LAY BARE ITS HIDDEN FRAME:
THE DEPRIVATION OF FOREIGN ISIS FIGHTER’S
CITIZENSHIP IN DENMARK, THE NETHERLANDS, AND
THE UNITED KINGDOM

BY HELENA VON NAGY*

ABSTRACT

With the rise of ISIS came the return of banishment. Ministers for security, immigration, or justice in many European countries now may revoke individuals’ citizenships based on the suspicion of their involvement with ISIS. Despite the universality of human rights, citizenship plays a fundamental role in international human rights law and protections. It is the key legal connection between the individual and the human rights system. Appropriately, that human rights law protects against the arbitrary deprivation of citizenship. However, those same treaties empower States with the option to remove individuals’ citizenship if they act in ways prejudicial to the interests of the State. European standards are also much more deferential to States than to the individual. Even so, Danish, Dutch, and British policies violate those international laws and to demonstrate the risk of denationalization to the human rights of their citizens. With limited substantive and procedural protections in denationalization proceedings, banished from their home, suspected ISIS fighters and associated persons lose their “right to have rights. Instead of returning their citizens to take

* My utmost thanks to Professors Patty Blum and Eric Stover, as well as the members of the S’22 Human Rights and Social Justice Writing Workshop for their insightful and invaluable commentary. I am also grateful to the comments of my peers and our group leaders in the 2022 Salzburg Cutler Fellows Program, and my panel leader and fellow discussants at the American Society of International Law 2022 Mid-Year Meeting, and the indefatigable editors at the University of Pennsylvania Journal of International Law.
accountability for their actions or try to rehabilitate these fighters, States such as Denmark, the Netherlands, and the United Kingdom brush these individuals under the proverbial rug. Stripping citizenship is not only an egregious violation of human rights, but also belongs to an antiquated vision of the world.
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INTRODUCTION

. . . . the façade of Europe’s political system . . . lay bare its hidden frame. Such visible exposures were the sufferings of more and more groups of people to whom suddenly the rules of the world around them had ceased to apply.

- Hannah Arendt, Origins of Totalitarianism

They found her wandering in the desert, nine months pregnant. Her two other children were dead. Three years earlier, Shamima Begum had left the apartment in East London, where she had lived since birth, to travel to Syria to join ISIS. She was 15 at the time. According to unverified reports in British papers, she became a member of ISIS’ morality police and sewed suicide bombers into their vests. Eventually, she fled the village of Baghuz, the last village under ISIS control, in early 2019 as the Syrian Defense Forces (“SDF”) closed in. The SDF captured her and placed her in the al-

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1 HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 267 (1951).
Hol detention camp in Syria. In February 2019, her third child died of pneumonia less than three weeks after birth. He is buried in al-Hol. Shamima requested that the United Kingdom let her come home to her family. Her request triggered an uproar among the public about her apparent lack of remorse for joining ISIS and justification of terrorist attacks. The U.K. Home Secretary stripped her U.K. citizenship. The United Kingdom allows this kind of denationalization, or involuntary removal of citizenship, unless it would render an individual stateless. Yet, Shamima did not hold a dual citizenship. The U.K. Supreme Court upheld the Home Office’s decision and denied Shamima Begum her citizenship. Today, she remains in al-Hol.

Shamima Begum exemplifies a larger, worrying trend. The declaration of an Islamic State in the Levant drew 30 to 40,000 individuals to join the organization. Between five and ten thousand of those came from Europe. After the fall of ISIS, many of the thousands of men and women who traveled to join ISIS sought to

[https://perma.cc/8RGF-2J72] (documenting the mass exodus of people from Baghuz in early 2019).


8 See Shamima Begum: IS Teenager’s Baby Son Has Died, supra note 3.


return. Undeniably, they present a difficult challenge. Many, like Shamima, claim they seek to return to their families and live quietly. Others may still hold fast to ISIS propaganda or plan to carry out violence. Undoubtedly, monitoring returned ISIS fighters could present significant logistical and financial burdens for State security services. Rather than address the complex motivations for their return, however, European governments increasingly began to use citizenship as a tool to nullify the issue entirely: denationalization prevents the individual from returning. The so-called “securitization of citizenship” has given many European governments great power to deploy citizenship as a tool under the auspices of “national security.” Since the rise of ISIS, seventeen European countries have amended their nationality laws to allow for the revocation of citizenship as punishment for supporting ISIS. This punitive measure rarely requires a criminal conviction. Indeed, Ministers for Security, Immigration, or Justice frequently make these determinations without a criminal trial and with exceptionally low standards of proof and weak judicial review.

In the past, countries would denaturalize “political undesirables” or revoke citizenship gained through immigration and naturalization. Now, eleven of these seventeen countries, including Denmark, the Netherlands, and the United Kingdom, authorize the deprivation of birthright citizenship. This analysis focuses on these three countries because, in addition to the availability of sources in English, their widespread deprivation of birthright citizenship of foreign fighters trapped in detention camps in Syria illustrates the broader threat of denationalization. The

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17 See discussion infra Section III.
deprivation of birthright citizenship *in absentia* makes the likelihood of *de jure* statelessness much more likely.

Thus, Danish, Dutch, and British denationalization policies, and others like them, pose an even greater risk. As Hannah Arendt wrote decades ago:

The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world . . . . Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice . . . .

To remove citizenship, birthright citizenship especially, is to place a person outside of the human rights system. While the security threat posed by ISIS is real and ongoing, the removal of birthright citizenship poses a fundamental threat to the global system of rights protections.

Thus far, the academic and activist literature on these laws has failed to provide a systematic analysis of how they violate international law, how the European court allows it, and the ramification of this practice of denationalization. This Article proceeds in three sections. Part I discusses the fundamental role of citizenship in international human rights law and protections, concluding that it is the key legal connection between the individual and the human rights system. Part II examines the international and European laws governing statelessness and citizenship and applies it to the Danish, Dutch, and British policies to demonstrate not only the risk to the human rights of their citizens, but also how the policies violate these laws. Part III concludes and discusses some potential paths forward to avoid a crisis of statelessness and systematic human rights violations.

*Human Rights Violations at Al-Hol*

The failure of the human rights regime to protect the stateless is most obvious at the two ISIS detention camps in Syria, al-Hol (alternately spelled al-Hawl) and al-Roj. Between the two camps, some 11,000 foreign nationals are detained. This includes

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20 *Arendt, supra* note 1, at 296.
approximately 640 children and 230 women from the United Kingdom/European Union.\textsuperscript{21} Al-Hol has a population density of around 36,000 people per square kilometer—over three times that of New York City.\textsuperscript{22}

The International Committee of the Red Cross ("ICRC") called the camp "apocalyptic."\textsuperscript{23} Human Rights Watch declared it to have inhuman or degrading conditions.\textsuperscript{24} The Office of the U.N. High Commissioner for Human Rights Chair of the Commission of Inquiry for Syria reported that the individuals detained in the camps are "are subject to indefinite detention in appalling conditions amounting to cruel, inhuman and degrading treatment."\textsuperscript{25}

According to the 2022 Commission of Inquiry report, there is limited access to healthcare, which leads to suffering and preventable deaths among women and children.\textsuperscript{26} Some children drowned in sewage pits or were burned when their tents caught fire because of the gas heaters used in the winter.\textsuperscript{27}

There are egregious violations of the rights to life and health. In 2019 and 2020, 700 detainees died, killed by detainees that remain loyal to ISIS, killed in crossfire between guards and detainees,\textsuperscript{28}

\begin{footnotes}
\footnote{21 See RIGHTS AND SECURITY INTERNATIONAL, EUROPE'S GUANTANAMO: THE INDEFINITE DETENTION OF EUROPEAN WOMEN AND CHILDREN IN NORTH EAST SYRIA 9, ¶ 13 (Feb. 17, 2021) [hereinafter RIGHTS AND SECURITY INTERNATIONAL].}
\footnote{22 See id., at 12, ¶ 18.}
\footnote{27 See id., ¶ 110.}
\end{footnotes}
of medical care, unsanitary conditions, or accidents such as tent fires. The Kurdish Red Crescent reported that at least 517 people, 371 of them children, died in 2019. Some women are forced to give birth in their tents without the aid of doctors, midwives, or aid workers. The drinking water is contaminated or in short supply. When it rains, tents flood with rain or sewage. In the summer, the temperatures can reach as high as 122 degrees Fahrenheit (50 degrees Celsius).

There are also significant risks of family separation, impermissible detention practices, and severe violations of the rights of children. Women are separated from their children, including breastfeeding infants, to be placed in internal confinement. In July 2019, UNICEF identified at least 520 unaccompanied or separated children in al-Hol camp. Boys from 12 years of age are routinely disappeared by the SDF and held without contact with their mothers in special prisons for the men. The Committee on the Rights of the Child concluded that “[t]he children are living in inhuman sanitary conditions, lacking basic necessities including water, food and health care, and facing an imminent risk of death.” Children suffer from PTSD and other
psychological disorders from the stress of camp life. \footnote{See id. at 4.} Children are subjected to sexual assault and rape. \footnote{Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra note 26, ¶ 113.} Overall, sexual assault and sexual exploitation by male guards is common. \footnote{See id. note 15, at 1.} The Commission of Inquiry concluded in no uncertain terms that “the blanket internment of nearly 60,000 individuals in al-Hol and al-Raj camps . . . cannot be justified and amounts to unlawful deprivation of liberty and, for the nearly 40,000 children among them, to deprivation of the range of child rights.” \footnote{See id.} The Commission also reported it had reasonable grounds to conclude that the conditions in the al-Hol camp in particular could amount to cruel or inhuman treatment. \footnote{See MIRA SIEGELBERG, STATELESSNESS: A MODERN HISTORY 173-74 (Harvard U. Press ed., 2020).}

I. HUMAN RIGHTS AND STATELESSNESS

Banishment—punishment by expulsion—is an ancient practice. \footnote{See Audrey Macklin, \textit{A Brief History of the Brief History of Citizenship Revocation in Canada}, 44 MAN. L. J. 434, 436 (2021).} From ancient times to today, banishment has been a tool used by States to rid themselves of political dissidents, convicted criminals, and ethnic or religious minorities. \footnote{See Macklin & Bauböck, supra note 15, at 1.} However, the hardening of State borders created a particularly thorny legal problem: statelessness. The political upheaval of the First World War caused massive migration flows and a spike in the number of stateless Europeans. \footnote{See id.; Radhika Vyas Mongia, \textit{Race, Nationality, Mobility: A History of the Passport}, in \textit{AFTER THE IMPERIAL TURN} 196, 199 (2020).} The horrors of World War II increased the number of stateless individuals again, including the Jewish people stripped of their citizenship by the Nazis as a precursor to deportation to concentration camps. By the end of the wars, there were fourteen million stateless people within Europe. \footnote{See MIRA SIEGELBERG, STATELESSNESS: A MODERN HISTORY 173-74 (Harvard U. Press ed., 2020).}
Proposals to make the U.N. a separate site of protection for stateless persons were rejected. States agreed that their citizens had a right to a nationality, but the stateless had no real legal protection, despite the rights enumerated in the UDHR. Today, an estimated 10 million people are stateless.

Arendt observed that to be stateless is to “[lack] any form of social, economic, or legal protection.” In many ways, this assessment has not changed. In practice, those who lack nationality have a great difficulty exercising their rights. Belonging to a State is central to human rights. As recognized by the Inter-American Court of Human Rights, nationality is the “political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community.”

Membership in a political community is a legal requirement for most civil rights. For example, Art. 21 of the UDHR protects the right for “everyone” to take part in the government of their own country. While the norm ostensibly promises a universal right to government participation, the human rights guarantee only applies with respect to “one’s country.” The “jurisdictional technicality actually operates as an exclusion clause for those who have no country, the stateless.” Thus stateless individuals lose the ability to vote, stand for office, and engage in other activities connected to participate in government. Similarly, freedom of movement is tied to citizenship. Several legal instruments protect the right to leave, enter, reenter, or remain in your own country. In the European and American human rights conventions, the right to enter or reenter is

48 Id. at 180.
51 See Brad K. Blitz & Maureen Lynch, Statelessness and the Deprivation of Nationality, in STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 1, 2 (Brad K. Blitz & Maureen Lynch eds. 2011).
granted with respect to the “State of which he is a national.” The International Covenant on Civil and Political Rights (“ICCPR”) protects the right to enter your own country. The Human Rights Committee, which monitors the implementation of the ICCPR, has interpreted “own country” more broadly than merely the country of nationality, including individuals with “special ties or claims” to the country, and “stateless persons arbitrarily deprived of the right to acquire nationality of the country of [long-term] residence.” However, beyond this interpretation of the ICCPR, an individual may be refused admittance to a state of which they are not a national. “Where the stateless are concerned, that is every State.”

