Case No. UKSC 2013/0150

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

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

OPEN SOCIETY JUSTICE INITIATIVE

Intervener

CASE OF THE INTERVENER

I. INTRODUCTION

1. By order of the Court of 19 March 2014, the Open Society Justice Initiative was granted permission to intervene by way of written submissions.

2. The judgment of the Court of Appeal in this case concerned the definition of a 'stateless person' in the 1954 Convention relating to the Status of Stateless Persons (the 1954 Statelessness Convention), Article 1(1). In particular, the question arising is:

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> When determining whether a person is stateless within the meaning of Article 1(1), is a person who is finally determined by the authorities of State A not to be its citizen, nevertheless to be regarded by State B as such a citizen because State B determines that State A did not comply with the law of State A and/or the rule of law when determining that he is not its citizen?

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

4. The Justice Initiative submits that the Court of Appeal adopted a mistaken interpretation of the 1954 Statelessness Convention, contrary to its text and purpose. If followed internationally, it would undermine the established approach to application of the 1954 Statelessness Convention and the Convention on the Reduction of Statelessness of 1961 (the 1961 Statelessness Convention) (together, the Statelessness Conventions) and deprive hundreds of thousands of people of recognition and protection as stateless persons.

5. Furthermore, if this Court were minded to agree with the Court of Appeal, we submit that this Court is required to refer the question of the interpretation of Article 1(1) under European Union (EU) law to the Court of Justice of the EU (CJEU).We agree with the Appellant that, since the Respondent's order under appeal would deprive the Appellant of his citizenship of the EU, settled CJEU jurisprudence precludes the exercise of that power without due regard to EU law.[2] This is relevant for a reason additional to the EU law proportionality point advanced by the Appellant.[3] The concept of 'stateless person' under Article 1(1) forms part of EU law. It follows that, in a case (as here) where a Member State must have regard to EU law, the national interpretation of Article 1(1) must have regard to the EU law interpretation of Article 1(1). If this Court were to allow this appeal, deprivation of EU citizenship is not in issue, so the duty to have regard to EU law is not engaged. However, if this Court were minded to agree with the Court of Appeal's interpretation of Article 1(1), and so to authorise the potential deprivation of EU citizenship, this Court must first seek a ruling of the CJEU on that interpretation, to ensure that this Court's interpretation is reached with proper regard to the interpretation under EU law.

[1] Court of Appeal judgment, para. 87.
[2] Appellant's Case, paras. 53-68.
[3] Appellant's Case, paras. 69-73.

II. THE INTERVENER

6. The Open Society Justice Initiative is a non-governmental organisation which 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* [2013] UKSC 62, which concerned international law relating to statelessness. We have acted as counsel or intervener 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 the Annex to this Case.

II. KEY INTERNATIONAL LAW PROVISIONS

7. The United Kingdom has ratified the Statelessness Conventions.

1954 Convention Relating to the Status of Stateless Persons

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8. The 1954 Statelessness Convention provides:

> *"***Preamble**
>
> *Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> *Considering* that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,
>
> *Considering* that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,
>
> *Considering* that it is desirable to regulate and improve the status of stateless persons by an international agreement,
>
> **HAVE AGREED** as follows:
>
> **Article 1: Definition of the term "stateless person"**
>
> 1. 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.

1961 Convention on the Reduction of Statelessness

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9. Article 8(1) of the 1961 Statelessness Convention provides:

> "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."

10. It was correctly held, by both SIAC and the Court of Appeal,[4] and is not contested by the parties here,[5] that the term 'stateless' in Article 8(1) of the 1961 Statelessness Convention has the same meaning as its use in Article 1(1) of the 1954 Convention. Like other human rights treaties[6] - and other international treaties - the Statelessness Conventions provide for inter-State disputes on interpretation to be determined by the International Court of Justice.[7] That Court has not ruled on the interpretation of the Statelessness Conventions.

United Nations High Commissioner for Refugees

11. Under international law, the Office of the UN High Commissioner for Refugees (UNHCR) is charged by the UN with interpreting the Statelessness Conventions. UNHCR is an inter-Governmental body with more than 60 years' experience of international law provisions protecting stateless persons. UNHCR's role requires it to interpret and apply those provisions directly, to understand state practice and to provide expert assistance to states. Its interpretation is not binding on states, but we submit it should be given heavy weight. It represents an interpretation informed by and developed over decades of seeking the practical and principled operation of the Statelessness Conventions by both UNHCR and States Parties and of interchange with experts from within and outside Government.

