Deprivation of Citizenship, Statelessness, and International Law

More Authority (if it were needed...)

by

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Introduction

1. In the debates on the implications of deprivation of British citizenship resulting in statelessness, many questions remain insufficiently answered. Two, in particular, stand out: First, in the context of nationality, the 'opposability' of an act of deprivation to other States, their duty, if any, to recognize the United Kingdom's act, and the obligation of the United Kingdom, notwithstanding its act of deprivation, to readmit the individuals concerned if their presence is unacceptable to any other State; secondly, the role of the passport and its legal relevance to the issue of 'returnability'.

2. The two questions are necessarily and essentially connected. As a matter of international law, nationality establishes the link between the individual and the State which is the basis of the right to the State to exercise the diplomatic protection of its citizens vis-à-vis other States, and of the correlative duty to admit or re-admit its citizens who are not permitted to remain in other countries.

3. The passport is not proof, but is evidence of nationality. In the relations between States, in their daily practice regulating the movements of people across frontiers, the passport is accepted as guaranteeing the *returnability* of the holder to the State of issue. Returnability may also attach to the document, irrespective of nationality, for States may issue passports to refugees, stateless persons, and even foreign nationals simply unable to obtain documentation from their own governments. Providing it guarantees returnability to the issuing State, and subject to visa requirements, if any, the passport is thus and on that account accepted for the purposes of international travel.

1. The applicable international law: The *Nottebohm Case*

4. In the debate in the House of Lords on 7 April 2014, Lord Taylor for the Government sought to dismiss the remarks of the Australian judge, Judge Read, in the *Nottebohm Case*, decided by the International Court of Justice in 1955.[1]

5. As any student of international law knows, the judgment in this case turned on whether Guatemala was obliged to accept that Liechtenstein was entitled to

[1] *Nottebohm (Liechtenstein v Guatemala) Case*, (1955) ICJ *Reports* 4.

exercise diplomatic protection with regard to Mr Nottebohm.[2] The Court concluded that nationality conferred by a State, 'only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.'[3] The Court considered the issue as one of *admissibility* (a 'plea in bar', to use Judge Read's own words) and it held that, in the circumstances and applying the doctrine of effective link, Mr Nottebohm's naturalization in Liechtenstein was not opposable to Guatemala. Judge Read (and others) dissented on this issue, but he is quoted, not for his dissent, but for the clarity of his statement of the law relevant to the relations between States which are occasioned by the admission of non-citizens. Those views, which are fully consistent with the views of Her Majesty's Government and amply supported by practice and doctrine before and since, are worth quoting in detail:

> '... Nationality and diplomatic protection are closely inter-related. The general rule of international law is that nationality gives rise to a right of diplomatic protection.
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> 'Fundamentally the obligation of a State to accord reasonable treatment to resident aliens and the correlative right of protection are based on the consent of the States concerned. When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission. That does not mean that it can deny the alien's national status or refuse to recognize it. But by refusing admission, the State prevents the establishment of legal relationships involving rights and obligations, as regards the alien, between the two countries.

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[2] Lord Taylor of Holbeach kindly acknowledges that I 'have some expertise on this topic since [I] was part of the legal team representing Al-Jedda': H.L. Deb., 7 April 2014, col. 1192. To this, I venture to add that, while the deprivation of citizenship resulting in statelessness goes way beyond the personal circumstances of Mr Al-Jedda and his family, his is but the latest in several hundred, if not more, cases of refugees, asylum seekers and stateless persons with which I have been involved as an academic, a practitioner, and as a legal adviser for twelve years in the Office of the United Nations High Commissioner for Refugees. It may also be relevant to note that I am the author of, among others, 'The Limits of the Power of Expulsion in Public International Law', (1976) 47 *British Yearbook of International Law* 55; *International Law and the Movement of Persons between States*, Oxford: Clarendon Press, 1978; *The Refugee in International Law*, Oxford: Clarendon Press, 1st edn., 1983; 2nd edn., 1996; 3rd edn., with Jane McAdam, 2007; that I was the Founding Editor of the *International Journal of Refugee Law* (Oxford University Press), and its Editor-in-Chief from 1989-2001; and that I am responsible also for the introductory notes to the basic international instruments on stateless persons, statelessness, refugees, and asylum, in the United Nations Audio-Visual Library of International Law: **http://www.un.org/law/avl/**. My curriculum vitae can be consulted at **http://www.blackstonechambers.com/**.