Whoever ceases to be a citizen of a State not only loses their civil rights, but also their “inalienable and universal” human rights, especially economic, social, and cultural (“ESC”) rights. Article 2 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) allows developing states to restrict the economic rights of non-citizens if it does not otherwise violate human rights. The Committee on Economic, Social, and Cultural Rights reaffirmed this special exception. In practice, stateless individuals are frequently deprived of ESC rights, with or without States invoking art. 2(3) of the ICESCR. This has been particularly evident after a decade of austerity measures in reaction to the 2008 financial crisis and the COVID-19 pandemic. There has been a sustained environment of

57 Hum. Rts. Comm., General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum: General Comment No. 27 Freedom of Movement (art. 12), ¶ 20, CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) [hereinafter General Comment No. 27].
58 Van Waas, supra note 54, at 27.
“the economic scapegoating of noncitizens” for many social woes, which harms stateless individuals.62

States created the 1954 Convention Relating to the Status of Stateless Persons (the “1954 Convention”) to improve the standard of living for stateless individuals. The Convention provisions recognize the rights to work,63 housing,64 education,65 public relief,66 and social security.67 The Convention is silent on political rights. Early attempts to add freedom of opinion and assembly were struck down.68 The standards of treatment for the enshrined rights are conditioned upon “levels of attachment,” ranging from merely ‘subject to [S]tate’s jurisdiction’ to ‘lawful stay and durable residence.’69 For example, the right of freedom of religion is guaranteed with physical presence; but freedom of movement only attaches with lawul presence.70 Stateless persons can be perpetually denied that lawful status, such that they can never access the rights housed in the 1954 Convention. 71

The enforcement of the explicitly protected rights is also much more difficult without a State. The inalienability of human rights requires their independence from nation-States, but the nation-State is the only judicial authority that can effectively acknowledge and enforce human rights. For example, the Optional Protocol to the ICCPR provides individuals with a forum to claim violations of human rights by their State.72 However, it only accepts


64 Id. art. 21.

65 Id. arts. 22, 43.

66 Id. art. 23.

67 Id. art. 24.

68 See van Waas, supra note 54, at 32.


70 See van Waas, supra note 54, at 29.

71 See id. at 33.

“communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party.” 73 The declarations and reservations by State Parties clarify that the individuals protected under the Optional Protocol must either be citizens of the State or present under its territorial jurisdiction. 74 More generally, some States, including Denmark, insist that its human rights obligations only extend to “individuals within [their] territory and subject to [their] jurisdiction.” 75 Thus, the Danish government argues that individuals present in third countries, including in refugee or detention camps, do not fall under their jurisdiction for ICCPR obligations. 76 This is generally considered an improper understanding of the extent of international human rights law obligations. Nonetheless, it provides yet another hurdle for individuals seeking to petition their States for redress. Human rights require robust State protection if they are to mean anything.

II. INTERNATIONAL LAW ON STATELESSNESS APPLIED

a. International Protections Against Statelessness

Unconditional citizenship is a relatively new phenomenon. 77 In the early twentieth century, the right to determine the procedures and conditions for withdrawal, and deprivation of one’s citizenship were considered the domaine réservé of a State. 78 In addition, 

73 Id. art. 1.
74 See, e.g., Declaration of France and Croatia, Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302 (interpreting article 1 of the Optional Protocol as “giving the Committee the competence to receive and consider communications from individuals subject to the jurisdiction of” France or Croatia).
75 MINISTRY FOREIGN AFF. DENMARK, APPENDIX A: RESPONSE BY THE GOVERNMENT OF THE KINGDOM OF DENMARK TO QUESTIONS TWO AND THREE FROM THE UNITED NATIONS SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS ON FOREIGN FIGHTERS 9 (2019) [hereinafter MINISTRY OF FOREIGN AFFAIRS OF DENMARK].
76 See id.
78 See, e.g., Nationality Decrees Issued in Tunis and Moroccos (French Zone) (Great Britain v. France), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, 24 (Feb. 7) ("The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of
international legal protections against statelessness gave States the power to remove individuals’ birthright citizenship if they act in ways prejudicial to the interests of the State. Since the founding of the U.N., international law on nationality has evolved to protect individuals who are already stateless and to prevent the occurrence of statelessness in most cases.\footnote{See, e.g., van Waas, supra note 54 (analyzing the positive development of citizenship acquisition for stateless people in eight case studies).} For example, though not a binding treaty, Article 13 of the UDHR proclaims the “right to return” to your country, while Article 15 declares that “[e]veryone has the right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality.”\footnote{UDHR, supra note 53, arts. 13, 15.} Subsequent resolutions of the U.N. Human Rights Council establish that “deprivation” in the UDHR also includes arbitrary ex lege loss of nationality.\footnote{U.N. High Comm’r for Refugees, Expert Meeting on Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality: Summary Conclusions, ¶ 9 (Mar. 2014) [hereinafter 2014 Expert Meeting Summary Conclusions].} Similarly, the ICCPR requests that States prevent the arbitrary deprivation of citizenship.\footnote{See ICCPR, supra note 56, art. 12(3); see also Sandra Mantu, “Terrorist Citizens and the Human Right to Nationality,” 26 J. CONTEMP. EUR. STUDIES 28, 30 (2018).} It does not distinguish between birthright citizenship (\textit{jus solis}), conferred based on birth within the territory; citizenship by descent (\textit{jus sanguinis}), inherited from your parents; or naturalization. Indeed, differentiation between types of citizenship would likely qualify as discrimination under international human rights law. The provisions of the UDHR have generally reached the status of customary international law (“CIL”); therefore, the protection against arbitrary deprivations likely also qualifies as CIL. The prominence of prohibitions on the arbitrary deprivation of nationality further supports this conclusion.\footnote{See U.N. High Comm’r for Refugees, Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, 2, U.N. Doc. No. HCR/CS/20/05 (May 2020) [hereinafter UNHCR Guidelines on Statelessness No. 5].}

ICCPR protections for the right to nationality go beyond citizenship. Article 12 recognizes the right to \textit{enter} one’s “own country.”\footnote{See ICCPR, supra note 56, art. 12(4).} As the Human Rights Committee has reiterated: ...
[T]here are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality . . . arbitrarily prevent this person from returning to his or her own country.\footnote{General Comment No. 27, supra note 57, ¶ 21.}

Importantly, in General Comment 27, the Human Rights Committee concluded that the scope of “own country” embraces not only the country of one’s nationality, but also “special ties or claims” a person has in relation to a given country.\footnote{Id. ¶ 20.} Those special ties and claims can include “long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.”\footnote{Hum. Rts. Comm., Communication No. 1557/2007, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 7.4, U.N. Doc. CCPR/C/102/D/1557/2007 (Sep. 1, 2011) [hereinafter Neystrom v. Austl.].} Nationals who lose their citizenship may still be allowed to enter their country of origin or long-term, habitual residence. In fact, explicitly, “nationals of a country who have been stripped of their nationality in violation of international law” cannot be prohibited from reentering that country.\footnote{General Comment No. 27, supra note 57, ¶ 20.}

International law also bans restrictions on the right to nationality based on membership in a protected group. Denationalization on the basis of an immutable trait or protected category, including race, religion, national origin, and sex, is and arbitrary revocation of citizenship. The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) demands States refrain from interfering with the right to nationality based on race, color, or ethnic origin.\footnote{See International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), Jan. 4, 1969, 660 U.N.T.S. 195.} Such discrimination includes categorical distinctions between dual and single nationals. According to the Committee for the Elimination of Racial Discrimination, a law that allows for the denationalization of those holding two or more citizenships, but not those with a single citizenship can “give rise to discriminatory practices contrary to [CERD].”\footnote{See Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Rwanda, ¶¶ 8-9, U.N. Doc. No. CERD/C/RWA/CO/18-20 (June 10, 2016) (“8. The Committee is disturbed by the distinction made by the State party in its most recent population census between Rwandans and Rwandans with dual nationality. The Committee is...”)}

\footnote{https://scholarship.law.upenn.edu/jil/vol45/iss2/3
DOI: https://doi.org/10.58112/jil.45-2.3}
Elimination of All Forms of Discrimination Against Women ("CEDAW") prohibits restrictions on nationality on the basis of sex or marriage to a non-national.91 The Convention on the Rights of the Child ("CRC") codifies children’s right to a nationality and requires states to respect and ensure that right.92 The Convention on the Rights of Persons with Disabilities ("CRPD") also protects the right to nationality and prohibits denationalization on the basis of disability.93

International law also broadly restricts the actions States may take to revoke an individuals’ nationality in addition to the prohibition on discriminatory revocation. The 1954 Convention strove to generally improve the status of stateless individuals. However, it failed to address the reduction and elimination of statelessness. The 1961 Statelessness Convention, born of the limitations in the 1954 Convention,94 prohibits broad categories of denationalization that could lead to statelessness.95 Article 8 forbids States from "depriv[ing] a person of its nationality if such deprivation would render him stateless."96 This includes a prohibition on the loss of citizenship due to birth outside of the country, for short-term residence abroad, or due to a spouse’s loss of citizenship.97 Under the 1961 Statelessness Convention, the state

96 See 1961 Statelessness Convention, supra note 95, art. 8(1).
97 See id. arts. 6-7.
has the burden of proof to demonstrate that a deprivation of nationality will not result in statelessness. States must inquire whether an individual actually possesses another nationality at the time of the denationalization, “not whether they could acquire a nationality at some future date.” Thus, denationalization is legally limited to dual nationals, setting up the potential for discrimination based on citizenship status, as discussed later.

However, under Article 8(3)(a) of the 1961 Statelessness Convention, States may revoke citizenship for conduct inconsistent with the duty of loyalty to the State even if it results in statelessness. Specifically, Article 8(3)(a)(ii) allows for the revocation of citizenship if the individual “conducted himself in a manner seriously prejudicial to the vital interests of the State,” provided that such a provision existed in a State’s domestic law at the time of its ratification. This provides an exception to the prohibition on statelessness.

Given that statelessness is allowed under Article 8, the Expert Committee tasked with interpreting the 1961 Statelessness Convention insisted that the criteria create a very high threshold. The conduct “seriously prejudicial to the vital interests of the State” must “threaten the foundations and organization of the State whose nationality is at issue.” In the Meeting of the Plenipotentiaries, 2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 7. UNHCR convened the Expert Committee in 2013 for the purpose of developing guidelines on the loss and deprivation of nationalization. Those guidelines combine the Expert Committee’s findings and a second meeting in 2018. They are published as the UNHCR Guidelines on Statelessness No. 5, supra note 83.

1961 Statelessness Convention, supra note 95, art. 8(3)(a); at the Conference of Plenipotentiaries, countries roundly rejected imagining a citizenship free from the strictures of loyalty. Still, under the fascist regime of Francisco Franco in 1959, Spain memorably submitted, “there is no convincing reason for abandoning certain basic criteria (fidelity, obedience, loyalty) which have to be considered in determining whether a person who would otherwise be without a nationality (and only such a person) should be deemed a national. However desirable the prevention of statelessness may be, it would be unreasonable to undermine for that purpose the very conception of nationality.” U.N. Conference on the Elimination or Reduction of Future Statelessness, Comments by Governments on the Revised Draft Convention on the Elimination of Future Statelessness and the Revised Draft Convention on the Reduction of Future Statelessness, 10, U.N. Doc. A/CONF.9/5/Add.1 (Mar. 12, 1959).

1961 Statelessness Convention, supra note 95, art. 8(3)(a)(ii).

2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 68.

Id.
many States coalesced around “treachery or disloyalty”\textsuperscript{105} as the standard, which the Expert Committee interpreted to include acts of terrorism.\textsuperscript{106} Thus, international law on statelessness may allow the kind of denationalization that is at issue here, despite the obvious human rights implications.

Even with the power to revoke citizenship as a punishment for terrorism, however, international law prohibits the \textit{arbitrary} deprivation of citizenship.\textsuperscript{107} The deprivations must adhere to the principle of legality, or foreseeability, predictability, and specificity. Under the ICCPR, all State action with regard to the revocation of citizenship must be provided for by law, in accordance with the object and purpose of the covenant, and reasonable under the circumstances.\textsuperscript{108} Under the 1961 Statelessness Convention as well, provisions related to loss and deprivation of citizenship must be “predictable.”\textsuperscript{109} This requirement reflects the general legal principle of legal certainty, or the requirement that laws be sufficiently precise to allow for individuals to structure their activities in accordance with them.

\begin{itemize}
  
  \item \textsuperscript{106} 2014 Expert Meeting Summary Conclusions, \textit{supra} note 81, ¶ 68.
  
  
  
  \item \textsuperscript{109} 2014 Expert Meeting Summary Conclusions, \textit{supra} note 81, ¶ 16.
\end{itemize}
Discriminatory deprivations of citizenship are presumptively arbitrary. Article 9 of the 1961 Statelessness Convention categorically prohibits deprivation of nationality on “racial, ethnic, religious or political grounds.” The Human Rights Council has also recognized this in multiple successive resolutions. Moreover, in cases where deprivation is on the basis of race, sex, color, or descent, it becomes both arbitrary and a breach of the *jus cogens* principle of non-discrimination of the right to a nationality. Recent U.N. human rights jurisprudence also suggests that differential treatment for dual and single nationals can qualify as discrimination.

