

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 37478/20

BETWEEN:

PHAM

Applicant

v.

UNITED KINGDOM

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

The AIRE Centre (Advice on Individual Rights in Europe) and ENS (European Network on Statelessness)

19 April 2021

EXECUTIVE SUMMARY

- I. This Court’s settled case law establishes that nationality is an element of personal identity. Deprivation of nationality constitutes an interference with a person’s right to respect for private life guaranteed under Article 8(1) of the European Convention on Human Rights. A Contracting State will breach its Article 8 obligations when depriving a person of nationality unless it can demonstrate that deprivation can be justified under Article 8(2). Contracting States must conduct a careful and thorough assessment of whether the deprivation would be arbitrary. The decision must be in accordance with the law, including all international obligations applicable to the Contracting State, and the authorities must act diligently and expeditiously in relation to any challenges to that decision. The deprivation of nationality must be demonstrated to be the minimum interference necessary to achieve a legitimate aim.
- II. Contracting States must assess the consequences of the deprivation of nationality for the individual and must take into account whether the applicant would be rendered stateless or at risk of statelessness by the deprivation. A thorough assessment of the applicant’s particular circumstances, including a full determination of the applicant’s resultant nationality status or potential statelessness, should be conducted by the Contracting State before deprivation. Such determinations must be in accordance with international law and guidance on the determination of statelessness.
- III. Under Article 53 ECHR, to comply with obligations under the Convention Relating to the Status of Stateless Persons (1954 Convention) and the Convention on the Reduction of Statelessness (1961 Convention), a Contracting State must assess whether statelessness would result from the deprivation of nationality before issuing a decision on the deprivation. Statelessness must be assessed based on the law of the State or States of which the person is said to be a national and how the competent authorities of that State or States apply the law in practice. The Contracting State depriving the individual of their nationality must ensure procedural safeguards and a right to a fair trial to individuals under the 1961 Convention. If statelessness would result, the 1961 Convention imposes strict limits on when deprivation is permissible, as discussed in Section B.

A. Obligations under Article 8 ECHR to prevent statelessness, to reduce the risk of statelessness and to protect stateless persons, in the context of deprivation of nationality

1. This section addresses obligations under the European Convention on Human Rights (ECHR) relating to nationality¹ and the consequences of deprivation under the caselaw of this Court. Article 8 ECHR protects family and private life, home and correspondence. Although this Court has reiterated that a “right to nationality” similar to that in Article 15 of the Universal Declaration of Human Rights, or a right to acquire or retain a particular nationality, are not guaranteed by the ECHR or its Protocols,² it has confirmed on several occasions that interferences with a person’s right to a nationality may engage Article 8 ECHR because of their impact on the private life of the individual. Nationality is an important element of personal identity and thus falls within the scope of the private life

¹ For the purposes of this intervention the terms of “nationality” and “citizenship” are being used interchangeably.

² *Petropavlovskis v. Latvia*, application no. 44230/06, judgment of 13 January 2015, §73.

rubric of Article 8, and attracts the procedural safeguards inherent in that Article.³ In *Genovese v. Malta*⁴ and *Karashev v. Finland*,⁵ the Court confirmed that a denial of nationality can result in a violation of Article 8.⁶ In the case of *Hoti v. Croatia*⁷ the Court looked at the concept of ‘stateless migrant’ as a special category of rights-holder under the ECHR. Having accepted that the acquisition or denial of nationality may raise an issue under Article 8 ECHR, in *Ramadan v. Malta* the Court then accepted that the same principles must apply to the revocation of a citizenship already acquired.⁸ In *Ghoumid and Others v. France*⁹ and *K2 v. the United Kingdom*,¹⁰ the Court once again stated that although the right to nationality is not as such guaranteed by the ECHR, arbitrary deprivation of nationality may engage Article 8 ECHR because of its impact on the private life of the person concerned.