12. UNHCR was established by the UN General Assembly in 1949[8] and is governed by the UN Economic and Social Council.[9] This appoints UNHCR's Executive Committee consisting of representatives from twenty

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[4] SIAC decision, para. 5; Court of Appeal judgment, paras. 28-30.
[5] Respondent's Objections, para. 11.
Authorities Tabs 68 & 69
[6] Refugee Convention, Article 38.
[7] 1954 Statelessness Convention, Article 34; 1961 Statelessness Convention, Article 14.
[8] *See* UN General Assembly Resolution 319 (IV) 0f 1949 (Refugees and stateless persons), available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/051/38/IMG/NR005138.pdf?OpenElement
[9] Available at http://www.unhcr.org/pages/49c3646c89.html

to twenty-five States Members of the UN or members of any of the specialized agencies, "to be elected by the Economic and Social Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem…"[10]

13. UNHCR has functions under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the Statelessness Conventions.

14. The Refugee Convention requires states parties to co-operate with UNHCR "in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention." The Convention makes particular provision for stateless persons, who are there described as a person "not having a nationality".[11]

15. The UN General Assembly designated UNHCR under Article 11 of the 1961 Statelessness Convention,[12] which provides that:

> "The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."

16. The function of examining such claims under the 1961 Statelessness Convention necessarily requires UNHCR to interpret and apply Article 1(1) of the 1954 Statelessness Convention.

17. UNHCR's Executive Committee adopted the *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless*

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[10] *See* UN General Assembly Resolution 428 (V) of 1950 (Statute of the Office of UNHCR), available at http://www.unhcr.org/3b66c39e1.html

[11] Refugee Convention, Article 1A(2) "Any person who … owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; *or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*." (emphasis added).

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[12] *See* UN General Assembly Resolution 3274 (XXIX) of 1974 and 31/36 of 1976 (expanding UNHCR mandate to cover persons falling under Articles 11 and 20 of the 1961 Convention; Resolution 50/152 of 1995 (endorsing responsibility for stateless persons generally); Resolution 61/137 of 2006 (setting out four broad areas of responsibility: identification, prevention and reduction of statelessness and protection of stateless persons).

Persons,[13] which included that the Executive Committee:

> "*Requests* UNHCR to actively disseminate information and, where appropriate, train government counterparts on appropriate mechanisms for identifying, recording, and granting a status to stateless persons;…
>
> *Encourages* UNHCR to implement programmes, at the request of concerned States, which contribute to protecting and assisting stateless persons, in particular by assisting stateless persons to access legal remedies to redress their stateless situation and in this context, to work with NGOs in providing legal counselling and other assistance as appropriate."

18. Most recently, in June 2014, UNHCR issued the *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (UNHCR Handbook).[14] This compiles and refines UNHCR guidance on the application of the 1954 Convention, including that which arose from the 2010 expert meeting in Prato, Italy,[15] to which the Court of Appeal referred.[16] As set out below, UNHCR's interpretation of Article 1(1) corresponds to that of the Appellant and is opposed to that of the Court of Appeal.

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1969 Vienna Convention on the Law of Treaties

19. The interpretation of international treaties is addressed by the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).[17] This does not have retroactive effect[18] and so does not, strictly, apply to the Statelessness Conventions. Nevertheless, many of the provisions of the Vienna Convention codify customary international law and its provisions are a useful guide to the likely approach to interpretation of earlier Conventions.[19] The Statelessness Conventions are 'treaties' of the kind to which the Vienna Convention applies.[20]

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[13] EXCOM Conclusions No. 106 (LVII) – 2006, available at http://www.unhcr.org/453497302.html.
[14] UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014), available at http://www.refworld.org/docid/53b676aa4.html.
[15] UNHCR, Expert Meeting, *The Concept of Stateless Persons under International Law*, UNHCR, May 2010, (Prato Report), available at http://www.refworld.org/docid/4ca1ae002.html
[16] Court of Appeal judgment, para. 38 et. seq,
[17] Vienna Convention on the Law of Treaties, 1969, Article 2.1(d), available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.
[18] Article 4.
[19] *Fothergill v Monarch Airlines Ltd* [1981] AC 251, HL, per Lord Diplock: "what it says in arts 31 and 32 about interpretation of treaties, in my view, does no more than codify already existing public international law".
[20] Article 2(1)(a).

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20. Article 31 of the Vienna Convention provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties."

III. THE CONTEXT AND THE ISSUE

21. The case arises from an appeal by the Appellant to the Special Immigration Appeals Commission which determined, as a preliminary issue, whether the Respondent's deprivation order would result in the Appellant becoming a stateless person.[21] It was common ground that the Appellant's only putative nationality (other than his undisputed British citizenship) was that of Vietnam.

