IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2020/0156**
ON APPEAL FROM THE COURT OF APPEAL **UKSC 2020/0157**
(CIVIL DIVISION) **UKSC 2020/0158**

King, Flaux and Singh LJJ
[2020] EWCA Civ 918

B E T W E E N:

SHAMIMA BEGUM

Respondent/Cross-Appeal Appellant

- and -

[SPECIAL IMMIGRATION APPEALS COMMISSION]

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Cross-Appeal Respondent

- and -

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

(2) THE NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")

(3) JUSTICE

Interveners

WRITTEN CASE OF THE UN SPECIAL RAPPORTEUR

A. Introduction

1. These are the written submissions of the First Intervener, the UN Special Rapporteur.[1] The UN Special Rapporteur is grateful to the Court for the opportunity to make these written submissions.[2]

[1] The expertise of Professor Ní Aoláin, the UN Special Rapporteur, and the scope of her mandate are explained in the Application of the UN Special Rapporteur for Permission to Intervene in the Supreme Court at §§4-6.

[2] This submission is provided by the UN Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations.

2. The UN Special Rapporteur's intervention focuses on a discrete issue of public international law relevant to the fair and effective appeal issue, raised in the appeal and the cross-appeal.[3]

3. Before the Divisional Court, the Respondent challenged SIAC's determination that her deprivation appeal should not be allowed, despite its finding that she lacked recourse to a fair and effective appeal. The Respondent 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 international law. The Respondent expressly invoked the prohibition against the arbitrary deprivation of nationality in Article 15(2) of the Universal Declaration of Human Rights ("**UDHR**").[4] The Secretary of State, for her part, denied the relevance of the prohibition.

4. In the proceedings below, in which the UN Special Rapporteur intervened,[5] Flaux LJ held that the safeguards provided by international law did not add anything to domestic public law principles. In any event, he accepted the Appellant's submissions that neither the deprivation decision nor the statutory scheme were arbitrary.[6] In this regard, Flaux LJ observed that "*nothing in the principles of international law relied upon dictates as the only answer to Ms Begum's appeal not being fair and effective that her deprivation appeal should be allowed, if there are other ways in which the unfairness and lack of effectiveness can be addressed*".[7] Ultimately, however, he held that allowing the Respondent's appeals in respect of the refusal of leave to enter was the only way in which to ensure a fair and effective appeal.[8] This determination is now the subject of Ground 1 of the appeal and the linked cross-appeal.

5. Before this Court, the Respondent continues to rely on Article 15(2) of the UDHR in connection with the proper interpretation of the statutory scheme. The Appellant continues to contend that international law adds nothing to the interpretative exercise.[9] There thus

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Authorisation for the positions and views expressed by the UN Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

[3] Statement of Facts and Issues, §§30, 31(a) and 32.

[4] Court of Appeal/Divisional Court judgment, §65.

[5] The UN Special Rapporteur's submissions were described as by the Court as "*helpful*": Court of Appeal/Divisional Court judgment, §108.

[6] *Ibid*, §109.

[7] *Ibid.*

[8] *Ibid*, §118.

[9] Respondent's Application for Permission to Cross-Appeal, §§40-41; Appellant's Written Case, §84.

remains a dispute as to the applicability and content of Article 15(2) UDHR. The UN Special Rapporteur seeks to assist the Court by addressing (i) the relevance of Article 15(2) as a rule of customary international law ("**CIL**"); (ii) the genesis and status of Article 15(2); and (iii) the content of the prohibition, focusing on its procedural safeguards.

B. The relevance of Article 15(2) of the UDHR to the issues raised in this appeal

6. The prohibition on arbitrary deprivation of citizenship enshrined in Article 15(2) UDHR is a relevant source of law on the basis that it is a rule of CIL. CIL is relevant for two reasons:

7. First, as the Respondent has contended,[10] it is well-settled in English law that "*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*",[11] including a principle of CIL. This strong presumption exists because domestic law should ordinarily develop in harmony with the UK's international obligations.[12]

8. Secondly, CIL is part of the common law,[13] although the precise basis and extent of that incorporation requires clarification.[14] At the very least, the "*presumption … is that CIL, once established can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt*".[15] This latter proposition is accepted by the Appellant.[16]

C. The prohibition on arbitrary deprivation of citizenship

The genesis of the prohibition: Article 15(2) of the UDHR

9. Adopted by the UN General Assembly in 1948, the UDHR laid down "*a common standard of achievement for all people and all nations*".[17] The right to nationality has a prominent place within

[10] Court of Appeal/Divisional Court judgment, §65.