Deprivations of citizenship must serve a legitimate purpose and be proportionate to the risk posed to be considered non-arbitrary. That purpose must be consistent with the objectives of human rights law. The Expert Committee suggested a balancing test between the interests of the individual and the State in order to judge proportionality. The interests of the individual depend on the strength of the link between the person with the State in question—“including birth in the territory, length of residence, family ties,

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111 1961 Statelessness Convention, *supra* note 95, art. 9.


115 *See generally* UNHCR Guidelines on Statelessness No. 5, *supra* note 83, ¶ 91.

economic activity as well as linguistic and cultural integration.” 117 The Human Rights Committee endorsed a similar position in Neystrom v. Australia, in which they found that Australia arbitrarily deprived Mr. Neystrom of the right to enter his own country. 118 Neystrom, born in Sweden, had lived his entire life in Australia and believed he was an Australian citizen. All of his family members were Australian citizens. Australia revoked Neystrom’s visa due to a criminal conviction for rape. However, the revocation occurred 14 years after the conviction. 119 Thus, the Human Rights Committee concluded the revocation was disproportionate and did not have a legitimate purpose, given the time between his conviction and visa revocation. Similarly, the Expert Committee suggested that deprivation that results in statelessness is “generally” arbitrary because the impact on the individuals often far outweighs State interests. 120

The Expert Committee also asserted that the deprivation must be “accompanied by full procedural guarantees.” 121 No matter who makes the denationalization decision, the 1961 Statelessness Convention specifically imposes procedural safeguards, including the right to a “fair hearing by a court or other independent body” for deprivations under Article 8. 122 The Expert Committee has also stressed that, where alleged criminal conduct, such as terrorism, underlies the deprivation, it is “strongly advisable” that a deprivation only occur after a finding of guilt in a criminal court. 123 With or without a criminal trial, the decision must remain open to effective administrative or judicial review. 124 The revoking State

117 Id., ¶ 21.
119 Id. ¶ 7, (“The Committee notes that the State party has provided no argument justifying the late character of the Minister’s decision. In light of these considerations, the Committee considers that the author’s deportation was arbitrary . . . .”).
120 Id. ¶¶ 7.6, 7.9.
121 2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 26.
122 1961 Statelessness Convention, supra note 95, ¶ 72; see also UNHCR Guidelines on Statelessness No. 5, supra note 83, ¶ 13.
123 2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 27.
124 Draft Articles on Nationality of Natural Persons, supra note 113, art. 17; see also 1961 Statelessness Convention, supra note 95, art. 8(4); European Convention on Nationality arts. 11-12, Nov. 11, 1997, E.T.S. No. 166. For a useful summary of these conditions, see Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality, supra note 107, ¶¶ 4-5; U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROTECTION OF STATELESS PERSONS UNDER THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS ¶¶ 71-77 (2014).
must also assess the possibility of statelessness at the moment of revocation. It cannot rely on a possible future acquisition of nationality to avoid statelessness: “[i]t is statelessness upon withdrawal of nationality and not the question of an individual’s potential eligibility for another nationality that is salient for the purposes of the 1961 Statelessness Convention.”

b. Regional European Protections Against Statelessness

Pursuant to the European Convention on Human Rights (“ECHR”), the European Court of Human Rights (“ECtHR”) has developed a test with similar standards for deprivation. Generally, the ECHR does not explicitly protect a right to citizenship. However, the ECtHR has held that, because of its impact on family life, the arbitrary deprivation of citizenship could amount to a violation of the Article 8 right to privacy and respect for family life. The Court’s three-pronged analysis considered whether the deprivation (i) adhered to the principle of legality, (ii) was necessary and proportional, and (iii) adhered to procedural protections. However, a survey of the cases related to citizenship deprivation reveal that the European standards are much more deferential to States and consistently miscalculate the impact on the individual concerned when dealing with terrorism-related national security cases.

125 UNHCR Guidelines on Statelessness No. 5, supra note 83, ¶ 87.
Under the first prong’s assessment of legality, the Court has developed divergent standards for terrorism and non-terrorism-related cases. In Kuriç v. Slovenia, a non-terrorism case, the applicant had his citizenship removed automatically after the breakup of Yugoslavia.\(^{129}\) The Court decided that the “erasure” of his citizenship was unforeseeable and, thus, arbitrary.\(^{130}\) Similarly, in another non-terrorism case Usmanov v. Russia, the Court ruled that the revocation of the applicant’s citizenship pursuant to Russia’s “excessively formalistic approach” after he failed to list his siblings on the application form, was unforeseeable.\(^{131}\) In contrast, in a terrorism-related case, the Court found that the United Kingdom had not arbitrarily deprived a Sudanese-British man, “K2,” of his citizenship under the British Nationality Act because the decision had been reviewed by the U.K. Court of Appeals and the U.K. Supreme Court.\(^{132}\) The British government alleged that K2 had engaged in “terrorism-related activities linked to Al-Shabaab.”\(^{133}\) The Court found that the United Kingdom’s action was in accordance with the law, noting the British Nationality Act, and deferred to the United Kingdom under a margin of appreciation.\(^{134}\) In other cases, the Court consistently found that deprivation heeded the principle of legality because the legislature extended the time limits for revocation, which could be applied both retroactively (Ghoumid v. France)\(^{135}\) and circularly when the decision was taken pursuant to a statute (Said v. Denmark, Johansen v. Denmark).\(^{136}\)


\(^{130}\) Id. ¶ 343.


\(^{133}\) Id. ¶ 5.

\(^{134}\) Id. ¶ 52 (explaining that the “interpretation of domestic legislation is primarily a matter for the national courts.”)


\(^{136}\) See, e.g., Said Abdul Salam Mubarak v. Denmark, App. No. 74411/16, ¶ 64 (Jan. 22, 2019), https://hudoc.echr.coe.int/?i=001-191222 [https://perma.cc/SB4D-7S5A] (“The decision to deprive the applicant of his Danish citizenship was taken by virtue of section 8(b) of the Act on Danish Nationality . . . . The Court is therefore satisfied that the decision was ‘in accordance with the law’.”); Johansen v. Denmark, App. No. 27801/19, ¶ 47 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9] (“The decision to deprive the applicant of his Danish citizenship was based on
The first prong of the Court’s test also requires an assessment of the procedural safeguards. In K2, the Court considered the U.K. appeals process in depth and held that the applicant had sufficient opportunities to appeal and review the evidence, despite the fact he could not reenter the country to attend the hearings or communicate with his lawyers in person, raising questions about the accused’s right to participate and communicate with their lawyers.\(^\text{137}\) Conversely in Usmanov, the Court held that the Russian system allowed the authorities to revoke Mr. Usmanov’s citizenship without requiring “those authorities to give a reasoned decision specifying the factual grounds on which it had been taken . . . .”\(^\text{138}\) Yet, there was no evidence that the British government had provided such a specific letter of notice. Rather, the Court deferred to the judgment of the appeals court in the United Kingdom even though much of the evidence against K2 was kept confidential.\(^\text{139}\)

Under the second and third prongs of the Court’s test, the Court examines whether the deprivation (i) has a legitimate purpose and (ii) is proportional to the State interest considering the potential impact of a deprivation of citizenship on the individual. The Court has affirmed multiple times that “the protection of the public from the threat of terrorism” qualifies as a legitimate aim.\(^\text{140}\) In Ghoumid, it also accepted that the deprivation of citizenship in itself was a legitimate aim if the individual has “severed the bond of loyalty to [the State] by committing particularly serious acts which, in the case of terrorism, undermine the very foundation of democracy.”\(^\text{141}\)


\(^{140}\) Id. ¶ 66; see also Johansen v. Denmark, App. No. 27801/19, ¶ 84 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9] (affirming the Court’s judgment in K2 v. United Kingdom).

In the proportionality analysis, the potential threat posed by terrorism overrides other concerns about the impact on the individual, no matter how drastic. In Kuriç, the Court accepted that Slovenia had a legitimate interest in protecting national security and controlling the entry of non-citizens.\(^{142}\) However, given the disproportionate repercussions—"the destruction of identity documents, loss of job opportunities, loss of health insurance, the impossibility of renewing identity documents or driving licenses, and difficulties in regulating pension rights"—the Court found that Slovenia should have taken steps to regularize the residence of Mr. Kuriç and his co-petitioners instead of stripping them of their legal personhood.\(^{143}\) In the terrorism-related national security cases, the Court ostensibly considers "whether the revocation of nationality rendered the applicant stateless . . . deprived the applicant of any legal status . . . [or] left the applicant without any valid documents."\(^{144}\) In Said and Johansen, the Court deferred to the government’s assessments of proportionality despite the fact that all three applicants had extensive family ties in Denmark.\(^{145}\) The Court similarly deferred to the British government’s assessment in K2 because the applicant had voluntarily left the United Kingdom, and his family could visit him.\(^{146}\)

In its gravity assessments, the Court’s statements suggest that it would not apply a categorical ban on statelessness, but rather require particularly severe threats to justify revocation in those instances. In Ghoumid, Johansen, K2, and Said, the Court noted in passing that denationalization in each case did not render them stateless.\(^{147}\) In K2, the Court referenced a European Court of Justice


\(^{143}\) Id. ¶¶ 356, 355, 371.


decision that held that it was legitimate for a Member State to revoke naturalization even when the applicant would lose their E.U. membership and become stateless as long as the revocation complied with the principle of proportionality.\textsuperscript{148} While the Court has not yet decided a case about nationality deprivation where the petition is a former ISIS fighter, given the severity of ISIS attacks in Europe, the Court may find that the specter of terrorism and the support for the groups that planned the attacks are enough to justify the revocation.

Citizenship finds a more robust protection under the European Convention on Nationality (“ECN”).\textsuperscript{149} Nonetheless, Article 7 of the ECN allows for the loss of nationality \textit{ex lege} if the individual engaged in “conduct seriously prejudicial to the vital interests of the State Party.”\textsuperscript{150} The explanatory report to the ECN stresses that this conduct includes treason and other activities directed against the vital interests of the State,\textsuperscript{151} which likely include terrorism. However, Article 7(3) provides that such revocation is not lawful if the person would thereby become stateless.\textsuperscript{152} Despite this promising protection, only twenty-one Council of Europe Member States are State Parties.\textsuperscript{153} The ECN also has no independent enforcement mechanism to hear and resolve specific State-to-State or individual-to-State disputes. The ECtHR will not incorporate the


\textsuperscript{150} European Convention on Nationality, supra note 124, art. 7(1).

\textsuperscript{151} See COUNCIL OF EUR., EXPLANATORY REPORT TO THE EUROPEAN CONVENTION ON NATIONALITY (Nov. 11, 1997); see also Gerard-Rene de Groot, The European Convention on Nationality: A Step Towards a Ius Commune in the Field of Nationality Law, 7 MAASTRICHT J. EUR. & COMP. L. 117, 142 (2000).

\textsuperscript{152} European Convention on Nationality, supra note 124, art. 7(3).

ECN into its jurisprudence, as the Court considers itself bound to interpretations of the European Convention on Human Rights. 154

c. Arbitrary Deprivation of Nationality: Denmark

Until 2019, Danish law did not allow for the revocation of citizenship unless the person had first been convicted of a serious crime against the State. Such crimes included attempting to bring the Danish State under foreign domination, 155 encouraging hostile measures against the Danish State, 156 providing assistance to the enemy in a time of war, 157 terrorism, 158 financial support for terrorism, 159 training or recruiting individuals to engage in acts of terrorism, 160 and certain other crimes in the Danish Penal Code (Straffeloven). 161 The deprivation order also had to come from a judge in the criminal court, and the court could not order the deprivation if it made the individual stateless. 162 Furthermore, the individual had to return to stand trial because Denmark did not allow trials in absentia for such serious crimes. Thus, the Danish government would ensure that the individual would be properly deported to their other country of citizenship, and not rendered de facto stateless.