22. It follows that the issue before SIAC was, in the language of Article 1(1):[22]

> "Is the Appellant considered as a national by Vietnam under the operation of its law?"

23. SIAC answered this question in the negative, on the ground that the Government of Vietnam does not consider the Appellant to be a citizen under the operation of its law and that 'both Vietnamese law and practice

[21] SIAC decision, para. 2.
[22] SIAC decision, para. 5.

give it that power to determine that question'. [23]

24. The Court of Appeal held that

> "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."[24]
>
> "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."[25]

25. The issue of law on appeal is therefore the meaning of Article 1(1) of the 1954 Statelessness Convention.

IV. INTERPRETATION OF THE STATELESSNESS CONVENTIONS

26. The Justice Initiative submits that SIAC was correct to hold as it did. We submit that, 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 the state does 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 law of that state or of the rule of law.

27. This is shown by the text of Article 1(1) and the object and purpose of the 1954 Statelessness Convention, interpreted to give effect to the rule of law. It is supported by judgments of international courts, the *travaux préparatoires*, and UNHCR guidance representing international academic opinion and state practice, including that of the UK.

<u>The text of Article 1(1)</u>

28. Article 1(1) expressly directs the decision-maker to determine whether the person is 'considered ... by' the state in question to be its own national. The primary question is:

[23] SIAC decision, para. 19.
[24] Court of Appeal judgment, para. 88.
[25] Court of Appeal judgment, para. 92.

"Does the state consider this person to be its national?"

29. Where State A has in fact considered whether a particular person is its national, then its answer is conclusive for other states under Article 1(1). The provision does not look to a decision by State B as to how it considers that State A's law ought to have been operated by State A, only how State A 'considers' the person's citizenship under operation of its law.

30. In cases where State A has not stated its consideration of a person's nationality status, then State B must determine on the evidence the viewpoint of State A on that question: the status which State A would consider the person to hold if asked.

31. The Court of Appeal's interpretation renders otiose the Article 1(1) words 'considered as'.

32. The term 'under the operation of its law' does not limit statelessness to persons who lost their citizenship by the *proper* operation of law. The term is present in Article 1(1) for a quite different purpose. It limits the class of stateless persons under the 1954 Statelessness Convention to persons who lack a nationality. It thereby excludes persons whose nationality was undisputed but who were not in fact protected by the state of nationality. This was important, because at the time the Convention was adopted, the term 'stateless persons' was sometimes used to encompass both these classes (see para. 33 below.)

33. The Court of Appeal examined the possible content of the labels stateless *de jure* and stateless *de facto*.[26] These terms are not used in the texts of the Statelessness Conventions nor elsewhere in international legal instruments. The Final Acts of the 1954 Convention and the 1961 Convention included a recommendation and resolution respectively that "persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality" but did not define these terms.[27] Authorities Tab 77 The label stateless *de jure* was used to refer to persons within the Article

[26] Court of Appeal judgment, paras. 32-34.
[27] *See* 1954 Convention, UN Treaty Series, vol. 360, p. 117, available at: http://www.refworld.org/docid/3ae6b3840.html. *See* Final Act of the UN Conference on the Elimination or Reduction of Future Statelessness, UN General Assembly, A/CONF.9/14, Resolution I, available at: http://legal.un.org/diplomaticconferences/statelessness-1959/docs/english/Vol_1/20_FINAL_ACT_A_conf_9_14_and_add-1.pdf. Authorities Tab 77

1(1) definition, while the label stateless *de facto* referred to persons who were not within that definition, but who were in fact unable to avail themselves of the protection of their state of nationality.[28] In the 1990s, this concept of stateless *de facto* was interpreted more broadly, so that it overlapped with persons who were also stateless *de jure.*[29] This overlap makes the references to the classes of stateless *de facto* a false guide to the concept of stateless *de jure*. In this appeal, the issue is not the meaning of these labels, but the interpretation of Article 1(1). The usage of the term stateless *de facto* and debate over its meaning shed little useful light on that question.

The object and purpose of the 1954 Statelessness Convention

34. The essential object and purpose of the 1954 Statelessness Convention is the protection of stateless individuals. This is abundantly clear from its text. Articles 4, 7, 8, 10 and 11-42 impose express obligations on Contracting States to grant stateless persons rights, favourable treatment or other protection. UNHCR's Introductory Note to the Convention states that the Convention "establishes a framework for the international protection of stateless persons and is the most comprehensive codification of the rights of stateless persons yet attempted at the international level".[30]

35. The adoption of the Court of Appeal's interpretation would seriously undermine that essential object. Where a person is considered by no state to be its citizen, that person's need for protection by a Contracting State is not altered by that state's determination that another state has breached its own law in considering that person not to be its citizen. Indeed, it would be wholly inconsistent with the Convention's object for persons unlawfully denied citizenship to be treated less favourably than those who lost it under the proper operation of the law of the state.