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

[12] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, §241 (Lord Kerr).

[13] See, e.g., the high authorities collected at *R v Jones (Margaret)* [2007] 1 AC 136, [2006] UKHL 16, §11 (with Lord Bingham noting that this proposition may require qualification).

[14] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, §§146-149 (Lord Mance).

[15] *Ibid*, §150.

[16] Court of Appeal/Divisional Court judgment, §85.

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

the UDHR (Article 15(1)), which reflects the fact that the status of nationality confers a collection of rights (and for that reason is it is often described as the 'right to have rights').[18] The right to nationality 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.*"

10. 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 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*").[19] 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.[20] The Indian representative expressed the view that the right not to be deprived of nationality was "*the fundamental right*".[21] Consistent with these views, the Committee adopted that aspect of Article 15(2) unanimously.[22]

The evolution of the prohibition under international law

11. Following the adoption of Article 15(2) 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.[23] More recent treaties, such as the Convention on the Rights of Persons with Disabilities, recognise the

[18] *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, [2019] 1 WLR 2070, §§30 and 49.

[19] '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.

[20] 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.*"

[21] 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).

[22] 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).

[23] 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 ("**ICCPR**") (1966) 999 UNTS 171, Article 24(3). See also in the rule against non-discrimination in the context of IHL: ICRC, Customary IHL Database, Rule 88 (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule88).

prohibition in express terms.[24] A significant number of regional human rights treaties contain a similar prohibition, often replicating the language of Article 15(2) UDHR.[25] More specifically, the 1961 Convention on the Reduction of Statelessness ("**1961 Convention**"), 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 discussed further below).[26]

12. Beyond this treaty framework, international governmental organisations have 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.[27] The prohibition has also been examined and upheld by the International Law Commission.[28]

The status of the prohibition

13. The UN Special Rapporteur considers that the prohibition against the arbitrary deprivation of nationality encapsulated in Article 15(2) of the UDHR is a rule 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*).[29] There are several indicators that this requirement is met.

14. First, 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*" (§10 above). It was

[24] Convention on the Rights of Persons with Disabilities (2006) 2515 UNTS 3, Article 18(1).

[25] American Convention on Human Rights (1969), Article 20(3); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), Article 24(2); European Convention on Nationality (1997), Article 4(c); Revised Arab Charter on Human Rights (2004), Article 29(1); ASEAN Human Rights Declaration (2012), Article 18. See also African Commission on Human and Peoples' Rights, 234: Resolution on the Right to Nationality, 23 April 2013.

[26] 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. This does not qualify its due process obligations under Article 8(4): see UNHCR, 'UNHCR Guidelines on Statelessness No. 5' (May 2020) ("**UNHCR 2020 Guidelines**"), §73.

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

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

[29] See *R (Jiminez) v First-tier Tribunal* [2019] EWCA Civ 51, [2019] 1 WLR 2956, §56.

unanimously adopted. Although non-binding, the UDHR's "*fundamental principles*" (such as this one) are recognised to be customary in nature.[30]

15. 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.

16. Thirdly, the prohibition has been recognised as customary by international courts,[31] individual judges,[32] and UN bodies.[33] The UN General Assembly, in particular, has characterised it as a "*fundamental principle of international law*" [34] 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*".[35]

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

[31] Eritrea-Ethiopia Claims Commission, Partial Award (Civilian Claims – Eritrea's Claims 15, 16, 23 and 27-32) (2004) 26 UNRIAA 195 ("**Eritrea-Ethiopia Partial Award**"), §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, §§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 ("***Case of Expelled Dominicans***"), §253 (referencing the "*fundamental right of the human person*" established by instruments including the UDHR); see also *Anudo Ochieng Naudo v United Republic of Tanzania*, African Court on Human and Peoples' Rights, Judgment, 22 March 2018 ("***Naudo v Tanzania***"), §76 (regarding the status of the UDHR as customary generally in the context of Article 15(2)).

