UKSC 2012/0129

In The Supreme Court of the United Kingdom

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

(ENGLAND)

B E T W E E N:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

HILAL ABDUL-RAZZAQ ALI AL-JEDDA

Respondent

- and -

OPEN SOCIETY JUSTICE INITIATIVE

Intervener

CASE FOR THE INTERVENER

I. THE INTERVENER

1. On 13 June 2013, the Court granted the Open Society Justice Initiative permission to present written submissions addressing international law.

2. The Justice Initiative is a non-governmental organisation which uses law to protect and empower people around the world. 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.

3. The Justice Initiative files third-party interventions and *amicus curiae* briefs before national and international courts and tribunals on significant questions of law where its thematically-focused expertise may be of assistance. 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 and various 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 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.

4. 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 applicant.

- *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 applicants.

- *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 intervener.

- *Bueno v. Dominican Republic*, Inter-American Commission of Human Rights, pending, (discriminatory denial of citizenship), acting as co-counsel for applicant.

5. 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.

II. INTRODUCTION

App Pt. 1b pp. 873-874

6. The essential question on this appeal is the interpretation of section 40(4) of the British Nationality Act 1981 (BNA), which precludes the Secretary of State from making an order depriving a person of British citizenship if she "is satisfied that the order would make a person stateless."

7. The Intervener's case is that international law informs – indeed determines – the interpretation of section 40(4). The conclusion of the Court of Appeal on the issue now before the Supreme Court is fully consistent with international law, in particular the 1961 Convention on the Reduction of Statelessness (1961 Convention)[1] and the 1954 Convention on the Status of Stateless Persons (1954 Convention),[2] (together, "the Statelessness Conventions"), to which the United Kingdom is a party. Article 8(1) of the 1961 Convention provides that "A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless." Section 40(4) gives effect to Article 8(1) in national law.

App Pt. 1b pp. 985-990

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8. UNHCR estimates that 12 million people are stateless worldwide. Stateless people suffer terrible personal consequences. Often they do not have the ability to go to school, access healthcare, or obtain a job. And stateless people are more vulnerable to violence and other rights violations. The interpretation of the Statelessness Conventions is a crucial tool for protection of stateless persons, see Open Society Justice Initiative, De Jure *Statelessness in the Real World: Applying the Prato Summary Conclusions*, 2011.

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9. The Intervener respectfully submits that the Supreme Court should affirm the Court of Appeal's holding on the issue.

[1] U.N. General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, UNTS, vol. 989, p. 175.
[2] U.N. General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117.

III. KEY INTERNATIONAL LAW PROVISIONS

1954 Convention Relating to the Status of Stateless Persons

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10. The 1954 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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11. The preamble to the 1961 Convention includes within the object and purpose of the Treaty that it is "desirable to reduce statelessness by international agreement." The full text of Article 8 of the Convention is set out in the Respondent's Case. Crucially, Article 8(1) provides :

Article 8

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

IV. ARGUMENT

12. The Intervener respectfully agrees with the Court of Appeal's conclusion. We submit that an order under section 40(2) of the British Nationality Act 1981 "makes a person stateless" (within the meaning of section 40(4) of that Act) if, on the making of the order, that person would become a stateless person within the meaning of Article 1(1) of the 1954 Convention.

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13. The Court of Appeal's interpretation of section 40(4) comports with the international framework for avoiding statelessness and protecting stateless persons, including authoritative guidance from the United Nations High Commissioner for Refugees (UNHCR), the U.N. agency with a formal mandate to prevent and reduce statelessness and to protect stateless persons globally.[3] The interpretation advocated by the Home Secretary, on the contrary, would jeopardize uniform understanding and application of the Article 1(1) definition of a stateless person, a fundamental concept within the overall framework.

14. The object and purpose of the Statelessness Conventions is protective: to ensure that individuals do not fall through gaps in the international human rights framework and that situations of statelessness are reduced worldwide (see Preamble to 1954 Convention at para. 10 above). The exercise of determining questions of statelessness should therefore be as straightforward as possible and guided by uniform rules capable of wide application in practice.[4] The interpretative

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[3] *See* U.N. 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; U.N. General Assembly Resolution 50/152 of 1995 (endorsing responsibility for stateless persons generally); U.N. General Assembly Resolution 61/137 of 2006 (setting out four broad areas of responsibility: identification, prevention and reduction of statelessness and protection of stateless persons).

