010; Vink, 2012; Valchars, 2014). The British situation of cancellation of citizenship (referred to as deprivation in the UK) is analysed in other jurisdictions as an example of how national security needs are currently being met. This is because in recent times there has been legislative change to considerably expand the powers to deprive people of their British citizenship. Also, there has been an enhanced use of these powers. Between 1949 and 1973 only ten people were deprived of their British citizenship (i.e., their citizenship rights have been cancelled by the state). Between 1973 and 2002 no one at all was so deprived (Hansard HL Deb 8 July 2002 Col 66 W). In the past three years, however, there are at least 53 known cases of deprivation of which five orders were made in 2012 and eight orders in 2013 (Brokenshire in HC Deb 4 March 2014 c730-1W; Ross, 2014).

It is intriguing that the use of the power to deprive, which has been present in statutory form since at least 1914 when it was introduced in the context of the First World War, is now on the upsurge (Gibney, 2013). In terms of expansion in the scope of the power,

in order to avoid risk of creating statelessness, until mid-2014 only dual nationality holders could be deprived of their British citizenship so that there remained some other citizenship even if British citizenship were removed. An amendment in 2014 has now enabled deprivation of single nationality British citizens as well. The deprivation can be undertaken even at the risk of causing statelessness so long as the affected persons are naturalized citizens and are not birth citizens. This raises two concerns, first, a real risk of state involvement in creating statelessness and secondly, unequal treatment of different kinds of citizens purely on the basis of their mode of acquisition of citizenship thereby leading to differential enjoyment of citizenship rights. The extent to which courts grapple with these two concerns would reveal much about the extent to which issues of political context suffuse court decisions and also provide some insight into how citizenship is conceived of in modern British society.

This article first looks at the wider socio-political debates about British citizenship to demonstrate how there are many images and perceptions of British citizenship depending on the political context. These images could potentially also be viewed in court cases at the point of loss of citizenship when the rights associated with citizenship are contested. To establish the context for understanding cancellation powers the article then presents the legislative development of deprivation powers. A detailed critical analysis of the case law follows to search for the meaning of citizenship and, through this, to illustrate how political context lacks presence in court judgments.

The paper hypothesises that a minimal approach to citizenship would steer clear of substantive discussions on rights and instead look at the formal ingredients and requirements of the law on deprivation. Thus, such cases would reveal little about the content of citizenship. A strong judicial approach to citizenship would, on the other hand,

attempt to lay out a detailed analysis of rights associated with citizenship in order to present a picture of what a citizen is about to lose at the time of deprivation of national citizenship. A strong judicial approach to citizenship would engage in factual review of the merits of a case in order to explicate upon the specific links of the facts with citizenship rights. To the contrary, a minimal view would avoid a detailed review, dealing instead with narrow, procedural issues or a technical discussion of the law. In such case law there would be little discussion of the content of citizenship. The wider socio-political debates on citizenship are important for understanding the extent to which legal discussions engage with issues salient to the context in which law operates. Generally, more context permeates case law when courts engage in proportionality review, an approach that requires judges to look more closely at balancing the different rights affected, the justifications for measures, other available measures, and the impacts of the measures. Proportionality review would generally involve examining specific facts more closely to judge the merits of a case. However, courts do not always engage in this kind of intense review, and are particularly reluctant to engage in a close scrutiny of justifications for national security measures.

The data for the paper is drawn from case reports, Parliamentary briefs and debates, seven in-depth interviews with practitioners who have litigated deprivation cases, and from journalistic accounts as well as from secondary literature on the topic. Although there are commentaries which analyze deprivation powers (for e.g., see Lavi, 2010; Sawyer, 2013; Sawyer and Wray, 2014, Fripp, 2013, 2014, Lenard 2016), this paper adds to the existing literature a more critical view of courts, the role of the legal profession, and the role of the law from a socio-legal approach. It also utilises cancellation of citizenship as a lens for gaining insight into contemporary views on British citizenship.

Images of Citizenship from Socio-Legal Literature

The first definition of British citizenship in law is found only in 1981 in the British Nationality Act when the Act sets out modes of acquisition of citizenship. Yet, there are different images of citizenship that inform legal thinking about citizenship which pre-date the 1981 Act. One such image is of a bundle of rights or duties linked with rights. Another image is of loyalty and protection. These images sometimes make composite pictures but at other times they clash. The rights dimension does not match the presentation of British citizenship as a 'privilege' conferred on individuals because the word 'privilege' indicates something is not an entitlement whereas a right is a legally protected entitlement. This conflict of concepts is captured in the words of British Immigration Minister Mark Harper who said in 2014: 'Citizenship is a privilege, not a right'. This renders citizenship provisions vulnerable to change rather than being protected as actual entitlements to a particular status or bundle of rights. Politicians also often link citizenship rights to the performance of duties of citizenship, again hollowing out the strong content of uniform rights and rendering these conditional (e.g. see Government Green Paper in 2009 on Rights and Responsibilities). The privilege or duty-linked views are more closely aligned with the loyalty and protection image of citizenship because these hint at a *quid pro quo* between the benefactor and the beneficiary of the relationship rather than a relationship which entitles persons to a set of safeguarded rights by simple operation of law.