2. **The interveners submit that this Court’s settled case law establishes that nationality is an element of personal identity and that deprivation of nationality will constitute an interference with a person’s right to respect for private life guaranteed under Article 8(1). If not justifiable under Article 8(2) a Contracting State may breach Article 8 ECHR when it deprives a person of nationality. The consequences of deprivation of nationality are particularly acute where this renders a person stateless.**
3. Under Article 8(2) ECHR, an interference with the right to respect for private and family life must be “in accordance with the law”. Decisions to deprive a person of their nationality must comply with substantive and procedural standards. A deprivation decision is considered arbitrary if it is not prescribed by law, is not the least intrusive means to achieving a legitimate aim and proportionate to such aim, or if adequate procedural safeguards are not in place.¹¹ Compliance with the principle of proportionality, including ensuring that deprivation is the least restrictive measure, is an integral part of the assessment on whether the decision is arbitrary.
4. The Court has stated that the revocation of the nationality which a person already held could have an impact on that person’s private and family life to the same, or a greater, extent than in cases concerning the right to acquire nationality or recognition of nationality.¹² In assessing whether a deprivation of nationality amounts to a breach of Article 8 ECHR, the test, as established by this Court in *Ramadan*¹³ and then applied in *K2*, requires (i) an assessment of whether the revocation was/would be arbitrary and (ii) of the consequences of revocation for the applicant.¹⁴ Whilst *K2* was an inadmissibility

³ *Ghoumid and others v. France*, applications no. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, judgment of 25 June 2020, §43-44; *Mennesson v. France*, application no. 65192/11, judgment of 26 June 2014, §97.

⁴ *Genovese v. Malta*, application no. 53124/09, judgment of 11 October 2011.

⁵ *Karashev v. Finland*, application no. 31414/96, decision of 12 January 1999.

⁶ *Genovese v. Malta* (n 4), §30; *Karashev v. Finland* (n 5).

⁷ *Hoti v. Croatia*, application no. 63311/14, judgment of 26 April 2018.

⁸ *Ramadan v. Malta*, application no. 76136/12, judgment of 21 June 2016, §85.

⁹ *Ghoumid and others v. France* (n 3).

¹⁰ *K2 v. the United Kingdom*, application no. 42387/13, decision of 7 February 2017.

¹¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05, available at: <https://www.refworld.org/docid/5ec5640c4.html> [accessed 15 April 2021], §§62, 91-95; and UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, §4. See also Brandvoll, J. (2014), ‘Deprivation of nationality: Limitations on rendering persons stateless under international law’, in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), pp. 194–216.

¹² *Ramadan v. Malta* (n 8), §85.

¹³ *Ramadan v. Malta* (n 8), §85.

¹⁴ *K2 v. the United Kingdom* (n 10), §49.

decision and not a judgment on the merits of the case, it is important in establishing the approach of this Court. The test for arbitrariness is different from that for proportionality, and requires an assessment of whether the deprivation was in accordance with the law, whether the individual had access to relevant procedural safeguards and whether the authorities acted diligently and expeditiously.¹⁵ The Court has used the expression “diligently and swiftly” in cases such as *K2*,¹⁶ where the person deprived was outside the country of nationality. The interveners submit that the risk of arbitrariness is high in such cases, and disputes must be resolved swiftly because of the risks to the person excluded from what was their country of nationality. In decisions to deprive a person of their nationality, States must apply the necessary procedural safeguards expeditiously, while ensuring that all relevant enquiries are made, so as not to leave an individual in limbo.