36. If adopted globally, the Court of Appeal's reasoning would deny the protection of these Conventions to large numbers of people. For example, the Statelessness Conventions would not apply to children of Haitian

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[28] *See* Hugh Massey, *UNHCR and De Facto Statelessness*, LPPR/2010/01, April 2010, p.26. para. 4, available at: http://www.refworld.org/docid/4bbf387d2.html.

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[29] *UNHCR and De Facto Statelessness*, Part II.

[30] UNHCR, Introductory Note to the Convention relating to the Status of Stateless Persons, November 2010, p. 3.

descent in the Dominican Republic, the 'erased' of Slovenia or Nubians in Kenya, because in all cases they became stateless in violation of the rule of law, see paras. 46-48 below. In many countries, across the world, communities of vulnerable people are considered by their state of residence to hold the citizenship of another state, yet lack any plausible means of persuading that other state to treat them as a citizen.[31]

37. The Court of Appeal's interpretation would also be burdensome for states making assessments of statelessness. Express decisions of other states under their citizenship laws would not be conclusive. Where those decisions conflict with that other state's law or with the rule of law, the state making the assessment may be expected to examine the laws and the procedure adopted to determine the effect that law *ought* to have had.

The rule of law

38. The Court of Appeal found that Vietnam's denial of the Appellant's citizenship is contrary to Vietnamese law. This finding justifies the conclusion that Vietnam violated the rule of law. Article 15(2) of the Universal Declaration of Human Rights provides "No one shall be arbitrarily deprived of his nationality…"[32]

Authorities Tab 72

39. The Court of Appeal reasoned that "respect for the rule of law" precluded the United Kingdom's courts from basing their determination under Article 1(1) on an action by "a Government of the foreign state … contrary to its own law".[33]

40. The Justice Initiative agrees with the Court of Appeal that Article 1(1) must be interpreted in accordance with the rule of law. But we disagree with the Court of Appeal that the rule of law *requires* that Article 1(1) be interpreted or applied with disregard for unlawful acts of other states.

[31] For a detailed analysis of the practical effect of UNHCR's 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, available at http://www.opensocietyfoundations.org/reports/de-jure-statelessness-real-world-applying-prato-summary-conclusions.

Authorities Tab 103

[32] Universal Declaration of Human Rights, available at http://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf.

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[33] Court of Appeal judgment, para. 92.

41. The rule of law is upheld by an interpretation of international human rights law which does not exclude individuals from a state's protection by reason of another state's violation of the rule of law. The rule of law is undermined by requiring the decision under Article 1(1) to be based on the fiction that the state of putative nationality properly operates its law or does so in accordance with the rule of law. A denial of citizenship in violation of the rule of law would be compounded by an interpretation of international law which required all other states to disregard that violation when determining whether that person was stateless. The grave consequences of such a fiction are shown in this case: interpreting the 1954 Convention to disregard Vietnam's denial of citizenship to the Appellant leads to authority to the UK under the 1961 Statelessness Convention to deprive him of citizenship. To confine the protections of the Statelessness Conventions to persons who lost their citizenship lawfully would be wholly inimical with their protective aims.

42. Citizenship status is crucial to the operation of international law. Adoption of the Court of Appeal's approach would leave many individuals with contradictory citizenship determinations, where citizenship of State A is denied by that state, but asserted by State B. This would create a state of grave uncertainty for those persons and the states dealing with them, depriving all affected of the certainty which is an essential element of the rule of law.

43. The courts of State B will be in the invidious position of being *required* to determine whether the final decisions of State A violated the rule of law, even though those courts lack any power to remedy those violations found – having only the duty to uphold State B's deprivation of citizenship. That would also be inimical to the rule of law.

The *travaux préparatoires*

44. SIAC's interpretation is supported by the *travaux préparatoires* for the 1954 Convention. At the Conference of Plenipotentiaries which adopted the 1954 Statelessness 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.[34] 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)

Authorities Tab 96

International jurisprudence

45. National courts and bodies charged with upholding international human rights conventions have consistently recognized as stateless those persons denied citizenship in violation of national law or international law.

46. *Yean and Bosico v. Dominican Republic* concerned children denied citizenship of the Dominican Republic (DR) despite proof that they were born in DR and had no right to another nationality.[35] The Inter-American Court of Human Rights ruled that proof of these facts entitled the children to be granted DR nationality on application.[36] By denying the application, DR had made the children stateless.[37] Citing the 1961 Statelessness Convention (to which DR is a signatory),[38] the Court ruled that the denial violated the law of DR and the Inter American Convention and subjected the children to racial discrimination contrary to that Convention (as children of Haitian descent).[39] The Court thus held that the state decision rendered the children stateless under international law, notwithstanding the fundamental illegality of that decision.