Even though the prohibition on statelessness remains, 163 the 2019 amendment to Section 8b of the Danish Nationality Act (Indfødsretsloven) radically lowered these requirements. Titled the

155 See Straffeloven [Penal Code], LBK No. 871 of 04/07/2014, Ch. 12 § 98(1) (Den.) .
156 See id. Ch. 12 § 100(1) (2014).
157 See id. Ch. 12 § 102(1) (2014).
158 See id. Ch. 13 § 114(1) (2014).
159 See id. Ch. 13 § 114a (2014).
160 See id. Ch. 13 § 114b (2014).
161 See generally, id. Chs. 12 & 13 (2014) (discussing crimes against the independence and security of the State and crimes against the State constitution and the supreme State authorities, terrorism, etc.).
162 See Indfødsretsloven [Nationality Act], LBK No. 1191 of 05/08/2020, §8 B (1)-(2) (Den.) [hereinafter Danish Nationality Act] (The full translation below is provided by Google Translate. However, where quoted in the text of the article, the translation is copied from the European Court of Human Rights Johansen v. Denmark case. See Johansen v. Denmark, App. No. 27801/19, ¶¶ 11, 16 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9]).
163 Id. § 8 B (3).
“Foreign Warriors Act” (Remmedkrigerloven),\textsuperscript{164} Section 8(b) now allows the Ministry of Immigration and Integration to deprive a person of their citizenship if they have “acted in a way that is to the serious detriment of the country’s vital interests.”\textsuperscript{165} The new law allows the Ministry to make the decision without a criminal conviction, and without first having to ensure the individual is present in Denmark.\textsuperscript{166} If the Ministry for Justice decides that the information necessary to make the denationalization decision cannot be sent to the Ministry of Immigration due to security reasons, the Ministry for Justice may order the deprivation instead.\textsuperscript{167}

When considering whether denationalization will make a person stateless, the government assesses whether the person may obtain another nationality “merely by registration” with the authorities of that country.\textsuperscript{168} The Danish government interprets the ban on statelessness to require only that a person be able to obtain another nationality through registration without the discretion of another country’s authorities.\textsuperscript{169} Thus, the government interprets the prohibition on statelessness not to require that the government prove the individual has a secondary citizenship. In Johansen, the Government stripped the appellant of his citizenship four years before officials could confirm he possessed a secondary citizenship.\textsuperscript{170}

In addition, the 2013 Aliens Act allows for the expulsion of people deprived of their citizenship, unless it would be contrary to Denmark’s international obligations.\textsuperscript{171} The Act also requires that an individual be permanently banned from Denmark if they are sentenced two years or more in prison in connection to any criminal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{164} \textit{Status på Statsborgerskab og Statsløshed i 2021} [Status of Citizenship and Statelessness in 2021], INST. FOR MENNESKERETTIGHEDER (May 1, 2022), https://menneskeret.dk/status/statsborgerskab-statsløshed [https://perma.cc/7EUV-SDMG].
\item \textsuperscript{165} Danish Nationality Act, \textit{supra} note 162, § 8 B (3).
\item \textsuperscript{166} MINISTRY OF FOREIGN AFFAIRS OF DENMARK, \textit{supra} note 75, at 2.
\item \textsuperscript{167} Danish Nationality Act, \textit{supra} note 162, § 8 B (4).
\item \textsuperscript{168} MINISTRY OF FOREIGN AFFAIRS OF DENMARK, \textit{supra} note 75, at 2, 6.
\item \textsuperscript{169} \textit{Id.} at 2.
\item \textsuperscript{170} See Johansen v. Denmark, App. No. 27801/19, ¶¶ 17, 20 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9].
\item \textsuperscript{171} Udlændingeloven [Aliens Act], LBK No. 863 of 25/06/2013, Chapter 4 § 22(1)-(8) [hereinafter Danish Aliens Act].
\end{itemize}
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The DNA is permissive with respect to citizenship deprivation; the courts “may” revoke an individual’s Danish citizenship. However, the Danish government and the Danish Supreme Court (Højesteret) have interpreted the DNA to require the nationality deprivation of individuals who, at the very least, are convicted of serious terrorism offenses, which triggers the expulsion requirement under the Aliens Act. The ECtHR reviewed the citizenship deprivation system under Section 8(b)(1) in Johnson v. Denmark and found that it generally met due process requirements. However, both Section 8(b)(1) and Section 8(b)(3)-(4) raise serious due process concerns.

i. Standard of Legality

Deprivation following a criminal conviction requires that the prosecution prove the specific elements of the crime, and the Danish legal code recognizes the principle of legality. However, the court may order denationalization for crimes ranging from homicide and hijacking as acts of terrorism to publicly encouraging violence against the State (mere speech). Under the new amended denationalization process, the Ministry may revoke citizenship if an individual engages in “conduct seriously prejudicial to the vital interests of the country.” The government borrowed this language from the European Convention on Nationality and relies on the Convention’s Commentary to define the relevant conduct. Therefore, the conduct must be of sufficient gravity to qualify: activities directed against the vital

172 Id. Chapter 6 § 32(2); see Johansen v. Denmark, App. No. 27801/19, ¶¶ 16, 22 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9].
174 Straffeloven [Penal Code], LBK No. 871 of 04/07/2014, Ch. 13 § 114(1).
175 Id. Ch. 13 § 114(5).
176 Id. Ch. 12 § 100.
177 Id. at 3; European Convention on Nationality, supra note 124, art. 7(1).
178 See MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 2; COUNCIL OF EUR., EXPLANATORY REPORT TO THE EUROPEAN CONVENTION ON NATIONALITY, supra note 151, at 11.
interests of the State. The government explicitly includes “terrorism, including training, instruction or education in some other manner of a person to commit or advance terrorist offences” under the covered conduct. The Danish government has used this power multiple times to denationalize women associated with ISIS, so they likely also include support for a group involved in terrorism as relevant conduct. The government may take into account whether the alleged conduct could fall under a provision in Chapters 12 or 13 of the Penal Code, but it is not required to. Explicitly, the government does not require a finding of intent to support a terrorist group or commit an act against the ‘vital interests of the State’ to order a denationalization. While “conduct directed against the vital interests of the [S]tate” has some limitations, the fact that it can apply to such a broad range of unenumerated behavior suggests that it is not sufficiently precise enough to satisfy the principles of legality and specificity.

The act also applies retroactively. According to the Dutch government, if the conduct could have resulted in deprivation under a Section 8b(1) conviction, then it can be used as a basis for an administrative deprivation of citizenship. The government does not have to prove the conduct or intent for prior acts either. The law applies retroactively as a strict liability penalty for unproven conduct.

ii. Discrimination

The Danish government claims that the revised Section 8 of the Danish Nationality Act does not discriminate on the basis of race, religion, or ethnic origin. On its face, the text seems neutral.

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181 MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 3.
183 MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 3.
184 Id.
185 Id. at 8.
186 Id. at 4.
However, the U.N. Special Rapporteur on Contemporary Forms of Racism noted that “overbroad policies ostensibly rooted in national security concerns permit arbitrary enforcement . . . which in practice have a disproportionate effect on marginalized racial, national and religious groups.”\(^\text{187}\) In 2021, the Danish government repatriated three Danish women and their fourteen children from camps in Syria.\(^\text{188}\) All seventeen had only Danish citizenship, thus the government had to repatriate them in order to prosecute them. However, other women in the camps had dual citizenship, and they were all stripped of their Danish citizenship in 2021 under the amended nationality law.\(^\text{189}\) The government also admitted that the only reason they returned the women to Denmark was because eventually the camps would empty, and they could not prevent their citizens from entering the country of their own volition once released from the detention camps.\(^\text{190}\) The remaining women, however, were prevented from returning on the basis of their secondary citizenship. The amended law applied to them because they were dual nationals. Perhaps paradoxically, due to the prohibition on statelessness, the law can only apply to dual nationals or possible dual nationals. The CERD Committee warned that such distinction between dual and single nationals can “give rise to discriminatory practices contrary to the [CERD].”\(^\text{191}\) Indeed, the ECHR prohibits arbitrary distinctions between those who acquired nationality at birth and those who received it later,\(^\text{192}\) and the


\(^{188}\) See Justitsministeriet, Besvarelse af spørgsmål nr. S 1543 fra medlem af Folketinget Peter Skaarup (DF) [Answer to Question No. S 1543 from Member of the Folketing Peter Skaarup (DF)] 2 (June 1, 2021).


\(^{190}\) See Justitsministeriet, supra note 188, at 3 (“Der er derfor en risiko for, at kvinderne med dansk statsborgerskab på kortere eller længere sigt kommer på fri fod og bevæger sig mod Danmark, hvor de ikke kan nægtes indrejse og ophold.” Translation provided by Google Translate: “There is therefore a risk that women with Danish citizenship will be released in the short or long term and move towards Denmark, where they cannot be denied entry and stay.”)

\(^{191}\) See supra note 90 and surrounding discussion.

European Convention on Nationality categorically bans such distinctions between nationals. Yet the Danish law establishes a second-class citizenship, effectively discriminating on the basis of nationality.

Furthermore, the law denies citizenship to children born in conflict zones to Danish parents, which may violate the protection of the child’s right to a nationality under the CRC. The government specifically justified this decision on the basis of the parent’s decision: “the delegation explained that the Danish Government did not want children of such individuals to become Danish citizens, due to their parents’ actions, and because they grew up under conditions where they had no bond to Denmark.”

Rising Islamophobia in Denmark has exacerbated the discriminatory impact of its denaturalization law. In recent years, mainstream political parties have adopted anti-immigrant rhetoric previously espoused only by the far right. The government discourse on Muslims has further legitimized, condoned, or even promoted the discrimination of Muslims in Denmark. Discrimination against Muslims and Danish individuals of Arab descent remains an issue across the executive, legislative, and judicial branches in Denmark. This has increased the risk that the law is purposefully used to punish Muslim or Arab-Danish citizens.

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193 See European Convention on Nationality, supra note 151, art. 5(2).
194 Convention on the Rights of the Child, supra note 92, arts. 7-8.
195 Press Release, U.N. Human Rights Office of the High Commissioner, Experts of the Committee on the Elimination of Racial Discrimination Ask Denmark About the Housing and Integration of Migrants and Their Descendants, and About Hate Speech and Hate Crimes (Nov. 21, 2021).
197 See Niels Valdemar Vinding, Discrimination of Muslims in Denmark, in STATE, RELIGION AND MUSLIMS BETWEEN DISCRIMINATION AND PROTECTION AT THE LEGISLATIVE, EXECUTIVE AND JUDICIAL LEVELS 144 (2020).
198 Id.
iii. Legitimate Purpose

Counterterrorism is unquestionably a legitimate purpose for States to pursue.\textsuperscript{199} The U.N. High Commissioner for Human Rights lamented how “terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations . . . .”\textsuperscript{200} The ECtHR specifically found that:

[T]errorist violence . . . constitutes a grave threat to human rights. [The Court] is therefore careful not to underestimate the extent of the danger represented by terrorism and the threat it poses to society. It considers it legitimate, in the face of such a threat, for Contracting States to take a firm stand against those who contribute to terrorist acts.\textsuperscript{201}

This threat may be particularly compelling to Denmark. Reportedly, Denmark had the second highest number of foreign terrorist fighters per capita in Europe.\textsuperscript{202} Many individuals who traveled to join ISIS received weapons training and established connections in a larger network of militant extremists.\textsuperscript{203} Some individuals may return to their country of origin to carry out terrorist attacks.\textsuperscript{204}

However, the purpose of the law was specifically to deprive citizenship. As the Danish government admitted, “there has been a wish to be able to deprive such persons, who are Danish nationals, of their nationality while they are still abroad and thus also prevent them from being able to return to Denmark . . . .”\textsuperscript{205} The imposition of a punishment does not constitute a legitimate interest; the Danish law explicitly uses denationalization as a penalty following a

\textsuperscript{199} See Johansen v. Denmark, App. No. 27801/19, ¶ 50 (Feb. 1, 2022), https://hudoc.echr.coe.int/eng/?i=001-216316 [https://perma.cc/X9KC-XEK9].
\textsuperscript{202} Ahmad Saiful Rijal Bin Hassan, Denmark’s De-Radicalisation Programme for Returning Foreign Terrorist Fighters, 11 COUNTER TERRORIST TRENDS & ANALYSES 13, 13 (2019).
\textsuperscript{204} See id. at 6.
\textsuperscript{205} MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 1.
criminal conviction. Additionally, the use of Section 8(b)(1) in order to trigger the sister provision in the Aliens Act that requires deportation may violate international human rights law, including the right to enter one’s country. States may not deprive a citizen of their nationality for the sole purpose of expelling them. Depriving an individual of their citizenship in order to prevent them from returning must, therefore, also be prohibited.

iv. Proportionality

Even if the deprivation power is solely an exercise of the legitimate State interest, it is almost always disproportionate to the impact on the individual. The punitive impact of citizenship deprivation severs individuals’ claim to many civil rights, as well as their ability to enforce what rights remain. Danish courts have dramatically underestimated the impact of citizenship deprivation and the threat of statelessness.

In order to deprive a person’s citizenship, the government must conduct an individualized balancing test to assess whether denationalization would have a disproportionate impact on the individual. However, the test undervalues a person’s connections to Denmark. In Johansen, the Danish Supreme Court upheld the government’s findings that denationalizing and deporting Mr. Johansen to Tunisia would not be disproportional because he had


207 Special Rapporteur, Skeleton Argument of the Un Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Combating Terrorism, ¶ 19, CO/798/2020 (May 29, 2020) [hereinafter U.N. Special Rapporteur Final Intervention] (“[T]he State is not justified in depriving a person of nationality for the sole purpose of expelling him or her. Nor would deprivation for the purpose of denying a national entry into the territory be permissible, given that nationals have the right, enshrined in Article 13(2) of the UDHR, to return to their country of nationality . . . “); see also GUY GOODWIN GILL, DEPRIVATION OF CITIZENSHIP, STATELESSNESS, AND INTERNATIONAL LAW: MORE AUTHORITY (IF IT WERE NEEDED . . . ) ¶¶ 7-8 (May 5, 2014).