5. In *Ramadan v. Malta*, the test mentioned in paragraph 4 above was applied to assess whether the decision to withdraw Mr Ramadan’s citizenship had been arbitrary. The Court looked at the legal basis of the withdrawal of citizenship, whether the necessary procedural safeguards were in place and whether the authorities acted diligently and expeditiously.¹⁷ The impact on the life of the applicant was also assessed, including the risk of removal, the possibility of continued residence and pursuance of business activities and the availability of other paths to naturalisation.¹⁸
6. The same test was also applied in *K2 v. the United Kingdom*, where the applicant’s citizenship was revoked while he was abroad and, because he was considered to be a threat to national security, he was subsequently excluded from the territory of the respondent State.¹⁹
7. For a deprivation order to be considered in accordance with the law, the relevant authorities must also have regard both to relevant domestic provisions and to the international law applicable to the State, including Article 8 of the Convention on the Reduction of Statelessness (1961 Convention).²⁰ Article 53 ECHR requires States not to fall below the applicable international standards in complying with their substantive and procedural obligations under the ECHR.
8. The lack of nationality and the consequences of deprivation of nationality, are primarily regulated by the main international human rights instruments specific to the prevention and reduction of statelessness, notably the 1961 Convention. Under Article 8(1) of the 1961 Convention, deprivation of nationality that would result in statelessness is strictly circumscribed. States must apply the international definition of a stateless person, set out in Article 1 of the Convention Relating to the Status of Stateless Persons (1954 Convention).²¹ It is thus essential for a Contracting State first to determine whether deprivation of nationality would result in statelessness, diligently conducting all necessary

¹⁵ *K2 v. the United Kingdom* (n 10), §49, 61.

¹⁶ *K2 v. the United Kingdom* (n 10), §50, 53.

¹⁷ *Ramadan v. Malta* (n 8), §§86-88.

¹⁸ *Ramadan v. Malta* (n 8), §§90-92.

¹⁹ *K2 v. the United Kingdom* (n 10), §49, 52-63.

²⁰ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf [accessed 15 April 2021].

²¹ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available <https://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.htm> [accessed 15 April 2021].

enquiries prior to the decision to deprive.²² These obligations under international law will be analysed in section B of this intervention.

9. **In decisions to deprive a person of nationality, Article 8 requires the Contracting States to conduct a careful and thorough assessment of whether the deprivation would be arbitrary. The decision must be in accordance with the law, including all international obligations applicable to the Contracting States (see section B), and the authorities must act diligently and expeditiously. Deprivation must be the minimum interference necessary to achieve a legitimate aim. The interveners emphasise the increased importance of ensuring that adequate procedural safeguards are in place during any procedure which may endanger an applicant's rights under the ECHR.**
10. An analysis of whether Article 8 has been breached requires consideration of the consequences of deprivation for the applicant.²³ In *Ghoumid and Others v. France*, the Court reiterated that arbitrary deprivation of nationality might impact the private life of the person concerned.²⁴ It held, however, that the decision to deprive the applicants of French nationality did not have the effect of rendering them stateless, as they already had another nationality (Moroccan for some applicants, Turkish for others).²⁵ It took into account that loss of French nationality did not automatically entail deportation from France: if a decision was taken against them that would result in expulsion from the territory, they would have access to procedures to assert their rights.²⁶ The Court observed in *K2 v. the United Kingdom* that the applicant would not be left stateless following deprivation of UK citizenship as he had Sudanese nationality, and that the interference with his private and family life caused by the deprivation of nationality was limited.²⁷ In these circumstances, the deprivation of nationality had been lawful under Article 8 ECHR. The Court only reached this conclusion, however, after being satisfied that the applicants had not been rendered stateless by the deprivation.²⁸
11. Where deprivation results in statelessness this will always have severe consequences for the individual. Stateless persons are often denied fundamental rights including access to employment, education, healthcare, civil and political rights. In *Hoti v. Croatia*, the Court reiterated that measures restricting the right to reside in a country may entail a violation of Article 8 ECHR if they create disproportionate consequences for the private and/or family life of the individuals concerned.²⁹ In that case, the Court emphasised the adverse consequences of statelessness, particularly as it affects the prospects of securing employment, access to healthcare or pension rights.³⁰ The Court in *Hoti* held that “the applicant’s situation is rather a specific situation of a stateless migrant who complains that the uncertainty of his situation and the impossibility to regularise his residence status [...] adversely affects his private life under Article 8 of the Convention.” The Court has emphasised in *Kurić and others v. Slovenia*³¹ that the applicants’ “erasure” from the Slovenian registration system left the stateless applicants in a state of legal limbo, and

²² UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5* (n 11), §45.

²³ *K2 v. the United Kingdom* (n 10), §49, §§62-63; *Ghoumid and others v. France* (n 3), §49.