[32] *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*").

[33] See, e.g., 'Arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/10/34, 26 January 2009 ("**01/2009 UNSG Report"**), §48; UN Counter-Terrorism Implementation Task Force, 'Guidance to States on human rights-compliant responses to the threat posed by foreign fighters', 2018, §40 ("*The prohibition of arbitrary deprivation of nationality has been widely recognized as a norm of customary international law*"); UNHCR 2020 Guidelines, §85 (referring to the "*strong international consensus that the right to nationality, and relatedly, the prohibition of arbitrary deprivation of nationality are fundamental principles of international law*").

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

[35] 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.

D. The content of the prohibition on arbitrary deprivation of citizenship

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

    (1) The reference to "*deprivation*" is straightforward. It implies an act of taking without the consent or request of the person concerned, and as such, broadly encompasses all acts of State-sponsored denaturalisation.[36] Naturally, that consent must be meaningful.

    (2) The reference to "*arbitrary*" is more complex, but it does have particular meaning in international law.[37] 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*".[38] In the human rights context, the standard aims to ensure that even 'lawful' interference with rights is consistent with the content and objectives of the relevant law, and above all, is reasonable.[39] Arbitrariness thus contains both substantive and procedural aspects.

18. 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).[40] This includes the rules regarding deprivations rendering a person stateless, where the 1961

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[36] 01/2009 UNSG Report, §49.

[37] 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*, p. 85-87.

[38] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep. 15, §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.

[39] 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), §4.

[40] *Ibid*; 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc. A/HRC/13/34, 14 December 2009 ("**12/2009 UNSG Report**"), §§24-25. See, e.g., *Ivcher Bronstein v Peru*, Inter-American Court of Human Rights, Judgment, 6 February 2001, Ser. C, No. 74, §95.

Convention is applicable,[41] or where statelessness is independently relevant.[42]

(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.[43] By way of illustration, deprivation of nationality on discriminatory grounds would be arbitrary by reason of this principle.[44] Nor is the State is justified in depriving a person of nationality for the sole purpose of expulsion[45] or denial of entry, given that every individual has the right to return to his/her country.[46] Significantly in the context of these proceedings, it must be appreciated that the right to return is a self-standing fundamental right, distinct from the right not to be arbitrarily deprived of citizenship. As such, the right to return cannot be presumed to be automatically extinguished through 'de-nationalisation'. It, too, must be respected.

(3) Finally, and also very 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.

E. Procedural safeguards required by CIL

19. The UN has frequently underlined States' obligation to observe "*minimum procedural standards*".[47] Those standards are "*essential to prevent abuse of the law*".[48] They apply in all cases, whether or not statelessness is involved.[49] There are two minimum requirements: first, the State must issue reasons for its deprivation decision in writing, and secondly, the State must

[41] See, e.g., 1961 Convention, Article 8(1).

[42] See, e.g., Eritrea-Ethiopia Partial Award, §§60, 62, where statelessness was relevant to the Commission's analysis.

[43] 01/2009 UNSG Report, §49; 12/2009 UNSG Report, §25. See the heightened standard in Article 8(3)(a)(i) of the 1961 Convention (deprivation on the basis of conduct seriously prejudicial to the State's vital interest).

[44] See footnote 23 above.

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

[46] See Article 13(2) of the UDHR and Article 12(4) of the ICCPR. The Human Rights Committee explained that the reference to "*his country*" in Article 12(4) "*is broader than the concept of 'country of his nationality*"', and applies, for example, to "*an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien*": UN HRC, 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)', (1999), §20.

[47] 12/2009 UNSG Report, §§43 and 63; UN HRC, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/RES/13/2, 24 March 2010, §10; UN HRC, 'Human rights and arbitrary deprivation of nationality', UN Doc. A/HRC/RES/20/5, 16 July 2012, §10.

