IN THE ADMINISTRATIVE COURT **CO/798/2020**

B E T W E E N:

THE QUEEN (on the application of SHAMIMA BEGUM)

Claimant

- and -

SPECIAL IMMIGRATION APPEALS COMMISSION

Respondent

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

- and -

(1) UN SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COMBATTING TERRORISM; (2) LIBERTY

Interveners

SKELETON ARGUMENT OF THE UN SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COMBATTING TERRORISM

A. Summary

1. These are the written submissions of the Intervener, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combatting Terrorism ("the UN Special Rapporteur"). The UN Special Rapporteur is grateful to the Court for the opportunity to make these written submissions.[1]

2. The UN Special Rapporteur's intervention focuses on a discrete issue of law raised by the Claimant in these proceedings. The Claimant challenges the Special Immigration Appeals Commission's ("SIAC's") determination regarding the Claimant's right to a fair and effective appeal. It is submitted that SIAC erred in its approach to statutory interpretation in several respects, including by reason of its failure to have due regard to applicable principles of

[1] This submission does not constitute a waiver, express or implied, of any privileges or immunities which the United Nations, the Office of the High Commissioner for Human Rights, or the Special Rapporteur enjoy under applicable international instruments, including the 1946 Convention on the Privileges and Immunities of the United Nations and recognised principles of international law.

international law.[2] The Claimant expressly invokes the prohibition against the arbitrary deprivation of nationality set out in Article 15(2) of the Universal Declaration of Human Rights ("UDHR").[3] The Secretary of State, for her part, contests both the extent of that prohibition and its relevance to SIAC's preliminary determination.[4]

3. On that basis, the UN Special Rapporteur understands there to be a dispute as to the scope and relevance of Article 15(2) of the UDHR and the prohibition contained in that provision. She seeks to assist the Court in its examination of this important issue by addressing the genesis, status and content of the UK's relevant public international law obligations.

B. The Mandate's interest in these proceedings

4. Professor Ní Aoláin was appointed as UN Special Rapporteur in 2017. The mandate of the UN Special Rapporteur is to gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while countering terrorism, and to report regularly to the Human Rights Council and General Assembly about, among other things, identified good policies and practices, as well as existing and emerging challenges and present recommendations on ways and means to overcome them. The mandate was created by the Commission on Human Rights (the predecessor of the Human Rights Council) in Resolution 2005/80 and has been regularly renewed by State consensus since then. The role of the mandate is to give concrete recommendations to States and other stakeholders on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The mandate also identifies, exchanges and promotes best practices on measures to counter terrorism that respect human rights and fundamental freedoms. In this context, the mandate holder has submitted *amicus curiae* briefs to national and regional courts on issues of human rights protection in the context of countering terrorism.

5. The UN Special Rapporteur has a direct interest, and specific expertise, in the issues raised in these proceedings. The mandate has consistently addressed the legal obligations that arise in respect of women and children associated with the Islamic State and other non-state groups operative in the northern Syrian Arab Republic and Iraq.[5] A range of human rights issues concerning women and children have been raised in interactive dialogues with the General Assembly and the Human Rights Council (in 2017, 2018 and 2019). The Special Rapporteur is a member of the UN Global Counter-Terrorism Coordination Compact supported by the UN Office of Counter-Terrorism and was a member of the Working Group that produced "*Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*" (2018). The UN Special Rapporteur has also taken a joint position with the SRSG-SVC, SRSG-CAC and SRSG-VAC on the rights of children and the

[2] Statement of Facts and Grounds ("SFG"), paras. 7(1), 41, 48.

[3] SFG, para. 48.

[4] Summary Grounds of Defence of the Secretary of State ("SGD"), para. 24.7 (including footnote 4).

[5] These include in her country assessments concerning France (A/HRC/40/52/Add.4), Belgium (A/HRC/40/52/Add.5) and Kazakhstan (A/HRC/43/46/Add.1).

responsibilities of States for women and children in the northern Syrian Arab Republic.

6. Consistent with her mandate, the UN Special Rapporteur is deeply concerned to ensure that States (including the UK) adhere to their international law obligations in cases concerning foreign fighters abroad, particularly those involving women and children. The prohibition of the arbitrary deprivation of citizenship provides essential protection to such individuals. The due process guarantees that are inherent in this prohibition are especially significant in cases (i) involving a risk of statelessness, (ii) in which the deprivation of nationality is made *in absentia* and (iii) in which the deprivation is made on the basis of broad and vague statutory language. The UN Special Rapporteur is particularly concerned to ensure that due process guarantees are upheld in those cases.