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[4] *See* UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02, at para. 4 ("Statelessness is a juridically relevant fact under international law. Thus, recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons….").

principles and human rights norms elaborated below are directed toward this goal of the widest possible protection.

15. The Intervener's arguments in support fall under the following heads:

A. Significance of the Statelessness Conventions. The legislative history makes clear that section 40(4) of the British Nationality Act 1981 was intended to give effect to Article 8(1) of the 1961 Convention, which should be interpreted consistently with the 1954 Convention definition of "stateless person".

B. The Definition of "Stateless Person" in International Law. The Court should consider only the actual situation at the moment of the deprivation of citizenship: past and future opportunities are not relevant. The question is determined by reference to the viewpoint of the competent national authority.

C. The Obligation to Avoid Statelessness. The duty to avoid statelessness is firmly established under international human rights law. The Intervener's proposed construction of Article 8(1) and section 40(4) is consistent with this duty: that of the Home Secretary is not.

A. The Significance of the Statelessness Conventions

16. The legislative history of section 40(4) indicates that it was enacted to give effect in the domestic law of the United Kingdom to Article 8(1) of the 1961 Convention. Section 40 should therefore be interpreted consistently with the Statelessness Conventions that make up the framework for addressing statelessness.

Legislative History: Giving Effect to the 1961 Convention

17. The Home Secretary's case (paras. 32-38) shows that section 40(4) has its origins in section 4(1) of the British Nationality (No 2) Act 1964. Section 4(1) was enacted to give effect to Article 8(1) of the 1961 Convention, subject to Article 8(3).

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18. Opening the Commons Second Reading debate on the British Nationality (No 2) Bill, the Government Minister promoting the Bill, Mr John Parker, stated "The primary purpose of the proposed Bill is to enable the United Kingdom to ratify the United Nations Convention for the reduction of statelessness, which was drawn up in 1961. . . Another question concerns deprivation of citizenship. Under the Bill the Home Secretary would surrender his right to take away British citizenship from any citizen if, by doing so, it would make that person stateless." (HC Deb 28 April 1964 vol. 694 cc207, 208). In the Lords Second Reading debate, the Government Minister promoting the Bill, Lord Walston, stated "Its main object is primarily to fulfil some of the conditions which this country agreed to in the Convention on the Reduction of Statelessness, which was agreed to in New York at the United Nations on August 30, 1961;" (HL Deb 29 June 1964 vol. 259 cc493).

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Article 8(1) of the 1961 Convention is to be interpreted consistently with the 1954 Convention definition of "stateless person" and other provisions of international law

19. The 1961 Convention uses the term "stateless", but does not define it. Article 1(1) of the 1954 Convention defines a "stateless person" as "a person who is not considered as a national by any State under the operation of its law". The Intervener submits that the 1961 Convention should be interpreted consistently with the 1954 Convention.

20. UNHCR has issued four sets of *Guidelines on Statelessness* covering the definition of a stateless person under Article 1(1), procedures for determining statelessness status, and the status of stateless persons at the national level. The guidelines state that they result from a series of expert consultations during 2010-2011 and are "intended to provide interpretive legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary".[5] One of the expert

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[5] *See* UNHCR, *Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, U.N. Doc. HCR/GS/12/01, at p. 1.

consultations, held in Prato, Italy in May 2010, focused specifically on the meaning of Article 1(1) and resulted in summary conclusions ("the Prato Summary Conclusions") that informed the *Guidelines on Statelessness No. 1* on the same topic.