[3] *Nottebohm Case*, above note 1, 23.

> On the other hand, by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national.
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> 'As a result of the admission of an alien, whether as a permanent settler or as a visitor, a whole series of legal relationships come into being. There are two States concerned, to which I shall refer as the receiving State and the protecting State. The receiving State becomes subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State and the individual, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations vis-à-vis the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation. This network of rights and obligations is fundamentally conventional in its origin – it begins with a voluntary act of the protecting State in permitting the individual to take up residence in the other country, and the voluntary act of admission by the receiving State. The scope and content of the rights are, however, largely defined by positive international law. Nevertheless, the receiving State has control at all stages because it can bring the situation to an end by deportation...
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> '*When a series of legal relationships, rights and duties exists between two States, it is not open to one of the States to bring the situation to an end by its unilateral action*...'[4]

6. This statement of the general law is unexceptional and in no way contradicted by the judgment of the Court, which found in the circumstances that Liechtenstein's claim to exercise diplomatic protection was inadmissible because, not meeting the international law standard of effective link, its grant of citizenship by naturalization was not opposable to Guatemala. The merits of the case, and the nature of the relationship which arises between States when the citizen of one enters the territory of another were never considered by the Court; significantly, neither Guatemala nor Liechtenstein questioned or qualified that

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[4] *Nottebohm Case*, Dissenting Opinion of Judge Read, above note 1, 34-49, 46-48 (emphasis supplied).

relationship in their pleadings, from which it might reasonably be inferred that both parties accepted it as settled law.

2. The applicable law: deprivation of citizenship and return

7. The unexceptional nature of Judge Read's description of the law is reflected in the doctrine. In 1927, **Sir John Fischer Williams, Barrister, Assistant Legal Adviser, Home Office, 1918-1920**, had already noted the following:

> 'A question of international rights and duties may well arise... if and whenever... the country where the denationalized person finds himself is tired of his presence and wishes to deport him. The state may then find itself unable to remove an alien whom it considers undesirable, if there is no state against whom to apply the rule of international law that every state is obliged to receive its own nationals, but not to receive aliens...
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> 'The proposition that a state can of its own sole authority sever the link which binds it to its own nationals in such a way as to be no longer compellable to receive back the person denationalized if another state should wish to deport him, involves then the consequence that a state has it in its power by unilateral action to deprive other states of a right which they now possess in relation to particular individuals. It seems contrary to positive international law to admit that an international right can be thus destroyed. *The duty of a state to receive back its nationals is laid down by the accepted authorities in the most general terms and is in accordance with the actual practice of states.* No state has any such duty in relation to individuals who are not its nationals. The duty is not a duty which the state owes to the individuals concerned; *it is an international duty which it owes to its fellow-states. It is surely contrary to principle that a state should in relation to any particular individual, whether inside or outside its territory, by its own unilateral act free itself from this obligation....*
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> 'Apart from this general argument, it may be said that *when a state issues to one of its nationals a passport for foreign travel, it impliedly undertakes with any state whose officials admit the bearer to its territory on the faith of the passport, that it will receive back the bearer of the passport, should he be expelled.* Country A cannot in fact, in the language of

> a British passport, "request and require" country B to aid and assist X, whom it describes as its own national, and then without the assent of country B disclaim the implied undertaking.'[5]

8. After considering the principle that no State may reach out and naturalize individuals within the territory and jurisdiction of another State, he argued that, as a matter of principle, the same rule applies to a forcible denationalization of a person abroad: '... equally it might be said, we have here an act of sovereignty taking effect outside the limits of the jurisdiction and making a forcible change in the status of an individual outside...'[6]

> '... while positive international law does not forbid a state unilaterally to sever the relationship of nationality so far as the individual is concerned, even if the person affected possesses or acquires no other nationality, still a state cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other states, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the state where he happens to be.'[7]

9. The British Government maintained this position on the applicable law at the 1930 League of Nations Hague Conference, where nationality was discussed in the First Committee. In common with other States, Great Britain endorsed the proposition in Basis of Discussion No. 1, that it was the right of every State to regulate the acquisition and loss of its nationality and that, while such matters were in general within the domestic jurisdiction of a State, there was no obligation to recognize laws which materially departed from generally recognized principles.[8]

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[5] Sir John Fischer Williams, 'Denationalization', (1927) 8 *British Yearbook of International Law* 45, 55-6 (emphasis supplied).