C. The prohibition on arbitrary deprivation of citizenship under Article 15(2) UDHR

7. International law has a well-established role in limiting States' regulation of nationality. Even though the definition and conferral of nationality is within the sovereign domain of States, international courts and tribunals have long recognised that international law imposes express limits on States' powers, both through customary international law ("CIL") and treaty obligations.[6] As the International Law Commission put it, "*the competence of States in this field may be exercised only within the limits set by international law*".[7] With the rapid development of international human rights law and the advent of nationality as a human right, the limitations on the State's exercise of these powers have become greater.[8]

8. The starting point as to the source of the prohibition on arbitrary deprivation of citizenship is the UDHR itself. Adopted by the UN General Assembly in 1948, the UDHR laid down "*a common standard of achievement for all people and all nations*".[9] Given that the status of nationality confers a collection of rights,[10] it is no surprise that the right to nationality has a prominent place within the UDHR (Article 15(1)). That right sits alongside the prohibition of its arbitrary deprivation (Article 15(2), which provides that "*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*"

9. The UK played an instrumental role in the introduction of the prohibition into the UDHR. Along with India, the UK made an early proposal to substitute the language of what is now

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[6] *Nationality Decrees Issued in Tunis and Morocco* (Permanent Court of International Justice), Ser. B, No. 4, Advisory Opinion, 7 February 1923, pp. 23-24; *Georges Pinson v United Mexican States* (1928) 5 UNRIAA 327, p. 364 (France-Mexico Claims Commission). See also Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) 179 LNTS 89, Article 1.

[7] ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries)' (1999) II(2) YBILC, p. 24, para. 3. See also 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009, para. 19.

[8] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84, 19 January 1984, Ser. A, No. 4, para. 32; *Case of the Girls Yean and Bosico v Dominican Republic*, Inter-American Court of Human Rights, Judgment, 8 September 2005, Ser. C, No. 130, para. 138.

[9] UDHR (adopted in UN GA Resolution 217(A) (III), UN Doc. A/810, p. 71), preamble.

[10] For this reason, it is often described as the 'right to have rights': see *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, [2019] 1 WLR 2070, paras 30 and 49; see also *Trop v Dulles* 356 US 86 (1958), pp. 101-102.

Article 15(1) with the language in Article 15(2) that encapsulates the prohibition (i.e., "*No one shall be arbitrarily deprived of his nationality*").[11] As early as June 1948, it was the UK's view that the prohibition on the arbitrary deprivation of nationality deserved inclusion in "*a declaration of general principles which were to be of significance for a long time to come*", instead of the right to nationality.[12] The Indian representative expressed the view that the right not to be deprived of nationality was "*the fundamental right*".[13] Consistent with these views, the Committee adopted that aspect of Article 15(2) unanimously.[14]

D. <u>The evolution of the prohibition under international law</u>

10. Following the adoption of Article 15(2) of the UDHR, the prohibition against the arbitrary deprivation of nationality has been variously expressed in a number of treaties. All of the principal global human rights treaties implicitly recognise the prohibition by proscribing discrimination on various grounds in respect of the right to nationality.[15] More recent treaties, such as the Convention on the Rights of Persons with Disabilities, recognise the prohibition in express terms.[16] A significant number of regional human rights treaties contain a similar prohibition, often replicating the language of Article 15(2) of the UDHR.[17] More specifically, the 1961 Convention on the Reduction of Statelessness, to which the UK is a party, explicitly prohibits a State from exercising powers of deprivation causing statelessness, unless certain conditions are met (including the right to a fair hearing, as

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[11] 'India and the United Kingdom: Proposed Amendments to the Draft Declaration of Human Rights', UN Doc. E/CN.4/99, 24 May 1948, p. 4 (Article 15). The United Kingdom also made a substantial contribution to the drafting of the two related treaties that followed Article 15(2) of the UDHR, namely the 1954 Convention on Statelessness and the 1961 Convention on the Reduction of Statelessness. See G. Goodwin-Gill, 'Mr Al-Jedda, Deprivation of Citizenship, and International Law' (2014), pp. 2-5, available online at: *https://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf*.