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21. The UNHCR *Guidelines on Statelessness No. 4* provide guidance on the 1961 Convention. They advise that Article 1(1) of the 1954 Convention "establishes the international definition of a stateless person" and is relevant to the interpretation of provisions employing the term under the 1961 Convention.[6]

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22. Academic literature on the Statelessness Conventions also supports this conclusion. "It is generally understood that by refraining from offering its own perspective on the question, the 1961 Statelessness Convention defers the matter back to the 1954 Convention relating to the Status of Stateless Persons."[7]

23. The International Law Commission considers that the Article 1(1) definition has become part of customary international law.[8]

24. This approach has been followed in the United Kingdom. As the Court of Appeal observed, the Special Immigration Appeals Commission reached the same conclusion in *Abu Hamza v. Secretary of State for the Home Department* (judgment of 5 November 2010): [9]

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> "The obvious, and, we are satisfied, only proper conclusion is that Parliament intended that the Secretary of State should not make a deprivation order [under section 40(2)] in respect of a person if satisfied that the effect would be that he would therefore be made a person who is not considered a national by any state under the operation of its law – the definition in Article 1.1 of the 1954 Convention. Such an interpretation has the

[6] UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, UN Doc. HCR/GS/12/04, 21 December 2012, at para. 16. See also UNHCR, *Guidelines on Statelessness No. 1*, *op cit*, at para. 5 ("[F]or the purposes of these Guidelines, the 1954 Convention establishes the universal definition of a "stateless person" in its Article 1(1).").

[7] Carol Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 Int'l J. Refugee L (1995) at p. 250. *See also* Laura van Waas, *Nationality Matters: Statelessness under International Law* 44 (2008), p. 44.

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[8] ILC, Commentary on the Draft Articles on Diplomatic Protection 2006, commentary on draft article 8, para. 3.

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[9] *See also B2 v. Secretary of State for the Home Department* [2013] EWCA Civ 616, 24 May 2013, at para. 96.

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advantage of aligning domestic law with the United Kingdom's international obligations." (para. 5)

25. The Home Secretary has also adopted the same approach. Since 6 April 2013, the Immigration Rules make express provision for stateless persons for the first time.[10] The Home Secretary's guidance to staff on decision-making under these new rules emphasises that the determination of statelessness "is neither a historic nor a predictive exercise." (see Respondent's case, para. 47.)

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B. The Definition of "Stateless Person" in International Law

26. The Intervener submits that Article 8(1) of the 1961 Convention is clear and simple. It is concerned only with decisions of a Contracting State to deprive a person of the nationality of that state. It precludes such a decision if that deprivation renders a person "stateless" within the meaning of the Article 1(1) definition of the 1954 Convention.

27. The proposition that a person is not stateless because he or she could have acquired citizenship or could acquire it in the future is at odds with two important and related aspects of the Article 1(1) definition. *Firstly*, that the state must determine whether, if the deprivation decision were made, the person would immediately become one who *is* stateless under the Article 1(1) definition. Potential future acquisition of nationality and past opportunities to acquire another nationality are irrelevant. *Secondly*, an individual's nationality status under Article 1(1) is assessed by reference to the operation of the law of the state of putative nationality as expressed through the viewpoint of a competent national authority.

1. Statelessness Is to Be Assessed at the Moment of Deprivation

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28. The UNHCR *Guidelines on Statelessness No. 1* clarify that it is the situation at the moment of the nationality determination that is relevant:

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[10] Statement of Changes in Immigration Rules, HC 1039, paras. 124-139, inserting new Part 14 in Statement of Changes in Immigration Rules, HC 395; *see also* accompanying Explanatory Memorandum, paras. 7.38 – 7.51.

> "An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have only been partially fulfilled or completed, the individual is still a national for the purposes of the stateless person definition." (para. 43)

29. Thus, even when an application for nationality is under consideration, the individual is not considered to be a national until the competent state authority makes a determination on the matter.

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30. The Prato Summary Conclusions likewise stress the *present tense* nature of the inquiry:

> "The Article 1(1) definition employs the present tense ("who is…") and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she may be entitled to acquire the nationality in the future." (para. 16)

31. These principles give effect to the protective purpose of the Statelessness Conventions by avoiding ambiguity in the process of determining statelessness.

32. It follows that, just as the Article 1(1) question – "is the person stateless?" – looks at the present situation, so the Article 8(1) question – "would deprivation render the person stateless?" – looks at the situation which would arise immediately upon deprivation of nationality. What *might have been* (if the individual and/or state of putative nationality had acted differently) and what *may be* (if the individual and/or state of putative nationality take steps in the future) is irrelevant. If the deprivation decision would leave a person without citizenship, Article 8(1) of the 1961 Convention applies, as the Court of Appeal found.