209 See supra discussion in Section I.
“not insignificant” ties to Tunisia.  

210 Johansen had been born, raised, and educated in Denmark. His mother and siblings lived there, as did his wife and young son. Prior to leaving for Syria, except for a six-and-a-half month-period in Tunisia, Johansen had lived only in Denmark. Johansen’s father lived in Tunisia, but the two were not close. However, Johansen could speak and read Arabic. He also cared deeply about his Islamic faith. His wife had also converted, and their son had attended Islamic school.  

211 Thus, his wife and son “were not entirely unprepared” to follow him to Tunisia, in the court’s reasoning.  

212 Given Johansen’s deep ties to Denmark and his rather tenuous connection to Tunisia, the Court’s ruling seems to turn only on the fact that Johansen and his family were Muslim, implying that practicing Islam gave someone significant connections to a Muslim-majority country. Thus, the Court suggested that any adherent to Islam can be returned to another Muslim-majority country by mere fact of their religion, establishing a precedent that possibly allows all individuals associated with ISIS to be unable to overcome the presumption that they can be deprived of their citizenship. The ECtHR affirmed the Court’s finding, deferring to its judgment based on the seriousness of the crime.  

213 Under the revised Section 8(b), the same individualized assessment must be made, including the potential impact of exile from Denmark and the age of the individual if the person is a minor.  

214 The Danish government will also consider whether the deprivation of Danish citizenship leads to the loss of E.U. citizenship, which could have wide-reaching effects on the individual’s family and work life under E.U. law. There is no court case examining an application of this test available in English, so it is unclear how the test has been applied. However, given the Court’s deference to the government in Johansen and the minimization of Johansen’s deep ties to Denmark, it is likely easy for Danish courts to uphold government decisions to denationalize and ban individuals. Furthermore, Danish politicians have vocally called for a reinterpretation or amendment of the 1961 Statelessness Convention to allow the prohibition of statelessness in cases of

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211 Id.  

212 Id.  

213 Id., ¶ 71.  

214 MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 3-4.  

215 Id. at 4.
denationalization. Thus, there may be increased pushes to purposefully minimize the impact of statelessness in the balancing test.

Under Article 3 of the ECHR, as well as the nonrefoulement provisions of the Convention Against Torture, states may not subject individuals to torture and other cruel, inhuman, or degrading treatment or punishment, including through deportation. The ECtHR affirmed there is no balancing test involved; the prohibition of torture is absolute. Johansen has effectively contravened Denmark’s international legal obligations. Although Johansen did not involve a Danish citizen detained in the camps in Syria, Denmark’s government has been well aware of the atrocious condition in the camps. Yet it has deprived a number of Danish women of their citizenship, exiling them from Denmark and forcing them to remain in the camps. It has not expelled these women from its territory, but it has banned them. The government clearly identified the location of these individuals and, knowing of the cruel and inhuman conditions in the camp, forced them to remain there to endure further maltreatment instead of repatriating them. It was through the action of the Danish government that these women continue to be subject to this treatment.

v. Procedural Due Process

i. The Decision-Maker. Under Section 8(b)(1), courts carry out the denationalization, and the individual has the right to appeal the decision under normal Danish due process protections. Under Sections 8(b)(3) and (4), the Ministry makes an administrative determination, so administrative due process protections apply. However, in both cases, the government does not have a burden to affirmatively prove that the individual has a secondary citizenship

216 See Ersbøll, supra note 189.
218 Id. ("[i]t is not possible to make the activities of the individual concerned, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion . . . .").
219 See JUSTITSMINISTERIET, supra note 188, at 2.
220 See Ersbøll, supra note 189.
221 MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 10.
and, therefore, will not be made stateless. Denmark’s domestic legislation thus contravenes the 1961 Statelessness Convention, pursuant to which the State has the burden of proof to demonstrate that a deprivation of nationality will not result in statelessness.222 In fact, Denmark has failed to meet that burden in implementation of Section 8(b). In Johansen, while Johansen did have Tunisian citizenship, that fact was not confirmed until four years after the decision to revoke his Danish citizenship.223 During the criminal trial under Section 8(b)(1), the government concluded that Johansen had alternative citizenship by reviewing the Tunisian nationality code and emails from the Tunisian Embassy in the Hague to the Copenhagen police that individuals with a Tunisian father acquired citizenship. Prior to his denationalization, the Ministry of Immigration and Integration was unable to contact the Tunisian authorities to confirm that Johansen actually possessed Tunisian citizenship.224

ii. Ability to Present Evidence. Under Section 8(b)(1), the individual must be present for the trial to be denationalized. Danish law does not allow for trials in absentia for the relevant crimes.225 Under Section 8(b)(3) and (4), however, the individual has fewer due process protections. Danish administrative law recognizes the right of interested parties to consultation, to make a statement, and to provide a justification (a defense).226 However, it becomes impossible to consult interested parties in situations where “the Ministry of Immigration and Integration does not know where the person concerned is staying.”227 In addition, the individual has no

222 2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 7.
225 MINISTRY OF FOREIGN AFFAIRS OF DENMARK, supra note 75, at 10.
226 Id. at 10.
opportunity to contest the decision before the denationalization goes into effect. The government sends notice to their digital mail account (e-Boks), which they can check on their cellphone; alternatively, the government publishes notice in the Official Gazette. If an individual either does not have digital mail account, is unable to access it, or is unable to access the Official Gazette due to a lack of a reliable cell or Wi-Fi connection, then they will never receive notice, effectively nullifying their ability to provide evidence or contest the decision.

iii. Judicial Review and Deference to the Decision-Maker. The Aliens Act establishes a presumption in favor of citizenship revocation under the Aliens Act. Therefore, Danish courts generally defer to the government in judicial review. In fact, until 2015, the courts had annulled only one law on the grounds of unconstitutionality. Even though defendants can rebut the Act by proving they have no or very little connection to the other country, the Supreme Court in Johansen unanimously overturned the lower courts, expelling Johansen from Denmark permanently, and demonstrating that tenuous connections to the other country do not qualify as “very little connection.” The Court ruling suggests that similar cases will follow an analogous pattern of deference to the government’s decision.

The deference to the government increases the hurdles the individual must overcome in an appeal under Sections 8(b)(3) and (4). After the Ministry deprives an individual of citizenship, they can appeal to the Copenhagen city court, but they must file the appeal within four weeks of notification. In exceptional circumstances, the court may allow the challenge after four weeks. If the individual is detained in Syria, this short window for in-person appeal sets up exactly the conflict that occurred when Shamima Begum tried to return to the United Kingdom. The individual must request leave to reenter the country to appear at the appeal.

228 *Id.* at 11.
229 *Id.* at 10.
231 *Id.* ¶ 22.
233 Ministry of Foreign Affairs of Denmark, *supra* note 75, at 11.
The Nationality Act also adds special rules for appeals of administrative denationalization. First, improper notice is not grounds for appeal. The government considers that the blame lies with an individual “if the party brought themself in a situation where it is not possible for them to access their digital post or read the Official Gazette[,” perhaps including leaving Denmark to join ISIS. This effectively nullifies the right to appeal for large swaths of men, women, and children detained in Syria. Second, the appeal also does not offer temporary relief or enjoin the denationalization decision. Third, in situations when the Ministry for Justice denationalizes an individual because the supporting evidence is too sensitive to show to the individual or their lawyer, the evidence may be reviewed on appeal by the court in camera. However, the appellant’s lawyer is not given access to the information. Instead, they are assigned a special advocate who can see the information to advocate in their interest. The advocate is not their lawyer, and once they see the evidence in camera, they can no longer discuss the case with the individual or their attorney. The most sensitive cases, perhaps where appeal is most necessary in a democratic system, are split in half, and each advocate is given incomplete information. Overall, sufficient facts have to be plead publicly to allow the court and the individual to provide a check on improper government uses of power, so the government cannot hide all the evidence.

**d. Arbitrary Deprivation of Nationality: The Netherlands**

Under the Netherlands Nationality Act, the Ministry of Justice and Security may revoke an individual’s Dutch citizenship if they are convicted of “terrorism or recruitment for an armed struggle or for an alien armed force.” The Act was amended in

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234  Id.
235  Id.
236  Id.
237  Id.
238  Id. at 12.
239  Id.
240  Id.
2017 to allow for revocation without a criminal conviction of individuals over 18 outside of the Netherlands if they “pose a threat to national security.”242 Previously, denationalization was only allowed after a conviction for terrorism.243 As long as the revocation does not contravene Article 8 of the ECHR, the Ministry can denationalize an individual if it appears that they have joined an organization the Council of Ministers has placed on a list of groups that pose a threat to national security.244 The Parliament passed the 2017 Amendment specifically to disincentivize young Dutch nationals from joining ISIS.245 An individual may appeal the revocation decision; however, they only have a window of four weeks after the decision.246

According to the Dutch government, since the 2017 Amendment, the Ministry has used this denationalization power in 24 instances to revoke the citizenship of individuals who joined a terrorist organization abroad. Two of the decisions were annulled by a court for lack of evidence demonstrating the affiliation, which led the government to repeal five other denationalizations. Five other cases are currently under appeal; and one decision has not yet been appealed. However, eleven withdrawals have been finalized.247

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i. Standard of Legality

Article 14(4) limits the Ministry to deprivations of citizenship in situations where the individual has joined an organization included on the list of groups that pose a threat to national security. The Ministry determines whether the individual has joined if it is "apparent from his conduct." There is no further explanation delimiting what types of conduct would lead the Ministry to believe an individual had joined the group. Someone who was taken to join ISIS by their spouse or as a child and only cooked meals under coercion would receive the same punishment as a fighter who perpetrated multiple attacks. It is a broad, overly vague standard.

ii. Discrimination

Article 14 arbitrarily deprives citizenship on the basis of nationality, race, or national origin. The prohibition on statelessness, perhaps paradoxically, means that only dual nationals can be denationalized. The law creates a distinction on the basis of nationality in violation of prohibition on discrimination. E. Tendayi Achiume, the U.N. Special Rapporteur for Contemporary Discrimination, summarized it forcefully: "[i]nstead of guaranteeing equality between its citizens, the Netherlands’ mono-/dual-nationality distinction establishes two classes of Dutch citizenship, one secure and one contingent."

The racial dynamics of dual citizenship in the Netherlands create further discrimination on the basis of race. Much about racial discrimination in the Netherlands remains unknown due to the government’s failure to collect and disaggregate relevant data. However, nearly half of all of Dutch dual citizens hold and/or are

250 Id.
252 U.N. Special Rapporteur Amicus Brief, supra note 251, ¶ 45.
descended from those with Moroccan or Turkish nationality.\textsuperscript{253} Yet, neither Dutch-Moroccan nor Dutch-Turkish dual citizens comprise more than 2.5% of the total Dutch population.\textsuperscript{254} In 2018, only 5% of the Dutch population identified as Muslim.\textsuperscript{255} Therefore, Dutch dual nationals are “more likely to belong to or be perceived to belong to ethnoreligious minority groups.”\textsuperscript{256} The intersection of race, descent, and national or ethnic origin within Dutch dual citizenship ensures that “any distinction on the basis of mono or dual nationality will not be neutral in its effects.”\textsuperscript{257} As the law creates a second-class, conditional citizenship for dual nationals, it indirectly produces a conditional citizenship on the basis of race, descent, and national or ethnic origin.