[12] 3rd Committee, 3rd Session, Summary Record of the 59th Meeting, UN Doc. E/CN.4/SR.59, 4 June 1948, p. 10 (Mr Wilson, UK). Mr Wilson explained "*States should not arbitrarily refuse to grant their protection to people who were their citizens.*"

[13] 3rd Committee, 3rd Session, Summary Record of the 60th Meeting, UN Doc. E/CN.4/SR.60, 4 June 1948, p. 4 (Mrs Mehta, India).

[14] 3rd Committee, 3rd Session, 124th Meeting, UN Doc. A/C.3/SR.124, 6 November 1948, p. 361 (note that, at that time, Article 15 was numbered as Article 13).

[15] See Convention on the Nationality of Married Women (1957) 309 UNTS 65, Articles 1-2; International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195, Article 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women (1979) 1249 UNTS 13, Article 9(1); Convention on the Rights of the Child (1989) 1577 UNTS 3, Article 8(1). See also International Covenant on Civil and Political Rights (1966) 999 UNTS 171, Article 24(3).

[16] Convention on the Rights of Persons with Disabilities (2006) 2515 UNTS 3, Article 18(1)(" ... *ensuring that persons with disabilities: … (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability.*")

[17] American Convention on Human Rights (1969), Article 20(3) ("*No one shall be arbitrarily deprived of his nationality or of the right to change it*"); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), Article 24(2) ("*No one shall be arbitrarily deprived of his citizenship or of the right to change it*"); European Convention on Nationality (1997), Article 4(c) ("*No one should be arbitrarily deprived of his or her nationality*"); Revised Arab Charter on Human Rights (2004), Article 29(1) ("*Every person has the right to a nationality, and no citizen shall be deprived of his nationality without a legally valid reason*"); ASEAN Human Rights Declaration (2012), Article 18 ("*No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality*"). See also African Commission on Human and Peoples' Rights, 234: Resolution on the Right to Nationality, 23 April 2013.

discussed further below).[18]

11. Beyond this treaty framework, international governmental organisations have also repeatedly confirmed the prohibition against the arbitrary deprivation of nationality. The UN has regularly done so, including by way of resolutions of the General Assembly, the Human Rights Council and its predecessor the UN Commission on Human Rights.[19] The UN Secretary General has also issued multiple reports dedicated to the subject.[20] The issue is regularly revisited given the UN's deep concern that the arbitrary deprivation of nationality may impede an individual's full enjoyment of their human rights.[21] The prohibition has also been examined and upheld by the International Law Commission.[22]

E. <u>The status of the prohibition</u>

12. The UN Special Rapporteur considers that the prohibition against the arbitrary deprivation of nationality encapsulated in Article 15(2) of the UDHR is a principle of CIL. As this Court will recall, CIL is a recognised source of international law derived from State practice and its acceptance as law (*opinio juris*).[23] There are several indicators that this requirement is satisfied.

13. <u>First</u>, the relevant part of Article 15(2) of the UDHR was introduced by the UK and India on the basis that it was a "*general principle*" and a "*fundamental right*" (§9 above). It was unanimously adopted. Although non-binding, the UDHR's "*fundamental principles*" (such as

[18] Convention on the Reduction of Statelessness (1961) 989 UNTS 175, Article 8(1)-(4). Note that the UK made a declaration under both Article 8(3)(a)(i) and (ii) of the Convention, which does not, for the avoidance of doubt, qualify its due process obligations under Article 8(4): see UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 73.

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

[20] See, e.g., 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009; 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009; 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc/ A/HRC/25/28, 19 December 2013.

[21] See, e.g., UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012, para. 6.

[22] ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries)' (1999) II(2) YBILC, p. 37 (Article 16); ILC, 'Draft Articles on the Expulsion of Aliens (with commentaries)' (2014) II(2) YBILC, p. 32 (Article 8), commentary para. 1.

[23] See *R (Jiminez) v First-tier Tribunal* [2019] EWCA Civ 51, [2019] 1 WLR 2956, para. 56 ("*to establish the existence of a rule of customary international law it is necessary to demonstrate a general state practice that is accepted as law (opinio juris)*"). See further ILC, 'Draft conclusions on identification of customary international law (with commentaries)' (2018) II(2) YBILC, pp. 124-125; Statute of the International Court of Justice, Article 38(1)(b) ("*international custom, as evidence of a general practice accepted as law*").

this one) are recognised to be customary in nature.[24]

14. Secondly, the consistent inclusion of the prohibition in global and regional human rights treaties provides further support for the conclusion that it constitutes a principle of CIL. Not only do those treaties demonstrate State practice across almost every continent, they also evidence *opinio juris* by reflecting States' repeated recognition of the normative force and binding character of the prohibition. If the UDHR itself did not crystallise custom, the treaties that followed it certainly did.