Loyalty and protection were core concepts prior to the emergence of the modern democratic state. It is surprising that there is a resurgence in modern days of concepts from days when empires and emperors were dominant in society. Lenard has explained this as a potential breakdown of the post-World War consensus on rights (2016). Whether or not this

is a full explanation, we can certainly identify departures from the post-World War situation in the UK today. Fransman (2011) and Dummett and Nicol (1990) write that there has been a lack of focus on citizenship in Britain until the post War period because of the importance attached instead to subjecthood. Deprivation powers point to how the political discourse in the UK in the context of present day national security challenges has led to a resurgence of 'subjecthood' repackaged as citizenship.

What, then is this key concept of 'subjecthood'? Subjecthood is the vertical relationship between subject and sovereign when the sovereign is the dominant power such as an emperor. There is no element of a horizontal relationship of equality in subjecthood as there is between citizens and their elected representatives in a democracy. Instead, the subject–sovereign relationship is a reciprocal relationship of allegiance and protection. This fitted well with the demands of the two World Wars when patriotism and loyalty to a single sovereign was considered to be of critical importance. Subjecthood has also served the objective of immigration control by deciding which overseas national has the capacity to enter the country in the context of de-colonization. It permitted, with racialized effects some subjects to claim blood links and retain citizenship while others were excluded through the British Nationality Act 1981 (Tyler 2010).

After, the two world wars, rights dimensions infused the ruler-ruled relationship and transformed 'subjecthood'. Marshall has identified three major groups of rights associated with citizenship: civil, political, and social (1950). Marshall's interpretation of the social element of citizenship encompasses a spectrum from the right to economic welfare to a right to share in the social heritage of the country (Joppke 2007). Initially civil and political rights dominate, but soon there is a progression to the social. The associated social rights connect citizens to each other as well as to the state. This lends the horizontal element of

citizenship, which is distinct from the vertical relationship of subjecthood. Marshall's conception of citizenship as a set of progressive rights that enhance the ability of people to contribute to society is a maximal conception of citizenship. Rather than being simply a status, citizenship facilitates life in society. The independence of former British colonies also freed many from the shackles of 'subjecthood.'

In the British context, nationality and citizenship have an intertwined status so changes to both domestic and international laws have reconfigured citizenship. The right to abode and free movement of Commonwealth citizens, free movement rights of EU citizens, and national security threats posed by home-grown terrorism post 9/11 became the newer kinds of political contention to challenge British citizenship. Viewed against this large canvas of political history, the heightened use of deprivation and its expanded selective application on naturalized citizens for national security purposes takes on a different form. Specifically, it appears to draw on the old allegiance and protection model of subjecthood. The withdrawal of state protection appears to be a punitive measure used against anyone who ostensibly breaches absolute allegiance. In the process, naturalized citizens and dual nationality holders are differentiated from single nationality holders and birth citizens.

What could be a reason to create such differences between citizens? Possibly the rationale is that multiple nationality holders and naturalized citizens who have had previous (and perhaps present) strong connections with other nations are the ones whose allegiance is more likely to waver. In some ways this approach is consistent with past practice in this country as British citizenship status has always been closely connected to immigration pathways. The immigration pathways have pigeon-holed entrants into various categories with differing rights. It can also be said that British citizenship has always been responsive to the supervening political context, rather than being a definite and clearly identifiable set of

concepts. It may be said that deprivation merely continues along this trajectory rather than initiating something completely new. After all, fears generated by the First World War, and the heightened suspicion of German nationals who were British citizens, enabled the inclusion of deprivation powers in 1914.

Yet tensions arise in contemporary times because the old subjecthood model does not readily translate into a citizenship one with any significant rights content. Post-World War British citizenship has not remained static and has instead responded to international changes in perceptions of nationality as well as the lack of nationality. In the backdrop of the two World Wars, the legacy of statelessness, particularly of Jewish people across Europe, and the institutionalization of international human rights have ushered in an era in which nationality has a more elevated status. Rights, and not protection, are at the centre of this view. The narrative of allegiance and protection has not been abandoned, but the rights discourse has also gained traction, which means that the subjecthood model does not easily fit anymore. It is this tension between the old subjecthood driven model of citizenship, and the newer rights linked one, which lies at the heart of the contests around deprivation. Owing to the historical neglect of discussions about rights and British citizenship identifying which rights link up with British citizenship is not an easy task. What can be asserted with some degree of certainty is that at the heart of citizenship is the right of abode. Macdonald, for instance, writes that the right of abode started out as a right unambiguously linked to a broad concept of British nationality (2014:108). Most other rights are then linked to the right of abode. The concrete links of citizenship with rights through the right of abode should be observable in case law. Alternatively, if rights appear to be decoupled from citizenship, that requires explanation as well. To understand the context of cancellation of

citizenship, and the disputes around cancellation, let us look at the legislative framework for deprivation of British citizenship.

Legislating Deprivation Powers

Despite its prominence in contemporary news, it is remarkable that deprivation is not a new power. It pre-existed the two World Wars. Its inclusion in legislative form has always been controversial. In 1870, a proposal to introduce deprivation was defeated due to vigorous opposition in Parliament (Gibney, 2013). The dimensions of the power to deprive have changed over time. For example, the 'reach' of the power increased after the 11 September 2001 attacks. Until then those who had acquired British citizenship through birth (birth citizens) could not be deprived of their citizenship for any subsequent conduct.