²⁴ *Ghoumid and others v. France* (n 3), §43.

²⁵ *Ghoumid and others v. France* (n 3), §50.

²⁶ *Ghoumid and others v. France* (n 3), §50.

²⁷ *K2 v. the United Kingdom* (n 10), §62.

²⁸ *Ghoumid and others v. France* (n 3), §50, 59; *K2 v. the United Kingdom* (n 10), §62.

²⁹ *Hoti v. Croatia* (n 7), §122.

³⁰ *Hoti v. Croatia* (n 7), §117, 126.

³¹ *Kurić and others v. Slovenia*, application no. 26828/06, judgment of 26 June 2012.

therefore in a situation of vulnerability and insecurity.³² Persons at risk of statelessness are particularly vulnerable due to the severe impact of statelessness on the enjoyment of fundamental rights.³³

12. In assessing the impact that an arbitrary denial or deprivation of nationality may have on the private life of an individual,³⁴ the specific circumstances of the person must also be taken into consideration, as the same treatment can have different effects on persons in different situations, with different personal characteristics or with enhanced vulnerability.³⁵ Where it is foreseeable that the individual may be rendered stateless by the deprivation, the long term adverse repercussions that statelessness may have in the enjoyment of the person's fundamental rights must have significant weight in the deprivation decision.
13. **The assessment required by Article 8 of the consequences of the deprivation of nationality for the individual must take into account whether the applicant was rendered stateless or at risk of statelessness by the deprivation. A thorough assessment of the applicant's particular circumstances should be conducted by the Contracting State before imposing any measures which may affect the applicant's rights under the ECHR. This must include a full determination of the individual's nationality status and risk of statelessness before the authorities issue a decision on the deprivation of their nationality, in accordance with international law and guidance on the determination of statelessness (see section B).**

B. International and European legal standards relating to persons being deprived of nationality where the person is at risk of being made stateless

14. Article 53 ECHR requires States not to fall below the international standards of instruments to which they are a signatory when carrying out their substantive and procedural obligations under the ECHR. The United Kingdom has acceded to both the Convention Relating to the Status of Stateless Persons (1954 Convention) and the Convention on the Reduction of Statelessness (1961 Convention), which have also been widely ratified by Council of Europe Member States.³⁶
15. States parties to the 1961 Convention are required by Article 8(1) of the 1961 Convention not to deprive a person of their nationality if such deprivation would render the person stateless, save in the limited circumstances for which provision is made under Article 8(2) and (3) of that Convention. Articles 8(2) and 8(3) must be interpreted narrowly and in

³² *Kurić and others v. Slovenia* (n 31), §302.

³³ A detailed report of the impact of deprivation of nationality on the enjoyment of human rights is contained in UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 19 December 2011, A/HRC/19/43.

³⁴ *Slivenko and Others v. Latvia* [GC], application no. 48321/99, 9 October 2003.

³⁵ The AIRE Centre (Advice on Individual Rights in Europe), DCR (Dutch Council for Refugees) and ECRE (European Council on Refugees and Exiles), Written submissions on behalf of the interveners in *M.H. v. Serbia*, application no 62410/17, 4 March 2019, available at <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/M.H.%20v%20Serbia%20TPI.pdf> referring to *mutatis mutandis Saadi v. the United Kingdom* [GC], application no. 13229/03, 29 January 2008, §66; *Mohamad v. Greece*, application no. 70586/11, 11 December 2014, §44.