15. Thirdly, the prohibition has been recognised as customary by international courts,[25] individual judges,[26] and UN bodies.[27] The UN General Assembly, in particular, has characterised it as a "*fundamental principle of international law*" [28] in a resolution which, having been adopted without objection, constitutes important evidence of both State practice and *opinio juris.* As one academic concluded after an extensive survey of the law, "*the prohibition of arbitrary deprivation of nationality is now a well-established customary norm of international law*".[29]

F. The content of the prohibition

16. There are two central words on which the interpretation of the provision depends: "*arbitrary*" and "*deprivation*".

17. The reference to "*deprivation*" is straightforward. It implies an act of taking without the

[24] See *Tehran Hostages Case (United States v Iran)* [1980] ICJ Rep. 3, p. 42, para. 91, which applies the UDHR's "*fundamental principles*" as law.

[25] Eritrea-Ethiopia Claims Commission, Partial Award (Civilian Claims – Eritrea's Claims 15, 16, 23 and 27-32) (2004) 26 UNRIAA 195, para. 57 (the Commission accepted that the rules cited, including Article 15.2 of the UDHR, were customary); *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84, 19 January 1984, Ser. A, No. 4, paras 33-34 (the Court referred to Article 15 of the UDHR in its recitation of "*international law*" on the right to nationality); *Case of Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights, Judgment, 28 August 2014, Ser. C, No. 282, para. 253 (referencing the "*fundamental right of the human person*" established by instruments including the UDHR); see also *Anudo Ochieng Naudo v United Republic of Tanzania*, African Court on Human and Peoples' Rights, Judgment, 22 March 2018, para. 76 (regarding the status of the UDHR as customary generally, in the context of considering Article 15(2)).

[26] *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* [1987] ICJ Rep. 18, p. 173 (Dissenting Opinion of Judge Evensen, citing Article 15.2 of the UDHR as one of the "*basic principles of law spelt out in the ... Declaration*"); Judge J. Crawford (ed), *Brownlie's Principles of Public International Law* (2019), p. 508, who accepts that there is "*some basis for holding it to be a rule of customary international law*". As regards nationality more generally, see *Nottebohm Case* [1955] ICJ Rep. 4, p. 63 (Dissenting Opinion of Judge ad hoc Guggenheim referred to the "*basic principle embodied in Article 15(1) of the Universal Declaration of Human Rights*").

[27] See, e.g., 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 48; UN Counter-Terrorism Implementation Task Force, 'Guidance to States on human rights-compliant responses to the threat posed by foreign fighters', 2018, para. 40 ("*The prohibition of arbitrary deprivation of nationality has been widely recognized as a norm of customary international law*"); UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 85 (referring to the "*strong international consensus that the right to nationality, and relatedly, the prohibition of arbitrary deprivation of nationality are fundamental principles of international law*").

[28] UNGA, Resolution 50/152, UN Doc. A/RES/50/152, 9 February 1996, para. 16.

[29] T. Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' (2015) *Hungarian Yearbook of International Law and European Law* 67, p. 74; see also A. Edwards, 'The Meaning of Nationality' in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law* (2014), pp. 25-26.

consent or request of the person concerned, and as such, broadly encompasses all acts of State-sponsored denaturalisation.[30]

18. The reference to "*arbitrary*" is more complex, but it does have particular meaning in international law.[31] As the International Court of Justice has explained, arbitrariness and unlawfulness are not equivalent concepts. Arbitrariness is "*not so much something opposed to a rule of law, as something opposed to the rule of law … it is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety*".[32] In the human rights context, the standard aims to ensure that even 'lawful' interference with rights is consistent with the provisions, aims and objectives of the relevant law, and above all, is reasonable.[33] Arbitrariness thus contains both substantive and procedural aspects.

19. The key aspects of arbitrariness in the context of the prohibition against the arbitrary deprivation of nationality can be characterised as follows:

(1) The deprivation of nationality must conform to the law – both to its letter and its object (so as to avoid an outcome that is unjust, illegitimate or unpredictable).[34] This includes the rules regarding deprivations rendering a person stateless, where the 1961 Convention is applicable,[35] or where statelessness is independently relevant to the arbitrariness assessment.[36]

(2) The deprivation must serve a legitimate purpose that is consistent with international law and must be proportionate to the interest that the State seeks to protect.[37] This means, for example, that, as set out by the International Law Commission, the State is not justified in depriving a person of nationality for the sole purpose of expelling

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[30] 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 49.