Many countries also prevent the renunciation of citizenship, including Morocco. This inability places Dutch-Moroccan dual citizens at a disproportionately high risk of being stripped of their citizenship, as they make up nearly a quarter of all Dutch dual citizens.\textsuperscript{258} Certain barriers to the renunciation of Turkish citizenship also place Dutch-Turkish dual citizens at a higher risk for citizenship stripping.\textsuperscript{259}

The Human Rights Committee expressed skepticism at the measure due to its likelihood of “perpetuat[ing] stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants.”\textsuperscript{260} The European Commissioner for Human Rights also raised this issue, but the government ignored his question.\textsuperscript{261} The denationalization law is not unique in this respect. The Committee on the Elimination of Racial Discrimination cautioned that another Dutch law demonstrated “discrimination on the basis of nationality, particularly between so-called “Western” and “non-Western” State

\begin{footnotes}
\footnote{253} Id. ¶ 47. \\
\footnote{254} Id. \\
\footnote{255} Id. ¶ 47. \\
\footnote{256} Id. \\
\footnote{257} Id. ¶ 50. \\
\footnote{258} Id. ¶ 49; see also U.N. Special Rapporteur 2018 Report, supra note 62, ¶ 60. \\
\footnote{259} U.N. Special Rapporteur Amicus Brief, supra note 251, ¶ 49. \\
\footnote{261} Jaghai, supra note 243, at 14 (“The government ignored the issue and responded that the ECN allows them to revoke citizenship of people if it would not lead to statelessness.”).}

https://scholarship.law.upenn.edu/jil/vol45/iss2/3
DOI: https://doi.org/10.58112/jil.45-2.3
nationals—“a term capturing several of these overlapping, co-
constituting racialized distinctions.” Other human rights bodies
also noted the general presence of discrimination rooted in “anti-
foreign, anti-migrant, anti-Muslim, Afrophobic sentiment” in the
Netherlands. In its concluding observations to the Netherlands’
Sixth Periodic Report (2017), the U.N. Committee on Economic,
Social, and Cultural rights warned that the Netherlands had
unaddressed discrimination on the basis of actual or perceived
nationality, ethnicity, immigration status, and descent. The larger
environment of discrimination tends to exacerbate and invite more
discrimination.

iii. Legitimate Purpose

As with Danish law, Dutch law could be considered to have a
legitimate interest if its purpose is to prevent terrorism. Nearly 300
persons have travelled to Syria and Iraq from the Netherlands to join
a militant group, one-third of which are women. However, the
government’s purpose in amending the law was not to improve its
arsenal in the fight against terrorism. It was punitive to demonstrate
that “those who turn against the essential interests of the State are
no longer entitled to Dutch nationality,” as a Dutch politician stated
before the legislature. The government further went on to clarify
that expulsion is one purpose, albeit not the primary one.

262 Comm. on the Elimination of Racial Discrimination, Consideration of
Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 5, U.N.
263 U.N. Special Rapporteur Amicus Brief, supra note 251, ¶ 46.
264 Id.
265 Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the
Sixth Periodic Report of the
2017).
266 Tanya Mehra, The Repatriation of Five Women and Eleven Children from Syria:
A Turning Point in the Netherlands?, INT’L CTR. FOR COUNTER-TERRORISM (Feb. 11,
[https://perma.cc/2H6K-T2CP]
267 Senate of the States General, Memorandum of Reply, Amendment to the
Kingdom Act on Dutch Nationality to Expand the Possibilities for Deprivation of
Dutch Nationality in the Event of Terrorist Crimes 6, 34016-(R2036) nr. C, Sep. 18,
2015 (Neth.); see also INST. ON STATELESSNESS AND INCLUSION, supra note 253, at 17.
268 See Senate of the States General, Memorandum of Reply, supra note 271, at
11.
government also added that “in principle, no right of residence will be granted due to the threat the person poses to public order.”

Therefore, the purpose of the law seems to be overwhelmingly to punish individuals and deport them. The imposition of a punishment does not constitute a legitimate interest; States may not deprive a citizen of their nationality for the sole purpose of expelling them.

iv. Proportionality

As with the Danish law, denationalization under the Dutch Nationality Act has a disproportionate impact compared to the risk. The Dutch Security Services ("AIVD") are particularly concerned about the potential threat posed by returning fighters: “Even a relatively minor increase in the number of returnees can result in a sizable increase in the threat to Dutch national security.”

They also include children over the age of nine as dangerous “jihadist travelers.” While AIVD recognized that not all fighters posed the same risks—some might plan to carry out an attack while others would merely express their sympathy—they nonetheless forecast an increasing and more complex threat as future returnees attempt to come home post-2017.

In cases of citizenship deprivation following a criminal conviction under article 14(2), there does not appear to be an

269 See id., at 10; INST. ON STATELESSNESS AND INCLUSION, supra note 253, at 17.
270 See Draft Articles on the Expulsion of Aliens, supra note 209, art. 8 ("A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.").
272 Id.
273 Id. at 3.
274 Id., at 5.
275 See Netherlands Nationality Act, supra note 245, art. 14(2):

"2. Our Minister may revoke the Dutch nationality of a person who has been irrevocably convicted of:

a) a crime described in Titles I to IV of the Second Book of the Dutch Criminal Code, which according to the legal description is punishable by imprisonment of eight years or more;

b) a crime as referred to in Articles 83, 134a or 205 of the Dutch Criminal Code;

c) a crime that is similar to the crimes referred to under a, which, according to the legal description in the criminal law of one of the countries of the Kingdom,
individualized assessment of the risk.²⁷⁶ The Dutch government has explained that an assessment to see whether or not the vital interests of the State have been damaged is not necessary,²⁷⁷ because such damage is “assumed to exist whenever a person has been criminally convicted for a severe crime against the interests of the [S]tate.”²⁷⁸ Instead, pursuant to Article 14(4) administrative power to deprive, the government must conduct a balancing test to decide if the decision is proportional. However, the law only requires the Ministry to consider the impact of losing an E.U. citizenship and the “very special personal circumstances of the person concerned.”²⁷⁹ This threshold is lower than the Article 8 analysis under the ECHR even though the Ministry must ostensibly ensure that the government does not violate Article 8 as a Party State to the ECHR.

v. Procedural Due Process

i. The Decision-Maker. The Ministry of Justice and Security decides if a person’s citizenship will be revoked both after a criminal trial and as an administrative action.²⁸⁰ The Ministry makes their decision about whether or not the punishment is appropriate as well as whether or not the individual will become stateless “based primarily on information gathered by the security services.”²⁸¹ The Netherlands used to have an official registry of everyone’s dual nationality. It has since been taken down.²⁸² Therefore, no central

subject to a prison sentence of eight years or more, or a crime that, according to the legal description in the criminal law of a of the countries of the Kingdom is similar to the crimes referred to under b.
d) a crime described in Articles 6, 7, 8 and 8 bis of the Rome Statute of the International Criminal Court, concluded in Rome on 17 July 1998 (Trb. 2000, 120 and Trb. 2011, 73).”

²⁷⁶ INST. ON STATELESSNESS AND INCLUSION, supra note 253, at 17.
²⁷⁷ See Senate of the States General, Memorandum of Reply, supra note 271, at 8-9.
²⁷⁸ Id.
²⁸² Jaghai, supra note 243, at 14 (“[A] new law on registration of persons (Wet Basisregistratie Personen) was implemented, whereby a Dutch person’s second (and other) nationality is no longer registered anywhere since January 2015. Also, in cases where a person’s foreign nationality was registered prior to adoption of
database with complete information exists. Moreover, as of 2017, when the law was amended, there was no official procedure to determine statelessness.  

**ii. Ability to Present Evidence.** If an individual is denationalized after a criminal conviction, the criminal procedural code generally guarantees the ability to be present at court in order to provide a better defense. The Ministry is also required to send a written notice of intent to withdraw nationality under Article 14(2) to the person directly concerned. However, the law does not establish a subsequent requirement that the individual be notified if their citizenship is revoked.

Section 14(4) administrative revocations do not involve court proceedings, so the individual has no right to appear. The Ministry also has no obligation to notify the individual of either the intent to revoke or the actual revocation under 14(4). Therefore, they have no opportunity to try to present evidence, let alone learn on what basis the government will make the decision.

**iii. Judicial Review and Deference to the Decision-Maker.** The appeals rights under article 14 are also abridged. Denationalized individuals can only appeal to administrative courts, and the only grounds for appeal are procedural. There is an automatic appeal after four weeks if the individual has not already initiated one. However, the individual will not be allowed back into the Netherlands to attend their appeal. As the Dutch government explained, because “there is no criminal procedure, the right of presence does not apply in full.” They also note that, “allowing for return . . . would thwart the objective of the provision and nullify the justification of this law, it was decided to reverse such registration. As a result, it is not clear how the existing nationality deprivation measures are implemented, while providing a safeguard against statelessness.”

283 Id. at 15.

284 Mehra, supra note 270.


286 INST. ON STATELESSNESS AND INCLUSION, supra note 253, at 23.

287 Id.


290 House of Representative of the State General, Explanatory Memorandum, Amendment to the Kingdom Act on Dutch Citizenship in Connection with the Withdrawal of Dutch Citizenship int he Interest of National Security 10, Dec. 9, 2015 (Neth.).
revocation.”291 The evidence used to make the decision may also be kept secret. Under the General Administrative Law, parties must disclose relevant information to the court.292 However, information can be kept classified on grounds of so-called “important interests,” which includes national security according to the Ministry of Justice and Security.293

e. Arbitrary Deprivation of Nationality: The United Kingdom

The United Kingdom deprivation process is the most egregious violation of the prohibition on the arbitrary deprivation of citizenship. In 2014, Parliament amended Section 40 of the British Nationality Act (“BNA”), granting the Home Secretary the power to deprive a person of citizenship if they are “satisfied that deprivation is conducive to the public good.”294 The initial intent of the law was to permit the Home Secretary to make naturalized British citizens stateless if they had conducted themselves in a manner which is seriously prejudicial to the vital interests of the United Kingdom.295 Thus, the Secretary may not order a deprivation if they are

291 Id. at 10-11.
292 INST. ON STATELESSNESS AND INCLUSION, supra note 249, at 24.
293 House of Representative of the State General, Explanatory Memorandum, supra note 294, at 13; see also INST. ON STATELESSNESS AND INCLUSION, supra note 253, at 24.
294 British Nationality Act 1981, c. 61, § 40(2) (Eng.).
295 Farhad Ansari illustrates the British Nationality Law was amended in 2006 specifically to allow the deportation of a single man, Abu Hamza Al-Mansri. Indeed, the 2003 amendment was called the “Hamza Amendment.” Ansari also argues that the law was amended to allow naturalized British citizens to be made stateless in order to allow the SIAC to affirm Hamza’s appeal. At the time of the Parliamentary debate about the law, Hamza had filed an appeal, claiming that he would be made stateless because the Egyptian government had learned of the proceedings and revoked his citizenship before the British had. The 1981 version of the law did not permit deprivations of citizenship if it made the individual stateless. Because of Hamza’s appeal, the law was changed. See Farhad Ansari, Citizenship Deprivation: The Legacy of Tony Blair’s Desperation to Deport One British Man, CAGE (Dec. 22, 2021), https://www.cage.ngo/citizenship-deprivation-the-legacy-of-tony-blairs-desperation-to-deport-one-british-man [https://perma.cc/2MY7-CXYC]. The United States uses a similar practice of hiding evidence at the Guantanamo Military Tribunal. See Nisha Kapoor, On Windrush, Citizenship, and its Others, VERSO (May 1, 2018), https://www.versobooks.com/blogs/3774-on-windrush-citizenship-and-its-others [https://perma.cc/V9PY-JDFL].
“satisfied” that order would make the person stateless.\textsuperscript{296} In practice, this protection against statelessness has very little force. Since the 2014 amendment, relaxing the requirements on the Home Secretary, research by a lawyer-run website finds Home Office has removed citizenship of at least 464 people between 2014 and 2022.\textsuperscript{297} Shamima Begum is only the most famous case.

In cases where the deprivation involves questions of national security, the individual may appeal the decision either to the First Tier Tribunal or to the Special Immigration Appeals Court (“SIAC”).\textsuperscript{298} However, the Home Secretary has the power to issue a notice of intent that simultaneously deprives a person of their citizenship and processes their actual deprivation.\textsuperscript{299} Further, as of the Nationality and Borders Act of June 2022, the government does not have to give notice under the BNA if they do not have the necessary contact information, or if they are pursuing the interests of the public, national security, or diplomatic relations.\textsuperscript{300}

\textit{i. Standard of Legality}

The “conducive to the public good” standard is very broad; neither the Nationality and Borders Act nor the Home Office provide a precise definition of the conduct that would be considered unfavorable to the public good. There is no statutory definition of this test either,\textsuperscript{301} and the range of behavior to which the denationalization law has been applied suggests that such behavior

\begin{flushleft}
\textsuperscript{296} British Nationality Act 1981, c. 61, § 40(4).
\textsuperscript{298} British Nationality Act 1981, c. 61, § 40(a) (Eng.).
\textsuperscript{300} See Nationality and Borders Act 2022, c. 36, § 10(2)(5A) (Eng.).
\textsuperscript{301} Ansari, \textit{supra} note 299.
\end{flushleft}
is not limited to actual involvement in political violence.\textsuperscript{302} The ECtHR expressly declined to analyze whether the provision was impermissibly vague because the applicant failed to raise it in the relevant case.\textsuperscript{303} However, The U.N. Special Rapporteur on Contemporary Racism warned that the provision “appear[s] to confer the Secretary of State a broad, vague and subjective discretion to determine whether, when and why to deprive a person of citizenship which is contrary to the principle of legal certainty . . . .”\textsuperscript{304} Both the U.N. High Commissioner for Refugees and a panel of 60 experts on statelessness also concluded that “broadly defined and imprecise national security grounds . . . is presumptively arbitrary.”\textsuperscript{305}