The Nationality, Immigration and Asylum Act 2002 rendered birth citizens subject to deprivation of citizenship powers for the first time. This deprivation power was conditional on the deprived person retaining another citizenship and thus not being rendered stateless by deprivation. This approach is not about the blossoming of rights as envisaged by Marshall. Rather it illustrates another conception of citizenship found in Hannah Arendt's work. Arendt famously termed citizenship the 'right to have rights' (1966) as she considered citizenship more fundamental than any other associated right. It is a basic right of recognition. Arendt developed her ideas of citizenship by contrasting it with an absolute lack of rights for stateless people. When Arendt called 'citizenship' the 'right to have rights' she implied it is a fundamental rule, one which commentators such as Hann (2013) have termed a 'rule of recognition' in community. Without national citizenship people would not be recognized as belonging to any community and therefore it is a primary rule for their engagement and development as human beings. In actual operation citizenship is therefore

highly significant. Arendt's views differ from Marshall's formulation in being a more practical one as it seeks a way to operationalize rights as through a domestic connection. But it is also a minimal conception because it is just the first step of belonging; it is about being recognized as a human from a particular place rather than being a fully manifested mature set of rights.

There is support for Arendt's views in British Home Office statements. For instance, in 2013 Home Office Guidance on 'Applications for leave to remain as a stateless person' states that the 'Possession of nationality is essential for full participation in society, and a prerequisite for the enjoyment of the full range of human rights'. An Arendtian view of citizenship where citizenship is of value because it prevents absolute rightlessness but this view of citizenship does not lead on to a protected set of enumerated rights. In that sense, it is an essential but not comprehensive view of modern citizenship. It is this view however which meant that until recently no British citizen could be left stateless as a result of deprivation proceedings. For example, under the 1981 Act (as it was in 2011), the Home Secretary could deprive a person of citizenship if she was satisfied that this would be conducive to the public good (s.40(2)), but not if she was satisfied that the order would make him or her stateless (s.40(4)). A stateless person is defined in Article 1(1) of the 1954 Convention on Statelessness, which is binding on the UK, as 'a person who is not considered as a national by any State under the operation of its law'. Prior to amendment in 2015 under the British Nationality Act 1981 the Secretary of State could 'by order deprive a person of a citizenship status if ... satisfied that deprivation is conducive to the public good' (s.40(2)), but could not 'make [such] an order ... if ... satisfied that the order would make a person stateless' (s.40(4)). Even the Arendtian view of belonging somewhere to avoid statelessness, is now

under challenge. In 2015, an amendment to the British Nationality Act 1981 changed the legal situation and enabled the government to render any naturalized citizen stateless while depriving them of their citizenship. Thus, the Home Secretary can deprive British citizens of their citizenship if (1) it would be 'conducive to the public good' to deprive the person of their citizenship and to do so would not leave them stateless; (2) the home secretary is satisfied that citizenship was acquired through naturalization and obtained fraudulently or by false representation; or (3) on 'conducive' grounds where citizenship was acquired through naturalization and the home secretary has reasonable grounds to believe they could acquire another nationality (see Gower, 2014). The Secretary of State can use these powers for all naturalized citizens: irrespective of issues of statelessness if the conduct in question is 'not conducive to the public good' and is 'prejudicial to the vital interests of the country'. Thus in effect since mid-2014, she has also had the ability to revoke citizenship where she believes a naturalized citizen has done something 'seriously prejudicial to the vital interests' of the UK, even where it will render the individual stateless provided there is a reasonable belief that another nationality may be acquired. The 'reasonable belief' ingredient is a homage to the Arendtian view of citizenship as a protection against statelessness, but the overall scheme permits a complete evisceration of the state-citizen relationship irrespective of the lack of potential other associations for the expelled citizen.

The expansion of the power to include all naturalized citizens despite the risk of statelessness was debated at length in Parliament with many members of the House of Lords dissatisfied with its effects. Arendt was often quoted and citizenship was frequently characterized as the 'right to have rights'. In the Parliamentary debates during the passage of the new Immigration Act, Baroness Smith of Basildon asked the Immigration Minister

Lord Taylor of Holbeach, 'It would be helpful if the Minister could clarify whether there are any other areas of law in which we have different categories of citizens' (Immigration Bill, HL Deb 12 May 2014, col: 1690). Later she pursued this enquiry further, 'He has not answered any questions about whether there are any other areas of law in this country that allow for two categories of citizenship'. Her own understanding was, '...if someone was a naturalised British citizen, he or she had all the rights and responsibilities of any other citizen. That is changed by this legislation.' There is little clarity in the debates about these queries.