³⁶ At the time of writing, of the 47 Council of Europe Members States, 43 are party to the 1954 Convention (Cyprus, Estonia, Poland, and the Russian Federation are not yet party to the 1954 Convention), and 38 are party to the 1961 Convention (Cyprus, Estonia, Poland, the Russian Federation, Turkey, Greece, France, Slovenia, and Switzerland have not yet acceded to the 1961 Convention).

accordance with international human rights obligations.³⁷ Deprivation under Article 8(3) is restricted, including to cases where an individual acts in a manner “prejudicial to the vital interests of the Contracting State” under Article 8(3)(a)(ii). The use of the term “vital interests” in this exception must be interpreted as imposing a higher threshold than the generality of offences against national interests.³⁸ It applies to acts which are seriously prejudicial to functions of safeguarding the State’s integrity and external security, and protection of its constitutional foundations.³⁹ The exhaustive list of exceptions under Article 8(3) of the 1961 Convention is only available to States that have deposited a declaration to retain measures to deprive a person of their nationality, even where it would render that person stateless, on specific grounds allowed under Article 8(3). According to the same provision, such grounds for deprivation must also exist in the State’s national law at the time of signature, ratification or accession. The provision aims to “freeze” the legal framework applicable at that time,⁴⁰ therefore subsequent changes to national legislation must not expand the grounds for deprivation under Article 8(3). In accordance with Article 8(3)(a) of the 1961 Convention, the United Kingdom made a declaration to retain measures to deprive a naturalised person of their nationality on certain grounds.⁴¹

16. Deprivation of nationality has a significant impact on the enjoyment of civil, political, economic, social and cultural rights.⁴² Deprivation of nationality is generally arbitrary unless it serves a legitimate purpose, is the least intrusive means to achieve a legitimate aim and proportionate to such aim, and complies with the principles set out in section A.⁴³ Given the severity of the consequences where statelessness results, deprivation resulting in statelessness can only be considered proportionate in limited and narrow circumstances.⁴⁴ States should seek less intrusive means to achieving their legitimate aims (see paragraph 3), for example extradition or prosecution.⁴⁵ Article 8(4) of the 1961 Convention imposes procedural safeguards. Deprivation of nationality must be governed by law and the individual given a fair hearing.
17. Through a series of resolutions, the UN General Assembly gave the United Nations High Commissioner for Refugees (UNHCR) the formal mandate to prevent and reduce statelessness, as well as to protect the rights of stateless people.⁴⁶ To ensure compliance with international law, UNHCR makes clear that a Contracting State must, before issuing

³⁷ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, §12, 39; UNHCR, *Guidelines on Statelessness No. 5* (n 11), §§46-48.

³⁸ Bücken, L. and de Groot, R. (2018) ‘Deprivation of nationality under article 8 (3) of the 1961 Convention on the reduction of statelessness’, *Maastricht Journal of European and Comparative Law*, 25(1), pp. 38–51, available at <https://doi.org/10.1177/1023263X17754036> [accessed 15 April 2021].

³⁹ *ibid.*

⁴⁰ UNHCR, *Guidelines on Statelessness No. 5* (n 11), §§55.

⁴¹ Convention on the Reduction of Statelessness, New York, 30 August 1961, Declarations and Reservations, United Kingdom of Great Britain and Northern Ireland, as available on <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf> [accessed 15 April 2021].

⁴² A detailed report of the impact of deprivation of nationality on the enjoyment of human rights is contained in UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 19 December 2011, A/HRC/19/43.

⁴³ See paragraphs 9 and 13 of this submission. See also UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, §4; and UNHCR, *Guidelines on Statelessness No. 5* (n 11), §§62, 91-95.

⁴⁴ UNHCR, *Guidelines on Statelessness No. 5* (n 11), §95.

⁴⁵ On the principle of *aut dedere aut judicare*, see Arnell, P. (2020) ‘The legality of the citizenship deprivation of UK foreign terrorist fighters’, *ERA Forum* 21, pp. 395–412, available at <https://doi.org/10.1007/s12027-020-00615-9> at 5.5 [accessed 15 April 2021].