Authorities Tab 75

47. *Kurić and Others v. Slovenia*, concerned Yugoslav citizens resident in Slovenia at the time that state became independent, but who failed to acquire Slovenian citizenship and whose names were subsequently 'erased' from the register of permanent residents, making many stateless.[40] The Slovenian

Authorities Tab 61

[34] 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, available at http://www.refworld.org/pdfid/4785f03d2.pdf. Authorities Tab 96

[35] *Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights, 8 September 2005, available at: http://www.refworld.org/docid/44e497d94.html Tab 75

[36] *Yean and Bosico*, at para. 156(c). Tab 75

[37] DR had granted the children citizenship before the Court ruled: *Yean and Bosico*, at para. 147. Tab 75

[38] *Yean and Bosico*, at para. 143. Tab 75

[39] *Yean and Bosico*, at paras. 156 and 171-174. Tab 75

[40] *Kurić and Others v. Slovenia,* ECtHR, Grand Chamber judgment of 26 June 2012, para. 33. Tab 61

Constitutional Court held that the erasure had no basis in Slovenian law.[41] The European Court of Human Rights: recognised the statelessness of the applicants,[42] ruled that the erasure lacked the quality of 'law',[43] and found a violation of Article 8 ECHR.[44]

48. The same approach has been taken under the African Charter on the Rights and Welfare of the Child, an instrument of the African Union. In *Nubian Minors v. Kenya*, the African Committee on the Rights and Welfare of the Child, which is charged with interpreting the Charter, held that some Nubian children born in Kenya did not acquire Kenyan citizenship, even though this left them stateless.[45] Kenya had thereby violated the Charter.[46] The Committee did not hold that the children were all Kenyan citizens. Rather, it recommended that Kenya "should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian decent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality…"

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49. In none of these cases did the Court or Committee rule that the finding of a violation of national or international law in the process of denying citizenship had the effect that that the persons affected were to be treated as citizens. In every case, it held that the state had made the persons stateless, albeit unlawfully.

Academic opinion and state practice

50. SIAC's interpretation is strongly supported by international academic opinion. UNHCR brought together experts in 2010 to consider the meaning of Article 1(1).[47] Their opinions are reflected in UNHCR's own guidance, which takes into account its uniquely valuable understanding of state opinion and practice, and the practical operation of the 1954 Convention.

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[41] *Kurić*, para. 344.
[42] *Kurić* para. 15 (Kurić), para. 97 (Dabetić). The other applicants had retained or acquired a nationality.
[43] *Kurić,* para. 346.
[44] *Kurić*, paras. 360-362.
[45] *Nubian Minors v. Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision of 11 March 2011, at para. 49, available at: http://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf.
[46] *Nubian Minors*, para 50. Article 6(4) of the Charter required Kenya to ensure that a child "…acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws".
[47] Prato Report, see note 15 above.

The UNHCR *Handbook* states that replies from foreign authorities "must be taken on face value:"[48]

Authorities Tab 82

> "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."[49]

51. The *Handbook* also states:

> "A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to 'law' in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice." (para. 23)

52. The UNHCR *Handbook* stresses that where states do not in practice follow the rule of law in rendering nationality determinations, the decisions of authorities acting with impunity are to be given *greater weight*.[50]

> "[W]here the executive is able to ignore the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity … the position of State authorities that [persons] are not nationals would be *decisive* rather than the position of judicial authorities that might uphold the nationality rights of such [persons]." (para. 48)

53. UNHCR's guidance is a good indicator of state practice on interpretation of Article 1(1). UNHCR is the inter-Governmental body with responsibility for interpreting and guiding state implementation of the Statelessness Conventions.

54. The Respondent's guidance to staff determining questions of statelessness demonstrates that UK state practice comports with UNHCR guidance on the issue before the Court. This UK guidance, *Applications for leave to remain as a stateless person*,[51] is dated 1 May 2013, and does not appear to have been cited to the Court of Appeal, which heard this case on 2 May 2013. The UK Guidance expressly cites UNHCR guidance as it source[52] and states:[53]

Authorities Tab 24

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[48] UNHCR Handbook, para. 99.
[49] UNHCR Handbook, para. 99.
[50] *See also* Mike Sanderson, *Statelessness and Mass Expulsion in Sudan: A Reassessment of International Law*, 12 Nw. J. Int'l Hum. Rts. 74, 89-90 (2014), available at http://scholarlycommons.law.northwestern.edu/njihr/vol12/iss1/4.
[51] Home Office, 1 May 2013, available at https://www.gov.uk/government/publications/stateless-guidance.
[52] p.10, para 3.4, citing "UNHCR's guidelines on the definition of a stateless person" with a hypertext link to "Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) …", UNHCR, 20 February 2012, the essential content of which has been reproduced in the UNHCR Handbook.
[53] *Ibid.* at p.11, para 3.4

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> "Decisions made by the national authorities
>
> Where the national authorities have in practice treated 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."