Some safeguards were introduced in the final stage of the Act so that the risk of arbitrariness in decision making is reduced and the potential of becoming stateless is minimized. Thus, the secretary of state can only deprive naturalized citizens and then too only when she has reasonable grounds to believe the deprived persons could acquire another nationality. Academic and practitioner briefs on the provision played a large role in discussions in Parliament and influenced the final wording of the provision. The Joint Committee on Human Rights has considered several of the rights implications in its legislative scrutiny report looking closely at submissions of external parties such as Liberty, Reprieve, Professor Guy Goodwin-Gill, and the Immigration Law Practitioners' Association, particularly from the statelessness perspective. However, it is questionable whether the provision reflects the full scope of the arguments raised in the debates. The final version of the provision still raises serious queries about what kind of protection citizenship confers anymore, and the pragmatic effects of its removal particularly for naturalized and dual nationality citizens. It does not seem enough to simply say citizenship is avoidance of statelessness, what does it achieve when it is present? If the narrowest understanding of protected rights obtained through citizenship would be about the right to enter and right to

abode in a country, what specific rights do the right to enter and reside engage? (Fransman, 2011: 19).

Some steer on the content of rights can be obtained from non-deprivation cases which still address the links between nationality and citizenship rights such as cases of applications for citizenship or extent of obligations towards citizens for safeguarding them from harm. For example, while deciding on the admissibility of an application by Andrei Karassev and family against Finland (Application No. 31414/96), the European Court of Human Rights (ECtHR) observed that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 9 of the ECtHR, because of the impact of such a denial on the private life of the individual, but in the facts of the particular application it noted that there is no general right to acquire any particular nationality within the convention. Similarly, in *A B and C v Ireland* (App. No. 25579/05) – [2010] ECtHR, in the context of a positive obligation to provide a statutory framework regarding abortion law the ECHR observed that ‘States [are] under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity’ (para. 168). There are no such categorical observations about duty towards citizens in deprivation cases. This is surprising as both the points of entry into, and exit from citizenship are fertile grounds for exploring the conceptual force of citizenship as it is at these points that those impacted by its gain or loss put forward reasons for inclusion or exclusion. Thus, we may expect justifications for inclusion or exclusion and attempts to set out the scope of citizenship rights for deprivation cases but we shall see that such expectations are not met in the case law on cancellation of citizenship.

Deprivation Cases and Judicial Views on Citizenship

The three leading cases on deprivation are *G1*, *Al Jedda*, and *Pham* (erstwhile *B2*). These cases have similar factual patterns with a British citizen losing his citizenship while outside the UK. In all three cases the presence of another nationality and the avoidance of statelessness are the primary legal issues. Woven into *G1* and *Pham* are also issues of European citizenship and proportionality. This is because European citizenship and free movement rights are generally dependent on the holding of the national citizenship of a treaty country. Article 17(2) of the EC Treaty says that ‘Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby’. Therefore these cases presented opportunities for exploring a whole spectrum of rights and the connections of such rights with nationality and/or citizenship.

In *G1 v Secretary of State*, the Secretary of State had made an order under section 40(2) depriving *G1* of British citizenship. *G1* appealed to the Special Immigration Appeals Commission (hereafter, the SIAC), but also brought judicial review proceedings alleging among other arguments procedural unfairness under domestic and European Union law. The judges did not apply EU law and did not reach into proportionality or arbitrariness in the facts of the case. The reason for not discussing European Citizenship issues was laid out by Laws LJ (giving the leading judgment) in para. 38: ‘... The distribution of national citizenship is not within the competence of the European Union. So much is acknowledged in *Rottmann* itself ... as is “the principle of international law ... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality” (*Rottmann*, para. 48). Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to “have due regard” to the law of the European Union?’

These statements by Laws, LJ and the overall thrust of the judgment of *G1* (where *G1* lost his appeal) have led to a domino effect in deprivation cases. An example of this is how the lawyers in the *Pham* case considered themselves precluded from raising European citizenship issues in the first instance before the SIAC because of the *G1* pronouncements. In the *Pham* case, [2015] UKSC 19, *Pham* (formerly anonymized as the *B2* case) *v Secretary of State for the Home Department* was born in Vietnam but claimed asylum in the UK and was granted indefinite leave to remain in the UK. In 1995 *Pham* acquired British citizenship but did not renounce his Vietnamese nationality. When the Secretary of State made a deprivation order under s.40(4) of the 1981 Act, *Pham* claimed it rendered him stateless. The Vietnamese government had said that it would no longer regard him as a national of Vietnam even if the issue were unclear in domestic law of Vietnam. SIAC ordered a preliminary hearing to determine the statelessness question, which was then appealed to the Court of Appeal (CA) and ultimately to the Supreme Court (SC). Before the SC *Pham's* lawyers raised the issues of European citizenship rights but by then the SC was unwilling to adjudicate on any issue but for statelessness. They remitted the case back to the SIAC for all other considerations apart from the one of statelessness which they decided against *Pham*. It appears to be a missed opportunity to have a full determination from the highest court of the land. In *G1* the court did not reject the possibility of applying general principles in other situations so it had not really precluded the arguments which were not advanced by the lawyers in the early stages of *Pham* in the SIAC. In interviews, lawyers who worked on these cases explained that they always attempted to bring forth the strongest issues. Statelessness and the possibility of potential statelessness was the strongest ground in the cases. The weakest arguments were the ones about rights as there was no clear precedent

about the extinguishing of citizenship rights. Therefore rights arguments were not prioritised.

