In The Supreme Court of the United Kingdom

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND AND WALES)

B E T W E E N:

B2 **Applicant**

- and -

Secretary of State for the Home Department **Respondent**

SUBMISSIONS OF THE OPEN SOCIETY JUSTICE INITIATIVE IN SUPPORT OF APPLICATION FOR PERMISSION TO APPEAL

I. INTRODUCTION

1. The judgment of the Court of Appeal in this case determined an important issue of international law:

   > When determining whether a person is stateless within the meaning of the Convention relating to the Status of Stateless Persons of 1954 (the 1954 Convention), is a person who is finally determined by the authorities of State A not to be a citizen of that state, nevertheless to be regarded by State B as a citizen of State A if State B determines that State A did not comply with the rule of law when determining that he is not its citizen?

2. The Court of Appeal held that such a person would not be stateless, accepting that there were 'powerful' arguments against its holding.[1]

3. The Open Society Justice Initiative supports the application for permission to appeal. We submit that the Court of Appeal adopted a mistaken interpretation of the 1954 Convention: contrary to its text and purpose. If followed internationally, it would deprive hundreds of thousands of people of recognition as stateless persons.

[1] Court of Appeal judgment, para. 87.

4. Furthermore, the application of European Union (EU) law *may* require determination in this appeal. Because the Respondent's order under appeal would deprive the Applicant of his citizenship of the EU, the settled jurisprudence of the Court of Justice of the EU (CJEU) requires such a power to be exercised with due regard to EU law. EU law requires respect for rules of customary international law and protection of fundamental rights. We submit that those rules include the true meaning of 'stateless person' in the 1954 Convention. Since the Court of Appeal's ruling is contrary to that rule, a decision to deprive the Applicant of EU citizenship based upon that ruling would violate EU law. If this Court were to allow this appeal, no issue of EU law arises. However, if this Court were minded to agree with the Court of Appeal's interpretation, the interpretation of the 1954 Convention for the purposes of EU law should be referred to the CJEU.

II. THE OPEN SOCIETY JUSTICE INITIATIVE

5. The Open Society Justice Initiative is a non-governmental organisation and makes these submissions in the public interest under rule 15(1)(a) of the Rules of the United Kingdom Supreme Court. The Justice Initiative respectfully requests the Court to take these submissions into account when determining the application for permission to appeal.

6. The Justice Initiative uses law to protect and empower people around the world. We have particular expertise in the field of statelessness. We file third-party interventions before national and international courts and tribunals on significant questions of law where our thematically-focused expertise may be of assistance. Our intervention was admitted by this Court in *Home Secretary v Al-Jedda* (UKSC 2012/0129, judgment pending), which concerned international law relating to statelessness. We have acted as counsel or intervenor in cases concerning statelessness or citizenship before the European Court of Human Rights, the Inter-American Court of Human Rights and the African Committee of Experts on the Rights and Welfare of the Child. For details of our work, see Annex.

III. THE CONTEXT AND ISSUES

7. The case arises from an appeal by the Applicant (B2) to the Special Immigration Appeals Commission (SIAC) from an order of the Respondent to deprive B2 of his British citizenship (the

deprivation order). Section 40(4) of the British Nationality Act 1981 (BNA) precludes such an order if it "would make a person stateless".

8. The United Kingdom has ratified the 1954 Convention and the Convention on the Reduction of Statelessness of 1961 (the 1961 Convention) (together, the Statelessness Conventions).

9. It was correctly held, by both SIAC and the Court of Appeal,[2] and is not contested by the parties here,[3] that:

   a) BNA section 40(4) is to be interpreted to give effect to the United Kingdom's obligation under Article 8(1) of the 1961 Convention to "not deprive a person of its nationality if such deprivation would render him stateless."

   b) the term 'stateless' in the 1961 Convention, Article 8(1) (and thus in BNA section 40(4)) has the same meaning as its use in Article 1 of the 1954 Convention.

10. Article 1 of the 1954 Convention, provides:

    "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law."

11. SIAC decided to determine as a preliminary issue whether the deprivation order would result in B2 becoming a stateless person.[4] It was common ground that B2's only putative nationality (other than British) was that of Vietnam.

12. It follows that the issue before SIAC was:[5]

    'Is B2 considered as a national by Vietnam under the operation of its law?'

13. SIAC answered this question in the negative, on the ground that the Government of Vietnam does not consider B2 to be a citizen under the operation of its law and that "both Vietnamese law and practice give it that power to determine that question". [6]

14. The Court of Appeal held that

[2] SIAC decision, para. 5; Court of Appeal judgment, paras. 28-30.
[3] Home Secretary's objections, para. 11.
[4] SIAC decision, para. 2.
[5] SIAC decision, para. 5.
[6] SIAC decision, para. 19.

"The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of Article 1.1 of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful."[7]

"If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de jure* stateless."[8]

15. The issue of law on appeal is therefore the meaning of Article 1 of the 1954 Convention.

IV. INTERPRETATION OF THE STATELESSNESS CONVENTIONS

16. The Justice Initiative submits that SIAC was correct to hold as it did. For the purposes of the 1954 Convention, a person is 'not considered as a national' by a state if the relevant authorities of that state have finally determined that those authorities do not consider the person to be a national of that state under the operation of its law. That is so even where the authorities have made that determination in violation of the letter of the law of that state or of the rule of law.