2. Assessing the Viewpoint of the Putative State of Nationality

33. Statelessness is determined by reference to the viewpoint of the state of putative nationality as to a person's nationality status.

34. It is axiomatic that states determine who has their nationality, subject to international law obligations.[11] The relevance of an individual's actions or inactions to his or her nationality status is strictly circumscribed by this principle. As the Prato Summary Conclusions state: "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*." (para. 12). UNHCR considers the competent decision-making body in nationality matters to be "the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically." (UNHCR, *Guidelines on Statelessness No. 1*, para 20).

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35. The detail of the Guidelines supports the conclusion that this analysis is consistent, both internally and with the purpose and principles of the Statelessness Conventions. Thus, as a general rule, in states where nationality is not conferred automatically, the viewpoint of the state of putative nationality is to be regarded as demonstrated by state-issued documentation (UNHCR, *Guidelines on Statelessness No. 1*, para 20, 25-26); and a grant of nationality is not to be regarded as invalid because of related error by an individual or the state (UNHCR, *Guidelines on Statelessness No. 1*, para 38).

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36. In her Case, the Home Secretary contends that her construction of section 40(4) is "entirely consistent" with the UK's obligations under the 1961 Convention because, inter alia, "Mr Al-Jedda would be made stateless on account of his own failure to apply for and acquire Iraqi nationality," (para. 59). As shown above, this is inconsistent with the notions of immediacy and state viewpoint inherent in the Article 1(1) definition of a "stateless person". The Home Secretary cites no

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[11] *See, e.g. Tunis and Morocco Nationality Case*, Permanent Court of International Justice, (1923) P.C.I.J., Ser. B, No. 4, p. 24.

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material to support the contention that the interpretation or application of international law limitations on deprivation of nationality are affected by a person's failure to acquire a different nationality. The Intervener has identified no such material. On the contrary, in cases where state action infringes upon access to legal identity, including citizenship, regional human rights courts have declined to conclude that state responsibility is supplanted by the applicant's own negligence or failure to act, even where it is alleged by states that such action could have avoided the violation at stake.

37. In *Kurić and Others v. Slovenia*, the 1992 deletion *ex lege* of approximately 25,000 former Yugoslav citizens from the Slovenian registry of permanent residents was construed by the ECtHR as a deprivation of legal status, resulting in a violation of the applicants' Article 8 rights to private and/or family life (paras. 356, 362). The Slovenian government had argued, in part, that the "erased" had failed to apply for citizenship under the terms of the 1991 independence legislation and that the repercussions of this failure were foreseeable to them, such that any consequent interference with Convention rights was in accordance with law and justified (paras. 325-329).

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38. In response to the government's view that the applicants' inactions caused their names to be erased, the Court observed:

> "Allegedly, the 'erasure' was a consequence of [the applicants'] failure to seek to obtain Slovenian citizenship. However, the Court points out that an alien lawfully residing in a country may wish to continue living in that country without necessarily acquiring its citizenship." (para. 357)

39. The Grand Chamber went further, to conclude that Slovenia had a positive obligation under Article 8 to ensure that the applicants' failure to apply for citizenship within the prescribed time limits of the independence legislation did not have such a deleterious impact upon their rights as to strip them of legal status and accordant rights and privileges:

> "The Court is of the opinion that, in the particular circumstances of the present case, the regularisation of the residence status of

> former SFRY citizens was a necessary step which the State should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the 'erased'." (para. 359)

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40. Similarly, the state argued in *Yean and Bosico v. Dominican Republic* that its discriminatory denial of nationality to two young girls did not result in statelessness, because "The alleged victims were able to opt for Haitian nationality because of the *ius sanguinis* connection through their fathers . . ." (para. 121(c)). The girls were born in the Dominican Republic to Dominican mothers and Haitian fathers, and were entitled to Dominican nationality under the *jus soli* guarantee of the Constitution in effect at the time.

41. The Inter-American Court declined to engage with the state's representations that the applicants could opt for Haitian nationality to avoid statelessness on their own behalf, ruling instead that the Dominican authorities' actions violated Article 20 of the American Convention, which safeguards the right to nationality. The Court emphasized that the impact of those actions was indeed to render the applicants stateless: "The Court finds that, owing to the discriminatory treatment applied to the children, the State denied their nationality and left them stateless . . . ." (para. 172).