55. No evidence has been cited to show a significant pattern of state practice contrary to UNHCR guidance.

56. The adoption of the Court of Appeal's interpretation as the single correct interpretation of Article 1(1) would seriously upset this state practice. It may justify, even require, review of many decisions recognising persons as stateless, in the UK and abroad.

V. EUROPEAN UNION LAW

57. It is not disputed that a decision to deprive the Appellant of British citizenship would cause him to lose the status of EU citizen. In our submission, that would violate EU law if it were based upon a mistaken interpretation of Article 1(1). For this reason, if this Court were minded to agree with the Court of Appeal, the correct interpretation of Article 1(1) would become a question properly to be determined by the Court of Justice of the EU.

58. In support of this argument, we advance the following propositions:

    a) A decision of a Member State to deprive a person of citizenship of that state which results in loss of EU citizenship is a decision within the scope of EU law.

    b) EU law requires that such a decision be made with due regard to EU law.

    c) The Article 1(1) definition of stateless person forms part of EU law.

    d) Therefore, a Member State decision to deprive a person of citizenship which results in loss of EU citizenship must be based upon an interpretation of Article 1(1) which is no more restrictive than the interpretation of Article 1(1) which forms part of EU law.

59. The Appellant argues a different consequence of the application of EU law: that any decision to deprive him must respect the principle of proportionality.[54] The Respondent contended at the permission stage that the proportionality argument was premature, since SIAC had not reached the merits of depriving him of citizenship.[55] This prematurity argument does not apply to these submissions of the Justice Initiative, since these relate to the preliminary issue which SIAC did determine, and which is squarely before this Court.

Scope of EU law

60. In a series of cases beginning with *Micheletti* in 1992, the CJEU has held that Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law.[56] Also, the Court has consistently held that the Member States' adoption of Article 20(1) of the Treaty of the Functioning of the European Union (TFEU)[57] ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.") means that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States".[58]

Authorities Tab 26

61. The CJEU made these rulings before the TFEU was adopted. The Member States made that new Treaty in the same terms as the previous treaties upon which the rulings had been based.

62. These authorities were most recently affirmed by the Court in *Rottmann.*[59] 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

[54] Appellant's Case, paras. 69-74.
[55] Respondent's Objections, paras 21-26.
[56] C‑369/90 *Micheletti* [1992] ECR I‑4239, para. 10; C‑179/98 *Mesbah* [1999] ECR I‑7955, para. 29; C-192/99 *Kaur* [2001] ECR I-1237, para 19; C‑200/02 *Zhu & Chen* [2004] ECR I‑9925, Full Court, para. 37.
[57] formerly Article 17 of Treaty of European Community, inserted by Treaty of Maastricht.
[58] C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; C-413/99 *Baumbast* [2002] ECR I-7091, para. 82.
[59] C-135/08 *Rottmann* [2010] ECR I-01449, Grand Chamber, paras. 43-45.

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status of citizen of the Union and thereby be deprived of the rights attaching to that status'.

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63. In *Rahman (G1)*,[60] the Court of Appeal held, in essence, that *Rottmann* 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 this part of EU law.

Authorities Tab 56

64. We submit that *Rottmann* was correctly decided. The reasoning of the Grand Chamber of the CJEU was firmly based on two lines of case law the shorter of which was almost a decade old. The Member States had not chosen to change the language of the Treaties or to otherwise agree to reverse these lines of authority. In any event, this Court would have a duty to make a reference for a preliminary ruling before basing a judgment upon a holding that *Rottmann* was wrongly decided: the matter is presently *acte éclairé*.[61]

65. We submit that the question of whether UK law could and would take precedence over EU law does not arise in this case unless and until this Court intends to disagree with a ruling of the CJEU on the interpretation of Article 1(1). For obvious reasons, that question is one which ought only to be addressed once necessary to do so.

66. The *Rottmann* ruling demonstrates that under the consistent case law of the CJEU a decision to deprive a person of national citizenship which would result in loss of EU citizenship falls within the scope of EU law.