17. This is shown by both the text of Article 1 and the purpose of the Statelessness Conventions.

18. Article 1 expressly directs the decision-maker to determine whether the person is 'considered . . . by' the state in question to be its own national. Issues concerning the term 'under the operation of [that state's] law' arise only in the context of determining that primary question: Does the state consider this person to be its national? In particular, where the authorities of the state in question have <u>not</u> considered whether a person is its national, then it falls to another state considering the application of Article 1 to such a person to consider, under the law of that state, which body is charged by that state to determine citizenship and whether it would consider the person to be a national.

19. Where the state in question has already considered whether a person is its national under the operation of its law, then its answer is conclusive. Under the Statelessness Conventions, other

[7] Court of Appeal judgment, para. 88.
[8] Court of Appeal judgment, para. 92.

states are not concerned with determining how they consider that law ought to have been operated by that state.

20. This interpretation is supported by the *travaux préparatoires* for the 1954 Convention, which do not appear to have been cited below. At the Conference of Plenipotentiaries which adopted the 1954 Convention, the German representative stated that, under the draft of Article 1 which was adopted, no country of residence could dispute the declaration of a country of origin that it has deprived a person of its nationality.[9] Nehemiah Robinson comments that "it certainly was not the intention of the conference to require a formal proof from states with which the person had no intimate relationship. This would reduce the proofs to the country of origin and/or former permanent residence. *Once these countries have certified that the person is not a national of theirs, he would come within the definition of Article 1*." (emphasis added)

21. This interpretation is also supported by international academic and juristic opinion. Experts brought together by the United Nations High Commissioner for Refugees to consider the meaning of Article 1 concluded:[10]

> "12. Whether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. This does not mean that the State must be asked in all cases for its views about whether the individual is its national in the context of statelessness determination procedures. 13. *Rather, in assessing the State's view it is necessary to identify which of its authorities are competent to establish/confirm nationality for the purposes of Article 1(1).* This should be assessed on the basis of national law as well as practice in that State. In this context, a broad reading of "law" is justified, including for example customary rules and practices. If, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence) – *and/or after having checked as appropriate with those States* – the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1." (emphasis added)

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[9] 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, p. 10, at http://www.refworld.org/pdfid/4785f03d2.pdf

[10] UN High Commissioner for Refugees, Expert Meeting, *The Concept of Stateless Persons under International Law*, UNHCR, May 2010 ("Prato Conclusions"), at http://www.refworld.org/docid/4ca1ae002.html

22. The Court of Appeal's interpretation does not uphold the rule of law. On the contrary, the approach and outcomes required by such an interpretation are contrary to the rule of law and to the purpose of the Statelessness Conventions, namely the protection of stateless individuals.

23. The rule of law is not upheld by requiring the state considering the statelessness question (State A; here, the UK) to found its decision-making about an individual's statelessness on the false premise that the state of putative nationality (State B; here, Vietnam) operates its law in accordance with the rule of law. On the contrary, State B's purported violation of the rule of law in an individual's case would be compounded by an interpretation of international law which authorised State A to disregard that violation when deciding to deprive her of citizenship. The rule of law is upheld, not undermined, by an interpretation of international human rights law which requires states to protect an individual where another state's denial of protection arises from that state's violation of the rule of law.

24. Where, as here, the proposed interpretation of international law would not protect the fundamental rights of the individual affected, the fact that it also conflicts with international comity is a further reason for rejecting such an interpretation/application. The Court of Appeal's holding means authorities and courts of State A will disagree with final decisions of the authorities and courts of State B on the ground that the decisions were not in accordance with State B's law read in the light of the rule of law. This will inevitably lead to cases (as here) where State A disagrees with State B's final decision on who possesses citizenship of State B. This would place the courts of State A in the invidious position of being required to determine whether the final decisions of State B violated the rule of law, but without any power to remedy violations found, only the duty to uphold State A's deprivation of citizenship. That would be inimical to the rule of law.

25. SIAC's holding is consistent with the protective purpose of the Statelessness Conventions. If adopted globally, the Court of Appeal's reasoning would deny the protection of these Conventions to large numbers of people. In many countries across the world, communities of vulnerable people are labelled by their state of residence as citizens of another state – and so denied even the protections granted to the stateless - though the latter state conclusively denies they possess citizenship and against which decision they have no plausible remedy.[11] Properly understood, these

[11] For a detailed analysis of the practical effect of this interpretation on stateless populations in several different states, see Open Society Justice Initiative, *De Jure Statelessness in the Real World: Applying the Prato Summary Conclusions*, 2011, at http://www.opensocietyfoundations.org/reports/de-jure-statelessness-real-world-applying-prato-summary-conclusions .

people fall within the 1954 Convention – they are '*de jure'* stateless. They are differently situated from persons who are outside the country of their nationality and who are unable to avail themselves of the protection of that country – *'de facto'* stateless.