⁴⁶ See Executive Committee of the High Commissioner’s Programme, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) - 2006*, 6 October 2006, No. 106 (LVII), available at: <https://www.refworld.org/docid/453497302.html> [accessed 15 April 2021].

a deprivation order, conduct an assessment of the risk of statelessness. Whether an individual will be rendered stateless through withdrawal of nationality is a question of whether the individual is currently recognised as a national by any other State and has proof of another nationality.⁴⁷

18. In determining whether a person would be rendered stateless if deprived of their nationality, the Contracting State must refer to the definition of a stateless person in Article 1(1) of the 1954 Convention. According to this provision, the term stateless person means “a person who is not considered a national by any State under the operation of its law” and this definition forms part of customary international law.⁴⁸ States parties to the 1954 Convention have agreed to be bound by the definition of a stateless person in Article 1. The Contracting States must also take into consideration that the definition in Article 1 of the 1954 Convention is the internationally accepted definition of statelessness, and consider guidance on the interpretation of this definition.
19. UNHCR emphasises that the determination of whether the person is recognised as a national should not be based on the Contracting State’s interpretation of another State’s nationality laws, but rather be informed by consultations with and written confirmation from the State in question of the nationality status of the person concerned.⁴⁹ It is essential that these enquiries be made prior to the decision to deprive and that clear and precise information is sought from the State with which the person may have connections, to ensure that the individual would not be rendered stateless or at risk of statelessness by the deprivation.⁵⁰ The 2013 Report of the UN Secretary-General on human rights and arbitrary deprivation of nationality indicates that, when regulating the loss and deprivation of nationality, States ought to bear the burden of proving deprivation of nationality will not result in statelessness.⁵¹
20. What a State states in response to enquiries is not the end of an enquiry. Practice must also be considered. Statelessness is not assessed based only on the letter of the law, but is a “mixed question of fact and law” which requires an analysis of how the competent authorities apply the law in practice in a specific case.⁵² UNHCR’s guidance provides that, “where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country’s laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national”.⁵³

⁴⁷ UNHCR, *Guidelines on Statelessness No. 5* (n 11), §§44-45, 81.

⁴⁸ International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission, 2006 Vol. II (Part Two), <https://www.refworld.org/docid/525e7929d.html> [accessed 15 April 2021].

⁴⁹ UNHCR, *Guidelines on Statelessness No. 5* (n 11), §81. Previously, this Court has placed reliance on UNHCR guidelines, as seen in *M.S.S. v. Belgium and Greece*, application no. 30696/09, judgment of 21 January 2011, §295.

⁵⁰ UNHCR, *Guidelines on Statelessness No. 5* (n 11), §81; UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, §50.

⁵¹ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28. See *Kurić and others v. Slovenia* (n 31), §344; Travaux préparatoires for the 1954 Convention: summary record of the Second Conference of Plenipotentiaries, p. 26, cited in Nehemiah Robinson, *Convention relating to the Status of Stateless Persons: its history and interpretation*, a commentary, World Jewish Congress, 1955, available at <http://www.refworld.org/pdfid/4785f03d2.pdf> [accessed 15 April 2021]; *Yean and Bosic, Children v. The Dominican Republic*, Inter-American Court of Human Rights, 8 September 2005 §156(c).

⁵² UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, §23.

⁵³ *ibid.*, §37.

21. Some States have resorted to the concept of “*de facto* statelessness” to exclude stateless persons from the protection of the statelessness conventions but this is based on a misreading of the definition of statelessness. Under Article 1 of the 1954 Convention a person is considered stateless if not recognised by any State as a national “under the operation of its law”. The term encompasses an analysis of how the competent authorities apply the law in practice, therefore both the letter of the law and factual circumstances (e.g. arbitrary discriminatory practices of the competent authority) are relevant to the conclusion that a person is stateless.
22. This approach reflects the general principles of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provide that it is for each State to determine under its own law who are its nationals, and “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”.
23. The use of terms such as “*de facto* stateless”, to describe a person who should be considered stateless in accordance with a State’s law but is not in practice recognised as a national under the operation of that law, is not supported by international law and creates a risk that States will avoid their obligations towards stateless persons by wrongfully excluding them from the protection of the 1954 and 1961 Conventions. The relevant factor is whether the State recognises in practice the individual as its national, regardless of whether the authorities properly applied national legislation and complied with the rule of law. The aim and purpose of the statelessness conventions is the protection of stateless persons and prevention of statelessness, even when statelessness results from another State’s violation of national or international law. As UNHCR has clarified, “it is the subjective position of the other State that is critical in determining whether an individual is its national for the purposes of the stateless person definition”.⁵⁴
24. **To comply with its obligations under the 1954 and 1961 Conventions, applicable under Art. 53 ECHR to a consideration of Article 8 ECHR, a Contracting State must first assess whether statelessness would result from the deprivation of nationality before issuing a decision on the deprivation. Statelessness must be assessed based on the law of the State or States with which the person enjoys a relevant link and how the competent authorities in that State or those States apply the law in practice in the specific case. If statelessness would result, the Contracting State can deprive a person of nationality only where Articles 8(2) or 8(3) of the 1961 Convention apply. Such deprivation must not be arbitrary (see section A) and should amount to the minimum interference necessary to achieve a legitimate aim. The Contracting State must ensure procedural safeguards and a right to a fair trial under Article 8(4).**
25. The International Law Commission recognises that: “*Neither loss of nationality nor denationalization should lead to statelessness. In the case of denationalization in particular, there is a general obligation not to denationalize a citizen who does not have any other nationality*”.⁵⁵ The Principles on Deprivation of Nationality as a National