Other lawyers who were associated with campaigning on the issue of cancellation but did not directly litigate the cases expressed dissatisfaction with how these cases were conducted but the lawyers who were directly involved were unwilling to stake their chances on unsettled law. They simply avoided European Union citizenship and its relation to British citizenship in the context of cancellation of British citizenship is the area of law which is most uncertain and thus risky for their clients.

In the *Al Jedda* case [2013] UKSC 62, as earlier in *G1* and later in *Pham*, the thrust of the decision was on determining whether Mr Al Jedda had a surviving Iraqi nationality. Conversion of refugee status to British citizenship did not restore his lapsed Iraqi citizenship. This determination could have happened after a detailed analysis of Iraqi nationality law. No submissions on rights were considered at all and it is not possible to distil any jurisprudence on British citizenship.

Looking at these leading cases together, there are two possible interpretations of judicial views on citizenship. The first is that courts fail to develop any clear understanding on the meaning and content of British citizenship given that this is never the focus of the court proceedings. A second possible interpretation, however, is that the judgments flag significant convention rights to which British citizenship is potentially attached such as Articles 2 (right to life), 6 (right to fair trial) and 8 (right to privacy and family life) of the ECHR. However the judgments fail to fully develop these links between citizenship and rights. There are several potential explanations for why the court cases do not lay out the panoply of rights in any great detail. One explanation is that like *Arendt*, in these cases the judges assess citizenship against the absolute lack of rights in conditions of statelessness.

Arguably, had the purpose been to assess whether citizenship enables participation in the community, the approach would have been to look at the breadth of the rights.

How would a more maximal rights approach to citizenship have manifested itself in court judgments? Such an approach would have examined at length how the loss of citizenship impacts citizens and discussed the implications of non-uniform application of rules of citizenship. In an instance where such power has a heightened application on only one category of citizens, for e.g, naturalized citizens, a more maximal approach would have examined the right against non-discrimination (Article 14 ECHR) at length. A maximal approach in the judgments would be likely to highlight the importance of a national connection in the actual enjoyment of rights in the context of access to courts. For example, enjoyment of one's private and family life (Art. 8 ECHR) is operational only if someone has a right to enter into and reside within a country. Thus, the cases could have explored how citizenship provides the most secure legal status for access to uninterrupted stay in a country.

There are fundamental links to right to life which arise in deprivation cases. Not all cases of deprivation come up in challenges before British courts as persons, once removed from the UK, are generally unable to access British courts. The Bureau of Investigative Journalism has demonstrated through their news reports that removal may lead to endangerment of life. Two people deprived of citizenship were killed by subsequent drone attacks. One person deprived of citizenship while outside Britain is now in an American prison without a formal extradition process (Rozenberg, 2013). In the recent context British citizens in Syria suspected of being Jihadi terrorists have been killed by drones in killings authorized by the British government. These developments raise major philosophical and

ethical questions as well as legal questions about the right to life. Thus, when challenges do come up in British courts, even if under restrictive conditions through special advocates and closed materials proceedings, it seems important for courts not to avoid the larger issues about citizenship and rights. The next part of this article will briefly lay out the chief rights implications of deprivation proceedings which could be examined by courts in future proceedings.

Article 6 ECHR

Appeals in the SIAC are generally held as closed material proceedings. Most appeals to deprivation cases come up before the SIAC, a court that hears immigration cases with national security dimensions partly in closed material proceedings. There is no criminal charge against the people deprived and the Secretary of State acts on suspicion based on secret evidence (Fripp, 2013). Transparent and open justice is an essential part of the rule of law. Article 6 is a limited right and national security is a permitted limitation but the need for secrecy has to be strictly justified. Earlier this year, when the government wanted to conduct a criminal trial *in camera*, the Court of Appeals did not permit this and said the context of national security does not remove the requirement of open justice (*Guardian News and Media Ltd. v AB CD*, Case No: 2014/02393C1, decided on the 12 June 2014, Court of Appeal, Criminal Division). In another case *Tariq v Home Office* [2011] UKSC 35, decided on 13 July 2011, the Supreme Court did not uphold a challenge to closed materials proceedings in a national security matter but it came to this conclusion only after a full merits review to assess procedural fairness requirements.

The system of using special advocates (lawyers unable to communicate with their clients once they have seen all the available evidence), as used in the SIAC, has been

criticized by academic commentators and rights groups (Gearty, 2005). Many special advocates have resigned to protest against the inadequacies of the process (Dyer, 2014). For both in country and out of country appellants a predominant issue is the lack of proper service of notice to deprive. Many are served notice on their last known address or by informing a relative and do not get to know about the notice until much later. Related to notice there are several disputes about when the time limit for appeal expires (e.g. *H2 v SSHD*, decided on 25 July 2013 by the SIAC, or *L1 v SSHD* [2013] EWCA Civ 906, decided on 3 December 2010). Lack of notice and bars of limitation prevent access to court thereby denying a fair trial. There is clear recognition of this problem. In *L1*, the Court of Appeals directed that fairness required the SIAC to hold that his time for appealing should be extended by reason of 'special circumstances' by which it was referring to the Secretary of State waiting for L1 to leave the country before proceeding with his deprivation process. Article 6 (right to fair trial) is interfered with because the deprivation orders are generally served while the individual is outside the UK. The orders take immediate effect and the affected persons are unable to return to the UK to argue their appeal. Article 6, ECHR: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ...' While this may affect rights as a matter of happenstance, in *L1 v Secretary of State for the Home Department*, [2013] EWCA Civ 906, decided on 3 December 2010, the Court of Appeal found that the Secretary of State had deliberately delayed the deprivation decision until the appellant had left the country.