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C. The Obligation to Avoid Statelessness

42. The object and purpose of the 1961 Convention is to avoid statelessness. This object is firmly established in multiple international and regional human rights treaties and is widely recognised.

Object and Purpose of the 1961 Convention

43. An expert meeting convened by UNHCR in August 2011 to address the interpretation of the 1961 Convention concluded:

> "The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby guaranteeing every individual's right to a nationality. The Convention does so by establishing rules for Contracting States on acquisition, renunciation, loss and deprivation of nationality."

(UNHCR, Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children (Summary Conclusions), September 2011, para. 1)

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44. To interpret Article 8(1) of the 1961 Convention so as not to prevent deprivation because a person could have acquired a second nationality before deprivation or because that person might be able to acquire a nationality in the future, would give rise to statelessness. It would allow for deprivation of nationality leading to statelessness outside of the specific exceptions to this prohibition stated in the 1961 Convention, see Article 8 paras. (2)-(4). It would therefore be contrary to the purposes of the 1961 Convention and inconsistent with those narrowly drawn exceptions to Article 8(1). Article 8(1) should be interpreted to preclude *any* deprivation which would create statelessness, regardless of how that statelessness might otherwise have been avoided or might be avoided.

Relevance of International Human Rights Law

45. The proper interpretation and application of Article 8(1) of the 1961 Convention is informed by international human rights law (Vienna Convention on the Laws of Treaties 1969, art. 32(3)). The UNHCR Guidelines state that "[t]he provisions of the 1961 Convention must be read and interpreted in light of developments in international law, in particular international human rights law (Guidelines on Statelessness No. 4, para. 8).

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46. The norm prohibiting arbitrary deprivation of nationality has taken on increasing significance in the years since the adoption of the 1961 Convention.[12] It is now enshrined in a number of important international and regional instruments, such as Article 24 of the International Covenant on Civil and Political Rights, Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 7 of the U.N.

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[12] *See* Laura van Waas, Nationality Matters: Statelessness under International Law (2008), pp. 85-87; Johannes M. M. Chan, The Right to a Nationality as a Human Right, 12 Human Rights L. J. 1 (1991), pp. 8-9.

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Convention on the Rights of the Child, Article 20 of the American Convention on Human Rights and Article 6 of the African Charter on the Rights and Welfare of the Child. The U.N. Human Rights Council has consistently emphasized that arbitrary deprivation of nationality is a violation of human rights and fundamental freedoms and has urged states to avoid statelessness in adopting and implementing nationality legislation. See, Resolution 20/5, Human rights and arbitrary deprivation of nationality, A/HRC/RES/20/5, 16 July 2012, at preamble 3 (reciting past resolutions on the same topic) and para. 5 (urging states to implement nationality legislation with a view to avoiding statelessness).

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47. According to UNHCR, the avoidance of statelessness is a general principle of international law (see UNHCR submission, U.N. Human Rights Council, *Arbitrary deprivation of nationality: report of the Secretary-General*, 26 January 2009, A/HRC/10/34, at para. 51). UNHCR has further stated that deprivation of nationality resulting in statelessness will generally be arbitrary within the meaning of international law unless it serves a legitimate purpose and complies with the principle of proportionality as expressed through the limited set of exceptions "set out exhaustively" in Article 8(2) and (3) of the 1961 Convention, which should be narrowly construed (*Ibid*. at paras. 51-52). The U.N. Secretary-General's report on human rights and arbitrary deprivation of nationality of 14 December 2009 adopted this interpretation of the relationship between the duty to avoid statelessness under international human rights law and the proper interpretation of Article 8 of the 1961 Convention – agreeing that the exceptions should be "narrowly construed" as they are exceptions to the general principle that deprivation of nationality resulting in statelessness is arbitrary in violation of international human rights law. (U.N. Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, at para. 27).

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Council of Europe

48. The Council of Europe recognizes the obligation to avoid statelessness as part of customary international law with the 1961 Convention codifying the rules for its implementation.[13]

49. *European Convention on Nationality.* The 1997 European Convention on Nationality (ECN) sets out an obligation to avoid statelessness and requires states to create principles and rules to achieve that objective. The United Kingdom is not a party to this Convention.