Curiously enough, the Act used to require the government to prove that an individual’s behavior was a threat to the “vital interests” of the State copied language from the 1961 Statelessness Convention. In 2006, however, Parliament replaced this language with the conduciveness standard, arguing that the test was “too high and the hurdles too great.”\textsuperscript{306} Parliament borrowed the language for the new standard from the laws governing the deportation of foreign nationals. The British government erased the difference between their sovereign authority to expel non-nationals on their soil and the rights to leave and reenter owed to their citizens. Thus, the new version of the law radically expanded the government’s ability to penalize the conduct of citizens. The Home Office defines the relevant behavior in their internal memos as ranging from actual acts of terrorism (extreme violence) to other “unacceptable

\textsuperscript{302} Id.
\textsuperscript{304} E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) et al., Mandates of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on Trafficking in Persons, Especially Women and Children and the Working Group on Discrimination Against Women and Girls, at 4, OL GBR 3/2022 (Feb. 11, 2022) [hereinafter Special Rapporteur Letter to the U.K. government].
\textsuperscript{305} Id. at 3, citing Guidelines on Statelessness No. 5, supra note 83; INST. ON STATELESSNESS AND INCLUSION, PRINCIPLES ON DEPRIVATION OF NATIONALITY AS A NATIONAL SECURITY MEASURE 10, Principle 7.1. (2020)
\textsuperscript{306} Ansari, supra note 299.
behaviour” such as glorification of terrorism (mere speech).\footnote{British Nationality Act 1981, c. 61, § 40(4).} In its decision to revoke Shamima Begum’s citizenship, the Home Office cited the potential for any returning ISIS-affiliated person to be involved in “ISIL-directed attack planning,” “ISIL-enabled attacks,” “radicalising and recruiting U.K.-based associates,” and “posing a latent threat to the United Kingdom.”\footnote{U.K. HOME OFFICE, HM GOVERNMENT TRANSPARENCY REPORT 2018: DISRUPTIVE AND INVESTIGATORY POWERS 26, at 5.7 (2018).} It provided no further guidance to clarify the last, vague, category.

In practice, the deprivation power has been used against those accused of enforcing ISIS law within their territory (Shamima Begum), convicted for advocating terrorist acts (Abu Hamza Al-Mansri, whose trial triggered the 2006 amendment),\footnote{See Ansari, supra note 299.} and at least three humanitarian aid workers present in Syria.\footnote{British Nationality Act 1981, c. 61, § 40(4A)(a) (providing an exception for the general prohibition on making someone stateless if “the citizenship status results from the person’s naturalisation . . . .”).} There have also been suggestions that the law has been used by the Home Secretary to avoid limits on extradition or diplomatic inconveniences.\footnote{Simon Hooper, EXCLUSIVE: Birmingham Aid Worker in Syria Stripped of UK Citizenship, MIDDLE EAST EYE (May 21, 2019), https://www.middleeasteye.net/news/exclusive-birmingham-aid-worker-syria-striped-uk-citizenship [https://perma.cc/TPK4-LRME]; Rod Austin, Aid Worker Stranded in Syria After British Citizenship Revoked, GUARDIAN (Mar. 4, 2019), https://www.theguardian.com/global-development/2019/mar/04/aid-worker-stranded-in-syria-after-british-citizenship-revoked [https://perma.cc/3G6P-S4XB]; British Aid Worker Unlawfully Deprived of Citizenship Is Released Home as an Innocent Man, CAGE (May 8, 2021), https://www.cage.ngo/british-aid-worker-unlawfully-deprived-of-citizenship-is-released-home-as-an-innocent-man [https://perma.cc/2MY7-CXYC].}

\textit{ii. Discrimination}

The British Nationality Act prevents denaturalization “if the Home Secretary is “satisfied” they will not become stateless.\footnote{Ansari, supra note 299.} However, Section 40(4A)(a) allows deprivation even if the person will become stateless if the individual is a naturalized British citizen, as opposed to one with birthright citizenship.\footnote{Id. § 40(4A)(a) (providing an exception for the general prohibition on making someone stateless if “the citizenship status results from the person’s naturalisation . . . .”).} On its face, the Act discriminates on the basis of national origin. It distinguishes
between individuals born in the United Kingdom, and those born outside of the United Kingdom to non-U.K. parents, or who can otherwise not register for U.K. citizenship based on *jus solis* or *jus sanguinis*. It is easier for the government to strip naturalized citizens of their rights and the duties owed to them as citizens. Under ECtHR jurisprudence, discrimination on the basis of national origin is allowed if it has a legitimate aim and is necessary to achieve that goal. The Home Secretary argued in Parliament that the higher punishment for naturalized citizens was legitimate because they “have chosen British values and been naturalised on the basis of their good character.” However, neither the idea of “good character” nor the vague “conducive to the public good” standard clearly indicates any objective behavior that would reasonably justify why naturalized British citizens can be made stateless. Given the dramatic impact of statelessness on the individual, the sanction is so disproportionate to the specter of terrorism that it cannot reasonably be considered necessary when naturalized British citizens could be alternatively convicted or restricted in other ways.

There is also a historic connection between the deprivation of citizenship and racism. Section 40 is neutral on its face with respect to discrimination on the basis of race, national origin, and religion. However, the U.N. Special Rapporteur for Contemporary Racism warned the U.K. government of her concern that the United Kingdom’s “practice of depriving people of citizenship may have a disproportionate impact on people from non-white racial and ethnic backgrounds, and especially people from Muslim and migrant communities.” This was partly because they were more likely to have dual citizenship. The Home Office does not release statistics on how the deprivation of power is used disaggregated by race. Nonetheless, the Office for National Statistics found that two in every five people from non-white backgrounds are “likely to be eligible for the deprivation of their British nationality under Section

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314 For general British citizenship requirements, see id. §§ 1-11.
317 Arnell, supra note 319, at 404.
318 Special Rapporteur Letter to the U.K. government, supra note 308, at 8.
The government also wields the deprivation power in a larger environment of suspicion towards members of Muslim communities caused by other U.K. counterterrorism policies. The proposed amendment to the bill further risks discrimination on the basis of gender, disability, according to five U.N. Special Rapporteurs.

### iii. Legitimate Purpose:

As discussed previously, counterterrorism is a legitimate purpose, and the ECtHR recognized it as of a significant interest to the United Kingdom. In so far as the purpose of a law is to protect the British public against terrorist attacks, the law has a justifiable purpose. The intent behind the deprivation can be prevention of terrorism. For example, the Home Secretary cited Shamima’s affiliation with ISIL as justification for the deprivation in his letter notifying her of the action. The U.K. Supreme Court held in Shamima’s appeal that she had supported terrorist acts. They reasoned the primary role for women was as:

> [W]ives of fighters and mothers of their children, raising the next generation of fighters and citizens of the caliphate. Anyone who travelled to ISIL-controlled territory, even to fill non-combatant roles, was actively supporting a terrorist organisation that was engaged in mass murder and grave human rights abuses, with an agenda to intimidate and attack governments and citizens globally.

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319 Id.
320 Id. at 9.
321 Siobhán Mullally (Special Rapporteur on Trafficking in Persons, Especially Women and Children) et al., Mandates of the Special Rapporteur on Trafficking in Persons, Especially Women and Children; the Special Rapporteur on the Human Rights of Migrants; the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, at 6-7, OL GBR 11/2021 (Nov. 5, 2021).
324 Id. ¶ 17.
However, neither the use of deprivation as a punishment nor as a means to deport citizens are legitimate state interests. As the U.N. Special Rapporteur on Human Rights and Counterterrorism remarked in the mandate’s intervention in Shamima’s case:

The State is not justified in depriving a person of nationality for the sole purpose of expelling him or her. Nor would deprivation for the purpose of denying a national entry into the territory be permissible, given that nationals have the right, enshrined in Article 13(2) of the UDHR, to return to their country of nationality.325

Depriving an individual of their citizenship in order to prevent them from returning must, therefore, also be prohibited.

iv. Proportionality

The prevention of terrorism is undoubtably a vital interest to States.326 However, the mere suspicion of terrorism or the previous association with others involved in terrorism does not necessarily equate to an actual threat of terrorism. Indeed, the U.K. Supreme Court admitted that the prosecutors could not necessarily convict Shamima for a crime: “there was no evidence before the court from the police, the Crown Prosecution Service or the Director of Public Prosecutions as to whether it was either possible or appropriate to ensure that Ms. Begum was arrested on her return and charged with an offence.”327 This language also suggests that the Crown prosecution service did not even investigate if a prosecution would be possible. Yet the U.K. Supreme Court recognized not only the dramatic impact that being stateless can have on an individual, but also that the loss of British citizenship can “have a profound effect upon [one’s] life, especially where [their] alternative nationality is one with which [they have] little real connection.”328 Thus, the law, as interpreted, allows for the loss of many human rights without a corresponding action that makes the vague threat of terrorism more concrete.

325 U.N. Special Rapporteur Final Intervention, supra note 208, ¶ 19.
327 Special Immigr. Appeals Comm’n [2021] UKSC 7, [109].
328 See id. ¶ 94.
Moreover, the threat of terrorism does not relieve the government of its overriding obligation to ensure that individuals are not subject to violations of their right to life or the prohibition of torture and other cruel and inhuman degrading treatment and punishment. Indeed, the British government considered whether Shamima would be subject to deprivations of these rights. Both the SIAC and the Supreme Court focused exclusively on Shamima’s repatriation to Bangladesh and decided that there was no real risk of Shamima’s being forced to move there. At the time, the government and the courts were aware that Shamima lived in al-Hol, yet they overlooked entirely any possibility that she could suffer mistreatment while trapped in the detention camp. Indeed, The British government specifically considered possible human rights violations under articles 2 and 3 of the ECHR and found that “there [were] no substantial grounds to believe that a real risk of mistreatment contrary to [the right to life] or [the prohibition of torture] will arise as a result of Begum being deprived of her British citizenship while in Syria . . . .” The Supreme Court agreed with this assessment. However, the conditions at al-Hol are “apocalyptic” and inhumane, amounting to “cruel and inhuman degrading treatment and punishment” or torture according to several U.N. agencies. The decision to force individuals to remain in the camps should qualify as a violation of the right to life and the right to be free from torture.

v. Procedural Due Process

i. The Decision-Maker. Under Section 40, the Home Secretary makes the evaluation that the person (1) acted in an improper way, and (2) that deprivation would not render them stateless. Both inquiries must merely meet the Secretary’s “satisfaction.” As Shamima’s case demonstrates, the burden of proof on the secretary is woefully low. The government reportedly relied on unverified allegations that Shamima had been a member of the ISIS “morality police” in deciding to deprive her citizenship. Furthermore,

330 Id. ¶ 16.
331 Id. ¶ 22.
332 Richard Hall & Lizzie Dearden, Shamima Begum “Was Member of Feared ISIS Morality Police” in Syria, INDEPENDENT (Apr. 14, 2019).
despite the exhortations of the Bangladeshi government to the contrary, the Home Secretary, the SIAC, and the U.K. Supreme Court insisted that Shamima had Bangladeshi citizenship.\(^{333}\) This avoided legal statelessness on a technicality.\(^{334}\) However, the government of Bangladesh vehemently asserted that Shamima was not a citizen.\(^{335}\) At no point did the British government have to confirm that Shamima had an active citizenship that would grant her all the rights owed to citizens. Under the 1961 Statelessness Convention, the state has the burden of proof to demonstrate that a deprivation of nationality will not result in statelessness.\(^{336}\) States must also inquire whether an individual possesses another nationality at the time of the denationalization, “not whether they could acquire a nationality at some future date.”\(^{337}\) The United Kingdom did not meet this standard. Additionally, on a practical basis, the technical possibility that she could have activated her Bangladeshi citizenship within the next two years (she was 19 as of 2019) does not create the substantive possibility that Shamima, trapped in the al-Hol camp and internationally infamous for her connection to ISIS, can successfully claim a Bangladeshi citizenship. The implications for the other British citizens subject to the deprivation power are equally as bleak.

**ii. Appellant’s Ability to Present Evidence.** The Home Secretary makes a unilateral decision, so the individual has no ability to contest the decision before it is made. The law also gives the Secretary the power to issue the notice of intent to deprive and process the actual deprivation simultaneously.\(^{338}\) Thus, the individual cannot challenge or enjoin the deprivation of their citizenship before it goes into effect—a “deport now, appeal later” policy.\(^{339}\) Under the June 2022 Amendment, the Secretary can also deprive without notice, effectively nullifying the appellant’s rights

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\(^{333}\) Special Immigr. Appeals Comm’n [2021] UKSC 7, [116].

\(^{334}\) Ansari, supra note 299.

\(^{335}\) Shamima Begum Will Not Be Allowed Here, Bangladesh Says, supra note 11.

\(^{336}\) 2014 Expert Meeting Summary Conclusions, supra note 81, ¶ 7.

\(^{337}\) Id. ¶ 5.