[48] 12/2009 UNSG Report, §43.

[49] UNHCR 2020 Guidelines, §100.

grant the individual concerned a right to an independent review of that decision by a judicial or administrative body.[50] 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*").[51]

20. As to the content of the right of independent review, 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*".[52]

(2) The individual concerned must have, at the very least, sufficient information "*meaningfully*" to contest the facts and arguments of the State in court.[53]

(3) The decision-making process must be independent and objective.[54]

(4) The individual must be entitled to participate effectively in the proceedings. This usually entails the individual's personal participation (i.e., by arguing his/her case "*in front of a court or other independent body*"[55]). It also, at a minimum, requires participation in conditions of safety and security, and without intimidation.

(5) In cases involving the individual's possession of another nationality, the State should seek to obtain written confirmation of nationality from the other State concerned.[56]

(6) The effect of the State's deprivation determination should be suspended until the appeal process has concluded.[57]

21. The UNHCR has specifically recognised that cases in which deprivation decisions are made

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[50] 01/2009 UNSG Report, §67.

[51] 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, p. 38 (Article 17).

[52] ILC Draft Articles on Nationality, p. 38 (Article 17), commentary, §2; cited with apparent approval in 01/2009 UNSG Report, §57.

[53] UNHCR 2020 Guidelines, §74; Eritrea-Ethiopia Partial Award, §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.*")

[54] Eritrea-Ethiopia Partial Award, §71.

[55] UNHCR 2020 Guidelines, §74 ("*contest the facts and arguments … in front of a court or other independent body*"); *Naudo v Tanzania*, , §79 ("*allowing the concerned to defend himself before an international body*").

[56] UNHCR 2020 Guidelines, §§81 and 103.

[57] 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', UN Doc/ A/HRC/25/28, 19 December 2013 ("**2013 UNSG Report**"), §33.

while the individual is *in absentia* – such as that of the Respondent – pose particular risks. This is because those individuals will be "*unlikely to have practical or effective access to a fair hearing*".[58] If, however, a State is minded to deprive nationality in such circumstances:

> "*it should seek a court's endorsement that deprivation of nationality in absentia is strictly necessary to avoid risks to national security posed specifically by the presence of the person concerned within the State, and that such risks cannot be mitigated through alternate means in accordance with the requirement that deprivation of nationality be a measure proportionate to a State's legitimate aims.*"[59]

22. At the very least, one would expect the State to explain to the court precisely why it is that the national security risks said to be posed by the individual cannot be mitigated by other measures that allow the above procedural and substantive safeguards to be respected.

23. For the avoidance of any doubt, the consequence of any failure by the State to accord the individual an independent review meeting this standard is that the deprivation decision is arbitrary and in breach of CIL. As a result, to the extent that the Respondent is denied this right, her deprivation of citizenship is arbitrary and in breach of CIL (cf Flaux LJ, § 109).

F. <u>Consequences of an arbitrary deprivation of citizenship</u>

24. Upon any breach of the prohibition of arbitrary deprivation, the principles of CIL require specific action to be taken (cf Flaux LJ at §109, quoted at §4 above). Any breach of the due process guarantees provided by CIL requires an effective remedy.[60] At the very least, this remedy must include restoration of nationality, as two UN bodies have recognised.[61] In appropriate circumstances, the remedy will include compensation.[62]

TESSA GREGORY **GUGLIELMO VERDIRAME QC**
TOM SHORT **JASON POBJOY**
Leigh Day **BELINDA McRAE**
26 October 2020

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[58] UNHCR 2020 Guidelines, §104.

[59] *Ibid.*

[60] 01/2009 UNSG Report, §68; 2013 UNSC Report, §34; UNHCR 2020 Guidelines, §106. See further ICCPR, Article 2(3) and ILC's Draft Articles on State Responsibility, Article 31.

[61] UN HRC, 'Human rights and arbitrary deprivation of nationality', Resolution 10/13, 26 March 2009, §9; UNHCR 2020 Guidelines, §107.

[62] See, e.g., *Case of Expelled Dominicans*, §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).