The Joint Committee on Human Rights has found that deprivation cases fail to generate the kind of critical public debate and scrutiny because of the closed proceedings

(Legislative Scrutiny: Immigration Bill (Second Report), 3 March 2014, HC 1120). An intense proportionality review would be able to pierce the veil of secrecy that appears to surround deprivation proceedings. Evaluating whether or not closed material proceedings are ever justified is outside the scope of this article but the importance of intense proportionality review when procedural fairness issues arise cannot be over-emphasized.

Article 8 ECHR

Preliminary Article 8 (right to private and family life) arguments have been advanced in some cases where the person has said he is deprived of his private and family life in the UK as he is unable to re-enter. Article 8 states, 'Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence.' Paragraph 12 of Home Office supplementary memorandum on the ECHR memorandum: Government amendments tabled on 28 January 2014 for Commons Report Stage on Immigration Bill '...that deprivation of citizenship is capable of engaging Article 8. This is because nationality is part of a person's identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering someone stateless.'

However such arguments do not appear to form the basis of proportionality analysis in the cases. Even if touched upon Article 8 arguments have not proved to be ultimately determinative of the outcome of the cases. By way of illustration, the scope of Article 6 and Article 8 were argued in the SIAC case of *Al Jedda v SSHD*, decided on 22 October 2008 without forming the basis of its decision which was eventually decided on statelessness. The focus of arguments in this case, and in most of the other cases, is in emphasizing the lack of

an alternative nationality and the increased risk of statelessness. As legal reasoning generally is about disposing the case on the most applicable ground this is not surprising, but nevertheless it demonstrates how substantive rights claims have not been fully assessed.

Article 14 ECHR

Deprivation affects different kinds of citizens differentially thereby presenting issues of potential discrimination. Article 14 of the ECHR prohibits discrimination in the enjoyment of the substantive Convention rights and therefore, in the context of deprivation, would also prohibit discrimination in enjoyment of Article 6 and Article 8 rights. Article 14 is sometimes characterised as an 'ancillary' or a 'parasitic' right because its operation depends first on the engagement of another substantive right (O'Connell, 2009; Baker, 2006). But it has wide scope in terms of the kinds of discrimination it prohibits through the incorporation of a non-exhaustive list of protected characteristics (such as 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'). Specifically, the words 'other status' have been interpreted in case law to include various other characteristics such as marital status, sexual orientation, and legitimacy of birth, thereby widening the breadth of Article 14..

There are three main parts of an Article 14 analysis. The first is to identify a substantive right of the convention, the enjoyment of which is affected by a certain measure. The second is to establish direct or indirect discrimination. And, the third condition is to look for less restrictive means which would satisfy the objective of the measure in question. Taking each element of Article 14 separately, its applicability in deprivation cases can be ascertained.

The first requirement of Article 14 is to identify a substantive right of the convention, the enjoyment of which is affected by a measure. This is the so-called 'ambit requirement' of Article 14 (O'Connell, 2009). Scholars have argued persuasively that 'affecting enjoyment' does not mean the 'actual infringement' of another substantive right, as that would render Article 14 a superfluous right (e.g. Baker, 2006). What ambit means instead is that the facts of the case should be related to another substantive right which is enjoyed differentially by different people/groups because of the measure which is being challenged. It seems apparent that citizenship is factually related to many of the specific substantive rights under the Convention. Strong factual links to Article 8 (right to family and private life) are established in deprivation as in almost all the cases the appellants are deprived of citizenship while outside the country and are unable to re-enter the country to join their families.

After the landmark case from the European Court of Human Rights (ECtHR) of *Genovese v Malta*, (Application no. 53124/09, 11 November 2011), an actual Article 8 infringement is not required for an Article 14 challenge as long as a factual link is present. In *Genovese* the ECtHR found Malta to be in breach of Article 14 in conjunction with Article 8 because its nationality law prevented an illegitimate child from acquiring nationality if his father was Maltese whereas legitimate children could inherit nationality through either parent. Interestingly, in *Genovese* the applicant did not have established family life in Malta, the country whose citizenship he was asserting that he had been denied discriminatorily because of Maltese law not recognizing the citizenship claims of illegitimate children. The ECtHR stated although there was no general right to citizenship recognized in the ECHR it was possible to read Article 8 in an expansive manner. It said that the applicant's Maltese connection was part of his 'social identity' and therefore it would be sufficient for triggering

Article 8 even if he had no existing family links there; Article 14 could then be invoked as well.

The second requirement for establishing direct or indirect discrimination is to show the link between the categories affected by the measure and the protected characteristics listed in Article 14. In deprivation cases this relates to national origin, which is an explicit category in Article 14 as citizens of different national origins are treated differently by these measures. This appears to be direct discrimination as the measure affects one category simply on their protected characteristic of national origin. As there are reasons of national security forwarded the next step would be to assess if there is any objective justification which is for a legitimate purpose and meets the needs of proportionality. Objective context and proportionality can be evaluated using a series of relevant questions: Are these categories for deprivation made on the basis of naturalization and birth? Is the holding of other nationalities rational and reasonable? Are there important similarities (between categories) and differences (across categories) that are relevant for achieving the objective of the law, that is, national security?