<u>The requirement of EU law in relation to such a decision</u>

67. The requirement is for Member States to have 'due regard' to EU law: *Rottmann*.[62]

<u>Article 1(1) definition of stateless person is part of EU law</u>

68. The CJEU has not addressed the interpretation of Article 1(1). Nevertheless, the concept of 'stateless person' forms part of EU law and would be given

Authorities Tab 18
[60] *Rahman (G1)* [2012] EWCA Civ 867.
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[61] *See* Broberg & Fenger, *Preliminary References to the European Court of Justice* (Oxford, 2010, Oxford University Press), Ch. 6, s. 4.3, pp. 264-5; Ch. 12, s. 12.3.1, pp. 441-443.
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[62] *Rottmann*, paras 39, 48.

an autonomous and uniform interpretation which must be no less restrictive than the Article 1(1) definition.

69. Stateless persons were amongst the first beneficiaries of the legal system that now forms the European Union. Regulation 3/58 established the system of co-ordination of the social security systems of the Member States of the Communities.[63] Article 4 applied the Regulation "to persons who are or have been subject to the legislation of one or more of the Contracting Parties and are nationals of a Contracting Party, or are refugees or stateless persons resident in the territory of a Contracting Party…" This Regulation therefore conferred special benefits upon stateless persons, not generally provided to non-nationals of the Member States.

70. In *Khalil* the CJEU considered the legal basis for the inclusion of refugees and stateless persons in the successor regulation to Regulation 3/58.[64] The Court noted that the Communities' founding states were parties to the 1954 Statelessness Convention and to the Refugee Convention which contained obligations to ensure equal treatment as regards social security for stateless persons and refugees, respectively. "Each of the six original Member States had thus already undertaken at international level a general obligation to allow stateless persons and refugees to benefit from the social security laws and regulations under the same conditions as apply to the nationals of other States."[65] The Court held that the "Council cannot be criticised for having, in the exercise of the powers which have been conferred on it under Article 51 of the EEC Treaty, also included stateless persons and refugees resident on the territory of the Member States in order to take into account the abovementioned international obligations of those States."[66]

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71. This link to the 1954 Statelessness Convention was made express in Regulation 1408/71, which replaced Regulation 3/58,[67] Regulation 1408/71, Article 1(e) provides that "For the purposes of this Regulation … (e) 'stateless person' shall have the meaning assigned to it in Article 1 of the

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[63] Council Regulation (EEC) No 3/58 of 25 September 1958 on social security for migrant workers, OJ 30, 16.12.1958, p.561/58. Authorities Tab 28
[64] C-95/99 to C-98/99 & C-180/99 *Khalil* [2001] ECR I-7439. Tab 52
[65] *Khalil*, paras. 48-49. Tab 52
[66] *Khalil*, para. 56. Tab 52
[67] Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2. Tab 29

Convention relating to the Status of Stateless Persons, signed in New York on 28 September 1954". This language was reproduced in Regulation 883/2004, which replaced Regulation 1408/71 and is the current Regulation in the field.[68]

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72. Other EU legislation which confers advantages on stateless persons (as distinct from other non-nationals of the Member States) does not define such persons, such as Regulation 539/2001 which exempts certain stateless persons from the EU visa requirement.[69]

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73. In 2007, the Treaty of Lisbon made the first express reference to stateless persons in the EU Treaties, with the new Article 67 of the TFEU:[70]

> "1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
>
> 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. *For the purpose of this Title, stateless persons shall be treated as third-country nationals*." (emphasis added)

74. In the fields of asylum and immigration, much EU legislation uses the term 'third-country nationals and stateless persons' to refer to the class of all persons who are non-nationals of the Member States.[71] This legislation does not further define the term 'stateless persons'.

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[68] *See* Article 1(h) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

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[69] Article 1(1), third indent and Article 4(2)(b) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001, p. 1. as amended, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1413306544781&uri=CELEX:02001R0539-20140609.

Tab 30

[70] Article 2(64), Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN.

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Tabs 35 & 38
Tabs 39 & 40
Tab 32
Tab 33

[71] *See* Directive 2004/83 (asylum qualification) [tab 36], Directive 2005/85 (asylum procedure), Directive 2003/9 (reception), Directive 2011/95 (international protection qualification, recast), Directive 2013/32 (international protection procedure, recast), Directive 2013/33 (international protection reception, recast). This phrase is also used in Directive 2000/43 (race equality) and Directive 2000/78 (equal treatment in employment). However, other legislation refers only to third country nationals, defined as persons who are not EU citizens: Directive 2008/115 (return procedures). Directive 2009/50 (highly qualified third-country nationals).