V. EUROPEAN UNION LAW

26. The Justice Initiative submits that a decision to deprive a person of British citizenship which would have the effect of depriving that person of EU citizenship and which was reached on a mistaken interpretation of Article 1 of the 1954 Convention would violate EU law.

27. In *Rottman,*[12] the CJEU held that since Union citizenship is the fundamental status of nationals of Member States, Member States must have 'due regard' to EU law when exercising powers in nationality matters and that, consequently, the CJEU has jurisdiction to rule on questions concerning the 'conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status'.

28. In G1,[13] the Court of Appeal held, in essence, that *Rottman* was wrongly decided as a matter of EU law and that, if it were not, the British Courts would need to determine whether UK law took precedence over EU law.

29. If SIAC's holding in this case on Article 1 of the 1954 Convention is considered correct, no issue arises under EU law.

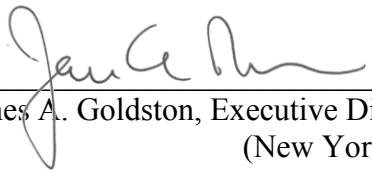
30. However, if this Court were minded to agree with the Court of Appeal's interpretation of Article 1, then compliance with EU law requires consideration of whether the CJEU may disagree and, unless the issue is *acte clair* in favour of the Respondent, to refer the question to the CJEU for a ruling.

31. The Justice Initiative submits that a decision to deprive a person of EU citizenship must comply with international law. The CJEU has consistently held that EU powers must, in general, be exercised in conformity with public international law including rules of customary international law.[14]

[12] [2010] ECR I-01449, paras. 43-45.
[13] [2012] EWCA Civ 867.
[14] Kapteyn et al. *The Law of the European Union and the European Communities* (4th rev. edn.: Kluwer, 2008), 425.

32. We also submit that a decision based upon a mistakenly restrictive interpretation of Article 1 of the 1954 Convention would not comply with international law. "International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law."[15] All but four EU states have ratified the 1954 Convention.[16] The International Law Commission considers that the definition in Article 1 of the 1954 Convention has become part of customary international law.[17]

33. The Respondent contends that it would be premature to consider the question whether a deprivation order may only be made if it would be proportionate. That submission misses the point that EU law is engaged by the determination of whether deprivation would make the Applicant stateless.



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[15] Case 4/73 *Nold* [1974] ECR 491.
[16] Cyprus, Estonia, Malta and Poland: http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en
[17] ILC, Commentary on the Draft Articles on Diplomatic Protection, 2006, commentary on draft rticle 8, para. 3.

ANNEX – INFORMATION ON THE OPEN SOCIETY JUSTICE INITIATIVE

Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo and Washington, D.C. Our interventions have been admitted in cases before the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, the International Criminal Tribunal for Rwanda, the Constitutional Court of Chile, the Supreme Court of Paraguay, the Constitutional Court of Peru, the Constitutional Court of Poland, the High Court of Nigeria and various lower national courts. We have represented applicants before many of those courts, including numerous cases before the ECHR and Inter-American Court of Human Rights, and also before the U.N. Human Rights Committee, the U.N. Committee against Torture, the Inter-American Commission of Human Rights, the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the Community Court of Justice of the Economic Community of West Africa (ECOWAS). The Justice Initiative has acted in significant cases concerning statelessness and citizenship, including:

- *Sejdić and Finci v. Bosnia and Herzegovina,* ECHR, Grand Chamber judgment of 22 December 2009 (denial of voting rights to ethnic minorities), acting as intervenor.
- *Kurić and Others v. Slovenia,* ECHR, Grand Chamber judgment of 26 July 2012 (discriminatory denial of legal status), acting as intervenor.
- *H.P. v. Denmark*, ECHR, application no. 55607/09, pending (discriminatory denial of citizenship by naturalization), acting as co-counsel for applicants.
- *Nubian Minors v. Kenya*, African Committee of Experts on the Rights and Welfare of the Child, decision of 22 March 2011 (discriminatory denial of citizenship), acting as co-counsel for applicant.
- *Nubian Community v. Kenya*, African Commission on Human and Peoples' Rights, pending, (discriminatory denial of citizenship), acting as co-counsel for applicants.
- *People v. Cote d'Ivoire*, African Commission on Human and Peoples' Rights, pending, (discriminatory denial of citizenship), acting as co-counsel for applicants.
- *Yean and Bosico v. Dominican Republic,* Inter-American Court of Human Rights, judgment of 8 September 2005 (discriminatory denial of citizenship), acting as intervenor.
- *Bueno v. Dominican Republic*, Inter-American Commission of Human Rights, pending, (discriminatory denial of citizenship), acting as co-counsel for applicants.

The Justice Initiative has made written submissions on the international and comparative legal standards on the right to a nationality and the avoidance of statelessness before international and regional bodies including the U.N. Committee on the Elimination of Racial Discrimination, the Offices of the U.N. High Commissioners for Refugees and for Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The Open Society Institute has consultative status with the Council of Europe and with the U.N. Economic and Social Council (ECOSOC). The Justice Initiative also has the status of an organisation entitled to lodge complaints with the European Social Charter Committee of the Council of Europe.