[6] He added: 'It is no longer possible to send undesirables abroad. Slops may be thrown out of the windows of a settler's hut on a prairie; in a town such a practice is inadmissible. English law has long ago abandoned the practice of transportation – partly no doubt from the fact that no temperate colony is now sufficiently under home control to allow of a practice...' Ibid., 57.

[7] Ibid., 61.

[8] During debate on the first basis of discussion, **Mr O. F. Dowson, Assistant Legal Adviser to the Home Office** confirmed the British Government's position with regard to this principle: Rosenne, S., ed., *League of Nations Conference for the Codification of International Law (1930)*, Dobbs Ferry, New York: Oceana Publications, 1975. Volume 3, 'Acts of the Conference. I Plenary Meetings. II Minutes of the First

10. Basis for Discussion No. 2 was worded as follows:

> 'If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose national he was remains bound to admit him to its territory at the request of the State where he is residing.'

11. On this issue, **Mr Dowson, Assistant Legal Adviser to the Home Office**, said:

> 'The question of deportation is a practical one, and... a matter which arises out of nationality and, consequently, is a proper one for this Conference to consider. My delegation would support this Basis either as it stands or, if it is not possible to accept it as it stands, with the omission of the words "after entering a foreign country". We should prefer, however, to adopt the original text of the Basis.'[9]

12. The issue was discussed again at the 20th Meeting, when a revised version of the Basis of Discussion was being considered for inclusion as an article in a separate convention. Mr Dowson, speaking for Great Britain, said:

> '*The underlying principle of the article is that a State ought not to be able, by unilateral action, to free itself from the obligation to receive back its national, the unilateral action being the deprivation of that person's nationality*. If it can do so, it clearly deprives the State on whose territory the national has been residing of a right which it possesses – that is to say, the right to look to the State whose nationality the person possesses to receive him back in the event (no doubt, the very unlikely event) of that person proving to be an undesirable person.
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> 'This seems to me to be a very reasonable position, because, in a sense, a kind of contract or obligation results from the grant of a passport to an individual by a State so that when that individual enters a foreign State with that passport, the State whose territory he enters is entitled to assume that the other State whose nationality the person possesses will receive him back in certain circumstances...'[10]

Committee'; Minutes of the First Committee (Nationality), 2nd Mtg., 18 March 1930, 22-3 (Rosenne, ed., 901-2).

[9] Above note, Minutes of the First Committee (Nationality), 3rd Mtg., 19 March 1930, 40-41 (Rosenne, ed., 920-21).

[10] Above note 8, Minutes of the First Committee (Nationality), 20th Mtg., 7 April 1930, 243-4, (Rosenne, ed., 1123-4).

13. Three years later, Hersch Lauterpacht, **later Sir Hersch Lauterpacht, Member of the International Law Commission and Judge of the International Court of Justice**, wrote on the instances of abuse of rights in international law. He noted that matters of nationality are, 'subject to the international obligations of the State, left to its municipal law'. It may deprive its subjects of nationality, but this may raise some difficult questions of statelessness.

> 'Such legislation may adversely affect legitimate rights of foreign States within whose territory the denationalized person resides. It saddles them with stateless persons whom they may find difficult to deport, but who were admitted under the implied undertaking of their parent State that they would be received if deported from the foreign country.'[11]

14. While in 1933, there may have been no clear rules limiting the freedom of States to denationalize, 'the indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal.[12]

15. The ninth edition of *Oppenheim's International Law*, edited by the late **Sir Robert Jennings, QC, formerly Whewell Professor of Public International Law in the University of Cambridge, and President and Judge of the International Court of Justice**, and the late **Sir Arthur Watts, QC, formerly Legal Adviser in the Foreign and Commonwealth Office**, had this to say with regard to the function of nationality, and to one particular right and one particular duty:

> 'The right is that of protection over its nationals abroad.... The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states...'[13]

16. They further noted that,

> 'Both the ability of a person to leave his own state, and the ability to enter another, are in practice closely connected

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[11] Hersch Lauterpacht, *The Function of Law in the International Community*, Oxford: Oxford University Press, 1933; repr'd 2011, 308-9.