Finally, in Article 14 proportionality challenges courts would also look at availability of lesser restrictive means to achieve the objective of the measure. In case of deprivation it appears there are several possible alternatives that are less restrictive. Terrorism is already defined in a very broad manner in national criminal laws. The SIAC can impose conditions such as Terrorism Prevention and Investigatory Measures on citizens as well as non-citizens. Additionally, the Home Secretary can cancel passports and refuse to issue British passports under prerogative powers. Reviewing the efficacy of these alternative measures would form part of proportionality analysis. These steps for applying Article 14 ECHR illustrate an alternative approach for engaging in a more substantive rights review for loss of citizenship.

It may be argued that the national security context confers greater discretion on the executive, thereby precluding intense proportionality analysis. However, in the context of counter-terrorism there is precedent for adopting the Article 14 approach to a more substantive rights review. In *A v Secretary of State* [2004] UKHL 56 on indefinite detention the SC held that section 23 of the Anti-terrorism, Crime and Security Act 2001, the objective of national security, was not met by the measure of indefinite detention of foreigners residing in the UK. In this case nine foreigners were indefinitely detained at Belmarsh prison without trial, out of concerns for national security. In the aftermath of 9/11 the Home Secretary had wanted to deport the men but most of them were at risk of torture in their home countries. Prior to detention no trial was provided as the government reasoned that it was an immigration rather than a criminal measure. The British government was unwilling to put all foreign terrorism suspects on trial, as either the evidence was not strong enough to convict the men or producing this evidence would reveal the identity of British intelligence sources (Poole, 2005). The foreigners were legally present in the country and had not been charged with any particular criminal offence. This led them to question why they were being held without being provided access to a trial. Lawyers for the detainees challenged the invocation of public emergency, which formed the basis for derogation from applicable rights made by the UK executive on grounds of emergency. They raised several arguments using the ECHR as incorporated in the domestic HRA, seeking to establish the right to liberty (Article 5), right to fair trial (Article 5(4) and Article 6) and right against non-discrimination (Article 14). Additionally, they argued that there was no evidence of any heightened risk to national security from foreigners as a category as compared to British citizens. This enabled them to raise a claim of violation of their right to non-discrimination (the Article 14 argument). The nine men submitted that all who reside in the UK should be

treated equally with respect to the objective of national security and that only foreigners, as a discrete category, could not be subjected to indefinite detention.

A majority of the House of Lords was convinced that the measure had discriminatory effects on only one category of people present in the UK (foreigners) without proportionate justification for a heightened effect on this category of people. It decided to make a declaration of incompatibility under section 4 of the HRA, stating that the indefinite detention regime was incompatible with the ECHR because the measures taken were disproportionately harsh on foreigners residing in the UK and were therefore discriminatory. Accordingly, it quashed the derogation order and made a declaration that section 23 of the ATCSA was incompatible with Articles 5 and 14 of the European Convention. The only dissenting opinion came from Lord Walker who ruled in favour of the government, stating that derogation measures are 'strictly necessary' and not disproportionate as these are temporary and subject to review by the SIAC. The other judges agreed with the submission of the detained men on the non-discrimination argument, as they could not be reasonably differentiated from British citizens who also may pose a threat to national security. The court held that the reason given by the executive of certain persons constituting heightened threats to national security was not specifically related to being a foreigner in the UK. There was little evidence that foreigners were a graver threat to national security interests than British citizens. The objective of national security was not met by the measure of indefinite detention of foreigners residing in the UK authorized by section 23 of the ATCSA and the measure therefore failed to meet the test of proportionality. The proportionality analysis in this case dips into substantive review by asking about the rationale for differential treatment. This reasoning looks clearly applicable to the deprivation cases where there is a heightened application of cancellation for conducive grounds only on one category of

citizens, naturalized citizens. The millions of foreign born or dual nationality British citizens who are not directly affected by a specific deprivation order nevertheless hold a right of a lower value than those born in the UK and having no other nationality.

Loss of Citizenship: Deafening Silence?

Given the high-octane political rhetoric on citizenship and rights as well as the wide-ranging social scientific research on the attributes of citizenship, the expectation would be for courts to seize upon the opportunity provided by deprivation cases to explicate on rights and citizenship. After all, at the point of expulsion from the relationship of citizenship there is a likelihood that courts will make observations about the quality of the relationship and what it entails. However, the recent deprivation judgments belie such expectations as there is a deafening silence on the meaning of citizenship in the cases. Such judicial silence requires explanation.