75. Twenty-four EU Member States are parties to the 1954 Statelessness Convention. The four states which are not parties - Cyprus, Estonia, Malta and Poland - acceded to the EU on 1 May 2004. In 2012, these four states pledged to the UN that they would ratify the 1954 Statelessness Convention.[72]

76. The CJEU has not been asked to rule on the meaning of the term 'stateless persons' in EU primary or secondary law. However, we submit that the CJEU would make three holdings, if asked to address the issue.

77. First, that the term 'stateless person' in EU legislation has a single interpretation throughout the EU. The notion of an autonomous and uniform interpretation is well established in EU law. "The terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question."[73] The EU laws in question make no reference to national law for the purpose of determining the meaning and scope of the concept of 'stateless person'. The context and objective of the laws in question militate in favour of a single interpretation. For example, Regulation 883/2004 co-ordinates the social security systems of the Member States. If these States applied the term 'stateless person' in different ways, relying on different interpretations of Article 1(1), that co-ordination would be undermined.

78. Second, that the term 'stateless person' in a piece of EU legislation must be interpreted no more restrictively than the Article 1(1) definition. To hold that the EU interpretation could be more restrictive would contradict the explicit terms of Regulations 1408/71 and 883/2004.

79. Third, that Article 1(1) has a single meaning, rather than its meaning being free for the courts of each state to determine. This has been the express

[72] European Union, Note Verbale to High-level meeting on the rule of law at the national and international levels, 19 September 2012, available at http://www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf.
[73] C-201/13 *Deckmyn* [2014] ECR I-0000, Grand Chamber, para. 14.

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approach of the UK Courts to the Refugee Convention.[74] In its rulings under the Asylum Qualification Directive,[75] the CJEU has adopted the same approach.[76]

Effect of requirement to have due regard to the EU interpretation of Article 1(1)

80. As argued above, EU law:

a) Requires that any decision to deprive the Appellant of British citizenship to be taken with due regard to EU law;

b) Determines – within the scope of EU law – the meaning of Article 1(1).

81. It follows that the UK must have due regard to the EU law meaning of Article 1(1) before depriving the Appellant of British citizenship.

82. If, within EU law, Article 1(1) has the same interpretation as that given to it by SIAC, then the UK courts and authorities would be obliged to have due regard to that, in particular:

a) To have due regard to that aspect of EU law when determining the UK law meaning of Article 1(1);

b) In the event that this Court disagreed with the CJEU and held that the single true meaning of Article 1(1) is narrower (as it was held to be by the Court of Appeal), this Court would consider what weight must be given to the contrary position of EU law in determining whether to uphold a decision with the consequence of depriving the Appellant of his EU citizenship.

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[74] *Secretary of State for the Home Department ex p. Adan & Aitseguer* [2001] 2 AC 477, per Lord Steyn "the Refugee Convention must be given an independent meaning ... there can only be one true interpretation of a treaty". Per Lord Hobhouse "Different countries within the EU have interpreted the Convention differently . . . So long as such differences continue to exist, the intention of the Conventions to provide a uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted."

[75] Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 2004, p. 12.

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[76] C-31/09 *Bolbol* [2010] ECR I-351 paras. 42-54 (meaning of Article 1D of Refugee Convention); C-71/11 & C-99/11 *Y & Z* [2012] ECR I-518 para. 61 (meaning of 'persecution' in Article 1(A)(2) of Refugee Convention).

83. We respectfully submit that the Court could not properly, or at the very least ought not to, embark on such considerations without having first sought a ruling of the CJEU on the interpretation within EU law of Article 1(1).

84. It follows that, if this Court were minded to agree with the Court of Appeal's interpretation of Article 1(1), compliance with EU law requires this Court to refer the question to the CJEU for a ruling. The question is not *acte clair*: the Court of Appeal recognised that there were powerful reasons for the contrary holding of SIAC.

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23 October 2014

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 (ECtHR), 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, the United Kingdom Supreme Court and lower national courts. We have represented applicants before many of those courts, including numerous cases before the ECtHR and Inter-American Court of Human Rights, and also before the UN Human Rights Committee, the UN 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*, ECtHR, Grand Chamber judgment of 22 December 2009 (denial of voting rights to ethnic minorities), acting as intervenor.

- *Kurić and Others v. Slovenia*, ECtHR, Grand Chamber judgment of 26 July 2012 (discriminatory denial of legal status), acting as intervenor.

- *H.P. v. Denmark*, ECtHR, 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 UN Committee on the Elimination of Racial Discrimination, the Offices of the UN 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 UN 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.

Case No. UKSC 2013/0150

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

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

OPEN SOCIETY JUSTICE INITIATIVE

Intervener

CASE OF THE INTERVENER

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