⁵⁴ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, §99.

⁵⁵ UN General Assembly, *Fourth report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur*, 24 March 2008, A/CN.4/594, available at: <https://www.refworld.org/docid/49997af51a.html> [accessed 15 April 2021], §29.

Security Measure⁵⁶ outline that States, as a basic rule, “*shall not deprive persons of nationality for the purpose of safeguarding national security*”.⁵⁷ This is subject to a narrow exception where there is a “*lawful conviction which meets international fair trial standards, and the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state*”.⁵⁸

26. The Universal Declaration of Human Rights (‘UDHR’) provides for the right to a nationality and prohibits arbitrary deprivation of nationality in Article 15. There is a consensus that these are fundamental principles of international law.⁵⁹ The UN Human Rights Committee has indicated that the notion of ‘arbitrariness’ must not be confined to or limited to ‘against the law’; it must be interpreted more broadly to include inappropriateness and injustice.⁶⁰ The UK is a party to the International Covenant on Civil and Political Rights (ICCPR), having ratified this international instrument in 1976.⁶¹ Two components can be distilled from this: procedural and substantive prohibitions, the latter including the emerging norm of a State’s duty to reduce and avoid statelessness.⁶²

⁵⁶ Principles on Deprivation of Nationality as a National Security Measure, available at <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality> [accessed 15 April 2021]. The Principles on Deprivation of Nationality as a National Security Measure were drafted by the Institute on Statelessness and Inclusion in collaboration with the Open Society Justice Initiative, “over a 30-month research and consultation period, with input from more than 60 leading experts in the fields of human rights, nationality and statelessness, counter-terrorism, refugee protection, child rights, migration and other related areas. The Principles restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice. They articulate the international law obligations of States and apply to all situations in which States take or consider taking steps to deprive a person of nationality as a national security measure”.

⁵⁷ *ibid.*, Principles 4 and 5.

⁵⁸ *ibid.*, Principle 4.

⁵⁹ Several courts have confirmed the fundamental nature of the right to a nationality. See e.g., *KV v Secretary of State for Home Department*, Court of Appeal of England and Wales, [2019] EWCA Civ 1796, para. 18; *Anudo Ochieng Anudo v Republic of Tanzania*, African Court on Human and Peoples’ Rights, application no. 012/2015, 22 March 2018, para. 76; and *Case of Expelled Dominicans and Haitians v Dominican Republic*, 28 August 2014, Inter-American Court of Human Rights, Series C No. 282, paras. 253 and 255. See also *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Reports 3, para. 91.

⁶⁰ *A. v. Australia*, communication no. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 Apr. 1997), para 9.2.

⁶¹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁶² Adjami, M. and Harrington, J. (2008), ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’, *Refugee Survey Quarterly*, Volume 27, Issue 3 pp. 93–109, available at <https://doi.org/10.1093/rsq/hdn047> [accessed 15 April 2021], pp. 100–104.