This paper highlights that such silence is most likely present because of the lack of full proportionality analysis. There is little review of the merits of the cases and more analysis of foreign nationality laws. The focus on statelessness and determination of who would be rendered stateless appears to be driven by a desire to comply with the very lowest standards set by international law. Yet lawyers expended maximum energy on arguing against statelessness with little submitted about the facilitative role of citizenship. This could be because of a number of possible reasons. The first possibility is that lawyers prefer the minimal rights approach of avoidance of statelessness for clients in conducive grounds cases, as they are wary of the consequences of a more substantive approach in matters related to national security. Auerbach (1976) says lawyers often tend to use the procedural

aspects of law rather than raise substantive normative issues. Therefore the avoidance of the risk of deep merits review is not unusual in legal cases. Lawyers often orient themselves to arguing narrow grounds as they assess these as more likely to succeed (Atiyah and Summers, 1987). Most deal with procedure as an end in itself in a formal, legal sense, disconnected from the broader issues of rights or the rule of law. This is symptomatic of legal formalism when the internal logic of rules dominates court proceedings. In many instances lawyers consider such an approach more 'professional' (for example, see McEvoy 2011). In interviews some of the lawyers attempted to distance themselves from the political campaigns against cancellation of citizenship, focussing instead on the technical requirements of the law and on their specific cases. Yet, most of them consider cancellation of citizenship an unfair and unequal law. The compartmentalization of the personal from the professional could partially explain why formal, technical arguments are proffered in court. The professional assessment of the practitioners of the likelihood of success of certain arguments appears to match the preferences of courts.

In the case of deprivation cases, courts have clearly preferred the legal formal approach of looking at foreign laws and differentiating between deprivation by law and deprivation by fact to neutralize the *Al Jeddah* holding. Adequate challenges would first have to pierce the veil of exceptionalism to make substantive rule of law challenges in order to forward full rights claims rather than targeting only procedural aspects of the law. Otherwise, the immediate consequence of dealing with cases on secondary rules of the games is that those rules can change rapidly and with ease. This is illustrated by the *Al Jeddah* case after which deprivation rules were changed.

A second possibility is that citizenship claims of persons of questionable conduct linked to security threats appear to be strong only when compared against the rights of

those who have no claims at all to stabilized nationality-linked rights (i.e. the stateless). This would lead lawyers to take up arguments focussed narrowly on statelessness as their strongest arguments in a case. In interviews lawyers explained their choices as strategies where the strongest legal points are dominant ones even if these do not address the most pressing legal issues of a case. Certainly, a wider approach to legal issues, albeit taken up too late, did not work in a satisfactory manner in the *Pham* case in the Supreme Court.

A third possibility for judicial silence on the meaning of citizenship is that national security concerns simply suspend ordinary rights in a manner that reinforces old colonial and World War era ideas on loyalty and protection. This third possibility indicates a regression to times when rights did not matter and citizenship was merely a nascent idea much over-shadowed by subjecthood.

Conclusion

Despite the prevalence of legal formalism in the judgments, and the lack of any real consideration of the rights linked with British citizenship, what can we still understand about British citizenship from deprivation rules and case law? Two salient features of British citizenship that are present from historical times, and are mirrored in recent deprivation judgments, are first, the responsiveness of citizenship to politics of the day and, secondly, how citizenship has usually consisted of different categories of rights holders. In the past, in response to colonial needs, British nationality was split up into more distinct species of citizenship. But when decolonization took place, the citizens of independent Commonwealth countries were no longer considered British citizens and there was a move towards an eventual consolidation of all the different subcategories of British nationality

into a single British citizenship. Deprivation law, however, reinstates the use of categories by introducing new ones into law such as naturalized versus birth citizens and single versus multiple nationality holders. Again, these subcategories are political creations responding to the challenges of the times (such as national security) rather than being propelled by deep-rooted values and beliefs about citizenship.

While British citizenship continues to be about varying categories it still models itself in the style of the loyalty model of subjecthood. This seems apparent from debates on legislative change and close readings of deprivation case law. A proportionality analysis using the Article 14 ECHR approach would seek the legal justifications for the continued use of citizenship categories in an age of universal human. This would unlock the potential for more informed dialogue on British citizenship today. Avoiding intense discussions about the content of citizenship appears merely to ignore the elephant in the room of increasing diversity in citizenry. Issues of multiculturalism and integration frame the national security debates in the context of which deprivation laws have changed today. Concerns about the failure to integrate were the chief reasons why citizenship lessons for all schoolchildren were introduced through changes to the national curriculum (Crick, 1998). Intervention in citizenship is often couched in the language of ‘communities’, ‘empowerment’ and ‘responsibility’ (Blair, 1998; Etzioni, 1995) but most interventions focus on ‘problematic’ citizens (Crick, 1998: 17). Politicians who discuss the duties of citizenship generally project a view of participatory citizenship where rights are conditional on the performance of duties. This is the communitarian idea of citizenship which posits that citizenship has to be earned and learned by performance of civic duties (Joppke 2010). The communitarian perspective is also another way of demanding proof of loyalty from citizens and is thus aligned more closely to the outdated subjecthood model.

Deprivation judgments which look at conduct deal specifically with problem citizens. Problem citizens are the test cases who check the robustness of the citizenship framework. But, evaluations of statelessness in deprivation cases are steeped in technical legalism and the meaning of citizenship is seldom contemplated by courts. Perhaps the very reluctance to engage with deeper meanings of citizenship can be interpreted as a concession to a minimal conception of citizenship. This conception is one where it is agreed that people should belong somewhere, if not in Britain. In the end, it is a rather disappointing caption to place on the many images of British citizenship which emerge from the social and political debates on the matter.

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