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50. *Council of Europe Recommendation R (1999) 18 on Statelessness.* Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness reiterates and elaborates many of the provisions of the ECN. The Recommendation advises courts to interpret national legislation so as to avoid statelessness.[14]

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Regional human rights courts and tribunals

51. Regional legal mechanisms have been called upon to address the causes and consequences of statelessness, including with respect the duty to avoid statelessness in situations of deprivation or denial of nationality.

52. In contrast to the international and regional instruments cited above (see para. 46), the European Convention on Human Rights does not expressly state a right to nationality. Nevertheless, the ECtHR has recognized that situations of arbitrary denial of nationality, particularly where they result in statelessness, may interfere with the enjoyment of Article 8.[15] The Court has explained that Article 8 must be interpreted in a broad sense, incorporating the individual's network

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[13] Council of Europe, Explanatory Report to the European Convention on Nationality, at para. 33.

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[14] *Ibid.* at Clause 1.4.1(f) ("In the application and interpretation of national legislation, account should be taken of the consequences of the relevant corresponding provisions of the legislation and of the practice of other States concerned, in order to avoid statelessness.").

[15] *See, e.g., Karassev v. Finland, ECtHR,* Decision of 12 January 1999, at page 10, point (b) ("Although right [sic] to citizenship is not as such guaranteed by the Convention or its Protocols, the Court does not exclude that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual").

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of personal, social and economic relations, and can sometimes embrace aspects of an individual's "social identity."[16] In the Chamber decision in *Kurić v. Slovenia,* the Court concluded that "in the light of relevant international-law standards aimed at the avoidance of statelessness, especially in situations of State succession… there has been a violation of Article 8".[17]

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53. The American Convention does expressly guarantee the right to nationality: Article 20.[18] In *Yean and Bosico v. the Dominican Republic*, judgment of 8 September 2005, the Inter-American Court of Human Rights, interpreting this provision, held that "at the current stage of the development of international human rights law, th[e] authority of the States [in making nationality determinations] is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness." (para. 140).

54. The same conclusion has been reached by the African Committee of Experts on the Rights and Welfare of the Child, which is the African Union mechanism charged with interpreting the African Charter on the Rights and Welfare of the Child. In its first-ever decision, *Institute for Human Rights and Development in Africa & Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. Government of Kenya,* 22 March 2011, the Committee found that Kenya's nationality practices left "a significant" number of Kenyans of Nubian descent vulnerable to statelessness, giving rise to a violation of Kenya's duty under Article 6(4)[19] of the Charter to ensure acquisition of the nationality of the country of birth where no other

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[16] *See, e.g., Mikulić v. Croatia*, ECtHR, Judgment of 7 February 2002, at para. 53; *Genovese v. Malta*, ECtHR, Judgment of 11 October 2011, at para. 33 (Article 8 in conjunction with Article 14).
[17] *Kurić and Others v. Slovenia*, ECtHR, Chamber Judgment of 13 July 2010, para. 376.
[18] "*Article 20 Right to Nationality*. 1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it."

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[19] Article 6(4) provides "States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall 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."

nationality is so acquired (para. 49). The Committee went on to observe that, even though the Kenyan government might argue that Nubian children had a claim to nationality in Sudan, "such a line of argument would be remiss of the fact that, implied in Article 6(4) is the obligation to implement the provision proactively in cooperation with other States." (para. 51). This reasoning echoes the UNHCR guidelines on the application of the Article 1(1) definition. States cannot rely upon the possibility of acquiring another nationality to circumvent their obligations as regards statelessness.

V. CONCLUSION

55. The Court of Appeal's interpretation of section 40(4) of the British Nationality Act 1981 was correct as comporting with the terms of the Statelessness Conventions and international human rights norms. Application of the Home Secretary's proposed interpretation of section 40(4) would be a violation of the United Kingdom's obligations under international law and would deviate significantly from the international community's approach to addressing statelessness.

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UKSC 2012/0129

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

(ENGLAND)

B E T W E E N:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

HILAL ABDUL-RAZZAQ ALI AL-JEDDA

Respondent

- and -

OPEN SOCIETY JUSTICE INITIATIVE

Intervener

CASE FOR THE INTERVENER

OPEN SOCIETY

JUSTICE INITIATIVE

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