[12] Ibid., 309.

[13] R. Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th edn., London: Longman, 1991, 857.

> with the possession of a passport (primarily because of the *prima facie* evidence of nationality – and thus of returnability to that state – which a passport affords)...'[14]
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> 'The right to expel aliens has its counterpart in the duty of a state to receive back those of its nationals who have nowhere else to go. The expulsion of a person who has the nationality of the expelling state or who has no nationality is therefore dependent for its practical effectiveness on the readiness of some other state to receive him even though under no obligation to do so.'[15]

17. In a footnote to this passage, the editors add that, 'States have sometimes deprived persons of their nationality as a prelude to expelling them...: since this will not of itself result in their acquiring a new nationality it will not give rise to any obligation on the part of other states to receive the persons concerned on their territory...'[16]

18. With regard to the loss of nationality, the editors note that, while this is at present left to the discretion of States, 'the matter is of direct importance for international law', and in certain circumstances, 'the deprivation of nationality may bring the state in question into conflict with its international obligations'.[17]

> 'In so far as deprivation of nationality results in statelessness, it must be regarded as retrogressive, and the fact that some states find no need (subject to certain exceptions) to provide for deprivation of nationality suggests that no vital national interest requires it...'[18]

19. The late **Sir Ian Brownlie, QC, formerly Chichele Professor of Public International Law in the University of Oxford and Member and former Chairman of the International Law Commission**, quotes the British position on nationality and international law which was expressed in replies to questions of the Preparatory Committee for the Hague Codification Conference (1929):

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[14] Ibid., 866.

[15] Ibid., 944-5.

[16] Ibid.

[17] Ibid., 877-8.

[18] Ibid., 880.

> 'The mere fact, however, that nationality falls in general within the domestic jurisdiction of a State does not exclude the possibility that the right of the State to use its discretion in legislating with regard to nationality may be restricted by duties which it owes to other States... Legislation which is inconsistent with such duties is not legislation which there is any obligation upon a State whose rights are ignored to recognize. It follows that the right of a State to legislate with regard to the acquisition and loss of its nationality and the duty of another State to recognize the effects of such legislation are not necessarily coincident.'[19]

20. Referring later to the duty to admit nationals expelled from other states and its corollary, the duty not to expel nationals, Brownlie observes:

> 'Yet obviously *ad hoc* denationalization would provide a ready means of evading these duties. In appropriate circumstances responsibility would be created for the breach of duty if it were show that the withdrawal of nationality was itself a part of the delictual conduct, facilitating the result.'[20]

21. **James Crawford, SC, Whewell Professor of Public International Law in the University of Cambridge and former member of the International Law Commission**, maintains this position unchanged in the 8th edition of *Brownlie's Principles of Public International Law*.[21]

3. The applicable law: passports and 'returnability'

22. As **Mr Dowson, Assistant Legal Adviser in the Home Office**, said in 1930:

> '... a kind of contract or obligation results from the grant of a passport to an individual by a State so that when that individual enters a foreign State with that passport, the State whose territory he enters is entitled to assume that the

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[19] *Principles of Public International Law*, 7th edn., Oxford: Oxford University Press, 2008, 386.

[20] In support of this position, Brownlie cites the work of Paul Weis. His views are set out in my Opinion of 12 March 2014, paragraph 22, and my Further Comments of 6 April 2014, paragraphs 4-6; they are not repeated here.

[21] James Crawford, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, 519-20.

> other State whose nationality the person possesses will receive him back in certain circumstances...'[22]

23. This unexceptional position has been endorsed, as noted above, by the British Government in the statements of Home Office officials, and in the legal writing of leading British international lawyers, including Sir John Fischer Williams, Sir Robert Jennings QC, and Sir Arthur Watts QC. The guarantee of returnability which attaches to the passport is also amply supported in doctrine generally and in the practice of States. Daniel Turack, author of a leading monograph on the subject, wrote in 1972 on the nature and function of the passport:

> '... states regard as one of its primary purposes that the issuing state will receive back the holder, if for any reason, he is compelled to leave the host state. The great majority of states do not seem to care about the nationality of the person seeking entry to its territory as long as he produces a valid legal passport so that he can be repatriated in case his presence should become undesirable in the country of sojourn...'[23]