[31] It has been described as a general principle of international law: see J. Stone. 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment' (2012) 25(1) *Leiden Journal of International Law*, pp. 85-87.

[32] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep. 15, para. 128 (emphasis added). This lack of equivalence between unlawfulness and arbitrariness was specifically recognised in the drafting history of Article 15(2) of the UDHR: the majority of State representatives took the view that a person could neither be deprived of nationality in breach of existing laws, nor on the basis of laws that operated arbitrarily: I. Ziemele and G. Schram, 'Article 15' in. A. Eide, G. Alfredson (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999), pp. 302-303.

[33] UN Human Rights Committee, 'CCPR General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)' (1988), para. 4.

[34] *Ibid*; 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009, paras 24-25. See, e.g., *Ivcher Bronstein v Peru*, Inter-American Court of Human Rights, Judgment, 6 February 2001, Ser. C, No. 74, para. 95.

[35] See, e.g., 1961 Convention on the Reduction of Statelessness, Article 8(1). As noted at footnote 18 above, deprivation resulting in statelessness is permitted under the 1961 Convention in certain limited circumstances.

[36] See, e.g., Eritrea-Ethiopia Claims Commission, Partial Award (Civilian Claims – Eritrea's Claims 15, 16, 23 and 27-32) (2004) 26 UNRIAA 195, paras 60, 62, where statelessness was a factor relevant to the Commission's analysis.

[37] 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 49; 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009, para. 25.

him or her.[38] Nor would deprivation for the purpose of denying a national entry into the territory be permissible, given that nationals have the right, enshrined in Article 13(2) of the UDHR, to return to their country of nationality. Deprivation of nationality on discriminatory grounds would also be arbitrary by reason of this principle.[39]

(3) Finally, and most significantly in the context of the present proceedings, sufficient procedural guarantees and safeguards must be in place to protect against the risk of arbitrariness in the decision-making process. In other words, due process must be respected at all times, as elaborated below.

20. The UN has frequently underlined States' obligation to observe what it terms "*minimum procedural standards*".[40] Those standards are "*essential to prevent abuse of the law*".[41] They apply in all cases, whether or not statelessness is involved.[42] There are two minimum requirements: first, the State must issue reasons for its deprivation decision in writing, and secondly, the State must grant the individual concerned a right to an independent review of that decision by a judicial or administrative body.[43] The second of those rights finds expression in Article 8(4) of the 1961 Convention ("*the right to a fair hearing by a court or other independent body*").[44]

21. As to the content of that guarantee, the following propositions emerge from the case-law, UN materials and commentary:

(1) A fair and effective hearing requires a "*meaningful review of the substantive issues*".[45]

(2) The individual concerned must have, at the very least, sufficient information "*meaningfully*" to contest the facts and arguments of the State in court, in the light of

[38] ILC, 'Draft Articles on the Expulsion of Aliens (with commentaries)' (2014) II(2) YBILC, p. 13 (Article 8), commentary, para. 1. See also UN Human Rights Committee, 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)' (1999), para. 21.

[39] See footnote 15 above.

[40] 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009, paras 43 and 63; UN HRC, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/RES/13/2, 24 March 2010, para. 10; UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012, para. 10.

[41] 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009, para. 43.

[42] UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 100.

[43] 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 67.

[44] See also Article 12 of the European Convention on Nationality (deprivation decisions must "*be open to an administrative or judicial review in conformity with [the State's] internal law*"). The UK is not a party to this Convention, but this provision reflects the CIL position by which the UK is bound. See further ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries)' (1999) II(2) YBILC, p. 38 (Article 17).