\(^{338}\) Ansari, supra note 299.

to present evidence.\textsuperscript{340} This decision not to give notice is subject to review by the SIAC.\textsuperscript{341} The SIAC will only overturn the government’s decision if their rationale is “obviously flawed,” in which case the government could either revoke the deprivation or just give late notice.\textsuperscript{342} Foreseeably, the government can invoke this provision every time they knew or had reason to know an individual was in a detention camp to avoid having to give actual notice to the individuals.

The individual appellants also have restricted rights in the tribunal to challenge the government’s assertion under Section 40. The law does not require that they be present for the appeal or even be able to communicate with their lawyers in person or in real-time. U.K. courts justify allowing the SIAC appeals \textit{in absentia} by citing the possibility that an applicant would reenter the United Kingdom and then refuse to leave after giving evidence in the trial, thereby frustrating the government’s efforts to “protect public safety.”\textsuperscript{343} The U.K. Supreme Court denied review on the matter; \textsuperscript{344} however, this interpretation has been upheld by the ECtHR.\textsuperscript{345}

The SIAC allows the government to rely on secret evidence (“closed material”) disclosed neither to the appellant nor their lawyers.\textsuperscript{346} Accordingly, one or more security-cleared, independent counsels, referred to as “special advocates,” is appointed by the Solicitor General to act on behalf of the appellant.\textsuperscript{347} Yet, this person is not the appellant’s lawyer. The appellant also has the right to appeal the Secretary’s deprivation decision in normal courts. However, if the Home Secretary’s decision relied in part on

\textsuperscript{340} The notice requirement under the British Nationality Act does not apply if the Secretary of State “does not have the information needed to be able to give notice,” or otherwise depending on national security, requirements of an ongoing investigation, personal security, or diplomatic concerns. \textit{See} Nationality and Borders Act 2022, c. 36, § 10(2)(5A) (Eng.).

\textsuperscript{341} Nationality and Borders Act 2022, c. 36, Schedule 4A (Eng.).

\textsuperscript{342} \textit{Id.} at Schedule 4A, §1(5)(b).


\textsuperscript{344} \textit{Id.}

\textsuperscript{345} \textit{Id.} ¶¶ 10, 28, 57.


information that, in their opinion, “should not be made public in the interests of national security and in the public interest,” the case will be deviated from the normal courts to the SIAC. Thus, the Home Secretary has a unilateral power to force the case into a court that uses secret evidence, an inherent threat to the appellant’s procedural due process rights.

iii. Judicial Review and Deference to the Decision-Maker. The simultaneous notice and deprivation “immediately strip[s] an individual of their citizenship . . . in the absence of any prior judicial oversight.” In Shamima’s case, this allowed the government to “leav[e] her abandoned for years in inhuman and degrading conditions in a Syrian detention camp” before “a court of law even reviewed the decision.” When an individual is able to appeal, the SIAC and the immediate appellate court are required to be deferential to the government’s judgment. On appeal from a SIAC judgment, the Court of Appeals may consider whether (1) the Home Secretary acted “in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety”; (2) the Home Secretary erred in the law, including by making conclusions that could not be reasonably held based on the evidence; (3) the Home Secretary was correctly satisfied in his statelessness assessment; and (4) the Home Secretary breached any other legal principles that arose under Section 6 of the Human Rights Act, which prohibits the government from violating any rights enshrined in the ECHR. However, the Supreme Court used this test to affirm the Home Secretary’s assessment that depriving Shamima Begum of her citizenship would neither render her stateless nor subject her to human rights violations, both of which demonstrated to be questionable rulings. The application of these tests must also adhere a 2001 House of Lords ruling that courts must show deference to the Home Secretary’s interpretation of what is “conducive to the public good” in national security cases, which drastically limits the appellant’s ability to challenge the decision. The Supreme Court

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349 Ansari, supra note 299.
350 Id.
351 Special Immigr. Appeals Comm’n [2021] UKSC 7, [71].
in Shamima’s case reprimanded the lower court for not affording the Home Secretary’s assessment “the respect which it should have received.”

Finally, if the applicant can rebut the presumption that an appeal while they are out of the country is not intrinsically unfair, the court suspends the appeal until the person can return. Thus, the person must wait until the Home Secretary gives them leave to return. However, the stay does not require that a court enjoin the deprivation order. Such a decision effectively closes the right to appeal, leaving the person stateless pending the Home Secretary’s unilateral determination that the applicant no longer poses a threat to the public. Even the Supreme Court recognized the issue, noting “[i]t is not a perfect solution, as it is not known how long it may be before that is possible.”

III. CONCLUSION

With the rise of ISIS came the return of banishment. Ministers for security, immigration, or justice in many European countries now may revoke individuals’ citizenships based on the suspicion of their involvement with ISIS. They frequently make these determinations without a criminal trial and with exceptionally low standards of proof and weak judicial review. International law prohibits the arbitrary deprivation of citizenship and generally strives to reduce statelessness. However, those same treaties empower States with the option to remove individuals’ citizenship if they act in ways prejudicial to the interests of the State. European standards are also much more deferential to States than to the individual. Namely, the ECtHR consistently ratifies denationalization in national security cases related to terrorism despite obvious signs of arbitrary deprivation. Deprivations of nationality can be assessed according to five factors relating to whether they (1) follow a lawful standard (including legal certainty, or precision); (2) discriminate; (3) serve a legitimate purpose; (4) impact the individual in a disproportionate manner; and (5) follow

353 Special Immigr. Appeals Comm’n [2021] UKSC 7, [134].
356 See id.
relevant procedural protections. The procedural protections depend on who the decision-maker is, whether the decision is made on an individualized basis, the ability of the affected parties to present evidence and dispute the government’s claim, and the judicial review standard, including the courts’ deference to the decision-maker.

The laws in Denmark, the Netherlands, and the United Kingdom fail to meet these standards. Though the U.K. law is the most egregious, all three laws have vague language that risk impermissible retroactive application and punish unforeseeable behavior. Within a larger atmosphere of Islamophobia, these laws frequently treat dual nationals as second-class citizens and are likely to discriminate on the basis of national origin, race, and religion. Though the laws ostensibly aim to reduce the risk of terrorism, a legitimate State interest, they consistently have a disproportionate impact on individuals. Regarding procedural protections, the laws generally place a low burden of proof on the government both for the alleged conduct that justifies denationalization and for the prohibition on making individuals stateless. There are constitutently very limited opportunities for defense and appeal.

Banished from their home, suspected ISIS fighters and associated persons lose their “right to have rights.”357 Human rights, though ostensibly universal, are intimately tied to citizenship. As recognized by the Inter-American Court of Human Rights, nationality is the “political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community.”358 This membership in a political community is a legal requirement for most civil rights. In practice, stateless individuals are also frequently deprived of economic, social, and cultural rights. The enforcement of all human rights is also much more difficult without a State.

This is especially true for the thousands of former ISIS fighters and associated individuals trapped in the Syrian detention camps in conditions the ICRC called “apocalyptic,”359 which could also implicate the States’ non-refoulement obligations. Of course, non-refoulement applies to the act of returning an individual to a place

357 ARENDT, supra note 1, at 296.
359 Conditions in Syria’s al-Hol Camp “Apocalyptic”: Red Cross, supra note 23.
where they could be tortured, while denationalization creates the impossibility of return. The underlying interest non-refoulement protects, however, is a positive obligation on the State to prevent torture. Thus, from a teleological perspective, the State’s purposeful entrapment of their citizens by banishing them to a place where they are reasonably likely to be subject to torture is equivalent to a State removing its citizen to a site of torture.

None of the individuals imprisoned in these camps can leave until their countries repatriate them. Instead of doing that, States such as Denmark, the Netherlands, and the United Kingdom brush these individuals under the proverbial rug. Stripping citizenship is not only an egregious violation of human rights, but also belongs to an antiquated vision of the world. It “extinguishes the prospect of rehabilitation or reintegration.”360 As Aubrey Macklin remarks,

[t]he paradigmatic subject of citizenship revocation—the terrorist—is excluded from the ambit of human dignity that underwrites contemporary penal philosophy and affirms capacity for autonomy, rational self-reflection and reform. He is, in that sense, not fully human and thus incapable of rehabilitation. Banishment operates as pure and permanent retribution.361

It is also counterproductive. Denationalization is merely symbolic. Instead of solving underlying threats of terrorism, it passes the buck. The discrimination inherent in denationalization practices also contributes to increasing disillusionment with Western States, increasing the risk of new radicalization.362 It also forces an individual disillusioned with ISIS to remain in their territory, or, in the case of the individuals detained in the camps, in close proximity to individuals who fervently espouse ISIS propaganda. This further disincentivizes individuals to renounce their allegiance.363 Denationalization also perpetuates racialized understandings of who “belongs” in Northern European countries.

361 Id.
Audrey Macklin cogently argued that the British government, specifically, has:

traded on a tacit understanding that British Muslims with brown skin inherently “belong” less to the [United Kingdom] than to some other country where the majority of people are Muslims with brown skin—even if they were born in Great Britain and have never even visited the other country of nationality.364

Denationalization, then, delivers an exclusionary, white supremacist message. Simultaneously, it can be understood as “an exercise in producing the alien from within,” where the State can shift accountability from the local society to an international “other” who does not belong.365

Denationalization also removes the jurisdictional link that allows prosecutors to hold terrorists accountable for their crimes.366 Both prosecutors and the victims of terrorist attacks are vocal in their calls for the return of fighters for prosecution.367 By refusing newly made “foreigners” access to their home countries even for trial, States negate the truth-telling process that a trial is intended to engage in. The State prevents victims, survivors, and defendants from attaining some measure of reconciliation, redress, or rehabilitation.

Revocation also does not reduce the underlying risk. Physical presence in a country is also not necessary to perpetrate an attack; in a technologically interconnected world, individuals can still orchestrate acts of terror from abroad.368 Furthermore, denationalization does not address the underlying danger of home-grown terrorists.369 Moreover, the increasing power given to State


365 Macklin, supra note 44, at 439.


367 See Paulussen, supra note 366.


369 See id.
security forces in denationalization cases can have dangerous spillover into other areas of “national security concern,” violating other human rights and undermining democratic principles generally.

Many States are repatriating their citizens and trying them for terrorist offenses, including Belgium and the United States, albeit too slowly. Kosovo has repatriated nearly all of its foreign fighters and set up special rehabilitation and reintegration programs with the assistance of the United States and the European Union. They established a network of verified imams to lead services and classes to deradicalize returned fighters. The International Criminal Court has also begun its investigation into ISIS-member’s crimes in Afghanistan, demonstrating the possibility for an international tribunal to prosecute foreign fighters.

Even without the conditions at al-Hol, or in a case with an individual who poses a more substantial terrorist threat, statelessness is never necessary. The government always retains the ability to try individuals in criminal courts. Criminal laws on terrorism allow for guilty verdicts for a wide range of behavior. Many governments in the Middle East and Africa are carrying out such prosecutions. The Netherlands public prosecutor is currently

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pursuing six prosecutions of women for their involvement with ISIS.³⁷³

The government believes that these six women could reasonably be convicted of terrorism-related offenses, yet allowed them to reenter the Netherlands. In fact, it was required to do so by the court in Rotterdam.³⁷⁴ The Netherlands also has a special terrorism detention facility for women in the city of Zwolle.³⁷⁵ Indeed, in the Netherlands, in 2019 there was a contentious debate between the Public Prosecution Service and the Ministry of Justice over how best to handle returning fighters. The prosecutors advocated loudly for prosecutions, while the Ministry preferred deprivation.³⁷⁶ International tribunals also always provide an opportunity for trials if governments feel unable to prosecute those accused of terrorism. Governments can also create de-extremization programs to reintegrate individuals associated with ISIS, especially women and children, into society and their families.

There are potential issues with prosecutions. As is evident in UK practice, much of the evidence necessary for these trials may be classified or otherwise sensitive information. The vast majority of the acti rei for the various crimes took place in Syria or Iraq, and there may not have been systematic attempts to preserve evidence for criminal trials, as, for example, there have been in Ukraine. It is also foreseeable that former ISIS fighters brought to trial can rely on a strong defense of coercion, or, in the case of teens like Shamima, child trafficking. However, these issues can be addressed when relevant. They have surely been addressed by the States successfully prosecuting their citizens.³⁷⁷ In order to address the damage ISIS and State reactions to ISIS caused to States, citizens, communities, and individuals, we must have a process of truth-telling, accountability,

³⁷⁴ Mehra, supra note 270.
³⁷⁵ Id.
³⁷⁷ See, e.g., EUROJUST & GENOCIDE NETWORK, PROSECUTION OF FOREIGN TERRORIST FIGHTERS FOR CORE INTERNATIONAL CRIMES AND TERRORISM-RELATED OFFENCES (2020).
and reconciliation. Prosecutions provide an avenue. However, given the blatant violations of international citizenship and human rights law, political imprudence, white supremacist implications, and overwhelming secrecy associated with the process, denationalization cannot.