24. More recently, Annalisa Meloni comments as follows on the subject of passports and 'returnability':

> '... under customary international law [a passport] indicates the existence of a duty on the issue State to admit the holder if he is expelled from another State and has nowhere else to go. Thus, even when a passport is issued to a non-national it may create an obligation for the issuing State to admit the holder if the State of nationality does not admit him, as it may be shown that in issuing the passport the issuing State impliedly warranted to a third State that the holder would be returnable to its territory... Because of such guarantee of 'returnability', municipal law generally prescribes the possession of passports by aliens as a condition of admission into the State's territory.'[24]

25. The entry on passports in the *Max Planck Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public

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[22] Above, text to note 10.

[23] Daniel Turack, *The Passport in International Law*, Lexington, Mass.: D. C. Heath & Company, 1972, 20

[24] Annalisa Meloni, *Visa Policy within the European Union Structure*, Springer, 2006, 25.

Law and International Law under the direction of Rüdiger Wolfrum, is to similar effect:

> '33. Every State has the right to expel aliens through deportation..., sending them back to their country of origin... States are obliged to readmit their passport holders into their territory and are estopped from refusing to do so...'[25]

26. In the present context, perhaps the most important element of State practice is that of the United Kingdom. 'Returnability' as evidenced by a foreign passport is a central feature of immigration control in UK law and practice. The Government's latest Guidance (26 November 2013), notes that 'returnability is 'the ability of a traveller to return to his or her country of residence (after visiting the UK).'[26] Some travel documents may provide no such guarantee, or guarantee re-entry for a limited period only. It is for the Entry Clearance Officer to check that a visa applicant '*has sufficient returnability*', the relevant requirements for which appear in paragraphs 21-22 of the Immigration Rules:

> '**Holders of restricted travel documents and passports**
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> '21. The leave to enter or remain in the United Kingdom of the holder of a passport or travel document whose permission to enter another country has to be exercised before a given date may be restricted so as to terminate at least 2 months before that date.
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> '22. If his passport or travel document is endorsed with a restriction on the period for which he may remain outside his country of normal residence, his leave to enter or remain in the United Kingdom may be limited so as not to extend beyond the period of authorised absence.'[27]

27. The 'Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused' include,

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[25] Cornelia Hagedorn, 'Passports' (2008): **http://opil.ouplaw.com/home/EPIL**. See also Rainer Hoffmann, 'Denaturalization and Forced Exile' (2013), paragraph 26, ibid.

[26] **https://www.gov.uk/government/publications/returnability-ecb07/ecb07-returnability**.

[27] Immigration Rules, Part 1: **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300836/20140406_Immigration_Rules_-_Part_1_MASTER.pdf**.

> '(13) failure... to satisfy the Immigration Officer that he will be admitted to another country after a stay in the United Kingdom...'[28]

Conclusion

28. It would appear that Her Majesty's Government has never accepted that another State has the right and is able unilaterally to denationalize its citizens while they are present in the United Kingdom, so as to make the this country responsible for their residence, safety and well-being.[29] It is equally clear that Her Majesty's Government, in its daily work of managing the admission of non-citizens, accepts foreign passports as effectively guaranteeing the re-admission of the holder to the issuing State.

29. These linked positions have been consistently maintained by the United Kingdom Government and by international lawyers, including British international lawyers of the very highest standing, for the past nearly ninety years, if not longer. On the basis of these views and of the practice of the United Kingdom and of States generally, one can confidently confirm that the contrary position is and remains manifestly incorrect.

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[28] Immigration Rules, Part 9: **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302674/20140410_Immigration_Rules_-_Part_9_MASTER.pdf**.

[29] Lord Holbeach says that, 'Other countries can already do this and those affected would be subject to our immigration rules for stateless persons': H.L, Deb, 7 April 2014, col. 1193. It would be interesting to know how many such cases there have been, and whether Her Majesty's Government has raised the issue with the passport-issuing State/State of nationality. While the United Kingdom and other States have accepted legal responsibilities towards *refugees*, who cannot be returned to their country of origin owing, for example, to a well-founded fear of persecution, this autonomous legal regime does not recognize, either expressly or impliedly, the right of States to *create* refugees.