[45] ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries)' (1999) II(2) YBILC, p. 38 (Article 17), commentary, para. 2; cited with apparent approval in 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 57.

the seriousness of the consequences that he/she faces.[46]

(3) The decision-making process must be independent and objective.[47]

(4) The individual will ordinarily be entitled to participate personally, arguing his/her case "*in front of a court or other independent body*".[48]

(5) Cases in which deprivation decisions are made while the individual is *in absentia* pose particular risks. Those individuals will be "*unlikely to have practical or effective access to a fair hearing*". If, however, a State is minded to proceed to deprive nationality in such circumstances, it should seek a court's endorsement that the deprivation of nationality is strictly necessary to avoid national security risks, and that those risks cannot be mitigated by a more proportionate step.[49]

(6) In cases involving the State's reliance on the individual's possession of another nationality, the State should seek to obtain written confirmation of the individual's nationality from the other State concerned.[50]

(7) The effect of the State's deprivation determination should be suspended until the appeal process has concluded.[51]

22. The UN Special Rapporteur observes, for completeness, that any breach of the due process guarantees provided by CIL requires an effective remedy.[52] This entails both a right to restoration of nationality and to compensation, where appropriate.[53]

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[46] UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 74; Eritrea-Ethiopia Claims Commission, Partial Award (Civilian Claims – Eritrea's Claims 15, 16, 23 and 27-32) (2004) 26 UNRIAA 195, para. 71 ("*Deprivation of nationality is a serious matter with important and lasting consequences for those affected. In principle, it should follow procedures in which affected persons are adequately informed regarding the proceedings, can present their cases to an objective decision maker, and can seek objective outside review.*")

[47] Eritrea-Ethiopia Claims Commission, Partial Award (Civilian Claims – Eritrea's Claims 15, 16, 23 and 27-32) (2004) 26 UNRIAA 195, para. 71.

[48] UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 74 ("*contest the facts and arguments … in front of a court or other independent body*"); *Anudo Ochieng Naudo v United Republic of Tanzania*, African Court on Human and Peoples' Rights, Judgment, 22 March 2018, para. 79 ("*allowing the concerned to defend himself before an international body*").

[49] UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 104. See further Concluding Observations on the Netherlands (CCPR/C/NLD/CO/5), 22 August 2019, paras 50-51.

[50] UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), paras 81 and 103.

[51] 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc/ A/HRC/25/28, 19 December 2013, para. 33.

[52] 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009, para. 68; 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc/ A/HRC/25/28, 19 December 2013, para. 34; UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020), para. 106. See further ICCPR, Article 2(3).

[53] UN HRC, 'Human rights and arbitrary deprivation of nationality', Resolution 7/10, 27 March 2008, para. 7; UN HRC, 'Human rights and arbitrary deprivation of nationality', Resolution 10/13, 26 March 2009, para. 9; footnote 52 above. See, e.g., *Case of Expelled Dominicans and Haitians v Dominican Republic*, Inter-American Court of Human Rights, 28 August 2014, Judgment, Ser. C, No. 282, para. 444 (duty to make reparation under CIL), 469 (requirement for domestic remedial measures to be taken to protect the right to nationality) and 479-482 (compensation for loss).

G. Application of the prohibition in UK domestic law

23. Against the background of that analysis, it then falls to the Court to apply the prohibition against the arbitrary deprivation of nationality as relevant to Ground 1 in these proceedings. However, the UN Special Rapporteur makes one additional observation as to the relevance of a rule of international law in domestic proceedings, which may assist the Court.

24. The Secretary of State appears to have assumed that the principles contained in Article 15(2) of the UDHR and Article 8(4) of the 1961 Convention are irrelevant, on the basis neither of them rises to the status of an incorporated treaty.[54] However, an incorporated treaty is not the only source of international law relevant for purposes of interpretation of domestic law. As is well-settled law, "*there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation*",[55] including obligations arising in treaties where they have not been incorporated in domestic law. This is because domestic law should ordinarily develop in harmony with the UK's international obligations.[56] It is principally on the basis of that presumption that the prohibition against arbitrary deprivation of nationality – a rule of international law binding on the UK – is engaged.

25. The UN Special Rapporteur hopes that these submissions will assist the Court in addressing the public international law issues before it. She respectfully remains at the Court's disposal in the event that any further assistance can be usefully provided.

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29 May 2020

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[54] SGD, footnote 4. For the avoidance of any doubt, the UDHR is not a treaty, whether unincorporated or otherwise.

[55] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, para. 27 (Lord Hoffmann). See also *Assange v Sweden* [2012] UKSC 22, [2012] 2 AC 471, paras 10 (Lord Phillips), 98 (Lord Brown); 112 (Lord Kerr); 122 (Lord Dyson).

[56] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, para. 241 (Lord Kerr). See also *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, para. 150 (Lord Mance). See also *R v Bow Street (Ex parte Pinochet) (No. 3)* [2000] 1 AC 147, 276 (Lord Millett) regarding the relationship between common law and CIL ("*Customary international law is part of the common law.*")