

Revocation of citizenship in the face of terrorism*

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Abstract

This contribution deals with the revocation of citizenship as a preventative measure against terrorism and offers an exposition of the appropriateness of the practice and its conformity with international human-rights law.

INTRODUCTION

The recent scourge of terrorism has made it imperative for states to implement counter-terrorism measures, which often include revocation of citizenship as a weapon to counter terrorist acts. However, while revocation of citizenship may appear to be a viable solution, it brings with it serious difficulties.¹ However, since states violate their international law obligations to protect their subjects by stripping their nationals of citizenship, circumspection is advised.² Revocation of citizenship is likened to the death penalty and a method of permanent exclusion of those convicted of serious offences.³

Importantly, the power to revoke citizenship on the basis of public security in order to prevent acts of terrorism has always been a contentious issue for democratic governments.⁴ The practice has been challenged as contrary to human-rights law and, when coupled with deportation of citizens suspected of involvement in terrorist-related acts, has been viewed as exporting the security threats from one country to another country.⁵ Furthermore, it means

* For the purposes of this article, the words ‘citizenship’ and ‘nationality’ will be used interchangeably.

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¹ Kent Roach and Craig Forcece, ‘Why Stripping Citizenship is a Weak Tool to Fight Terrorism’ (2016) <www.theglobemail.com/opinion/why-stripping-citizenship-is-a-weak-tool-to-fight-terrorism> accessed 3 March 2016.

² United Nations, ‘General Assembly A/HRC25/282013 Human Rights and Arbitrary Deprivation of Nationality’ (2013) <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/.../A-HRC-25-28-en.doc> accessed 2 September 2016.

³ Audrey Macklin, ‘Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien’ (2014) 40, 1 Queen’s LJ 3.

⁴ Rainer Bauböck and Vesco Paskalev, ‘Citizenship Deprivation: A Normative Analysis’ (2015) <www.ceps.eu/system/files/LSEB2-citizenshipDeprivation.pdf> accessed 31 May 2016.

⁵ Macklin, (n 3) 2.

that the deporting state fails to comply with its international obligation of prosecuting the perpetrators of terrorist crimes.⁶

The purpose of this article is to examine the development of the practice of revocation of citizenship as a weapon against terrorism in the United States of America (US), United Kingdom (UK), Canada, Australia, France and the Republic of South Africa (RSA). Although terrorism is a threat to national security, the question is whether revocation of citizenship is an appropriate measure for the prevention of terrorism. The effect of revocation on fundamental human rights will be considered. I start with an introduction, followed by an interrogation of the concept of citizenship. In the third part, I analyse different international instruments, that regulate citizenship, namely the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on Certain Questions Relating to the Conflict of Nationality Law; the Convention relating to the status of Stateless Persons; on the Reduction of Statelessness; and the International Covenant on Civil and Political Rights. The aim is to investigate the measures provided by these instruments in the protection of the right to citizenship or nationality.

The fourth part deals with the national laws in the different states that protect the right to nationality. Here I focus on the countries selected above. The US, UK, Australia and France have already shown a keen interest in revoking citizenship as a counter-terrorism measure. The Republic of South Africa has not yet indicated any interest in adopting such measures—unsurprisingly, as it is a democratic state governed by a constitution, which prohibits the revocation of citizenship.⁷

The fifth part compares the processes adopted for revocation of citizenship in the selected jurisdictions, and these are then compared before I analyse the human-rights challenges arising from the revocation of citizenship. Finally, I offer some concluding remarks.

THE CONCEPT OF CITIZENSHIP AND NATIONALITY

‘Citizenship’ or ‘nationality’ is described as a formal link between a state and a class of individuals in the main identified with that state. The ‘link’ in question amounts to a ‘bundle of privileges, powers and immunities’.⁸ Consequently, the rights of the people are determined with reference to the country of which they are citizens. In *Perez v Brownell*,⁹ Warren CJ held,

⁶ Bauböck and Paskalev (n 4).

⁷ S 20 of the Constitution of the Republic of South Africa, 1996 (hereinafter the ‘Constitution’).

⁸ Shai Lavi, ‘Citizenship Revocation as Punishment: On Modern Duties of Citizens and their Criminal Breach’ (2011) University of Toronto LJ 790; Robert Sloane, ‘Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality’ (2009) Harvard International LJ 1; see also Monika Ganczer, ‘The Right to Nationality as a Human Right?’ (2015) <http://real.matk.hu/24919/1/9789462365032_hfdst02.pdf> accessed 19 July 2016.

⁹ *Perez v Brownell* 356 US 44 (1958).

with regard to citizenship: ‘man’s basic right for it is nothing less than the right to have rights.’

Based on this decision, stateless persons are regarded as having no rights. This notion is in contradistinction with the human-rights law principles, which hold that being human entitles a person to human rights.¹⁰ Therefore, the mere fact of being a human being is an important characteristic that entitles a person to enjoy human rights, irrespective of whether or not he or she has nationality.¹¹

Furthermore, the US Supreme Court, in *Luria v United States*,¹² defined citizenship as ‘membership in a political society and implies a duty of allegiance on the part of a member and a duty of protection on a part of the society.’ In *Nottebohm (Liechtenstein v Guatemala)*¹³ the International Court of Justice described nationality as ‘a legal bond having its basis in a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal duties.’ In its advisory opinion on *Nationality Decrees Issued in Tunis and Morocco* the Permanent Court of Justice held that ‘in its present state of international law, questions of nationality are, in the opinion of the Court, in principle within its reserved domain.’¹⁴

According to Dugard, ‘nationality’ is a term of international law and denotes a legal connection between the individual and the state for external purposes.¹⁵ Volpp, on the other hand, is of the view that citizenship consists of four important elements: citizenship as a formal legal status; citizenship as rights; citizenship as political activity; and citizenship as identity.¹⁶ Another important aspect of citizenship is legal recognition. Therefore, for a person to be a citizen, he or she must enjoy the legal status of a citizen.¹⁷ Common to all nationality concepts is a genuine link or legal connection between the individual and the state.¹⁸

¹⁰ David Weissbrodt, ‘The Human Rights of Stateless Persons’ (2006) 28(1) Human Rights Quarterly 245 at 248.

¹¹ *ibid* 249.

¹² *Luria v United States* 231 US 9 (1913) at 22.

¹³ See *Nottebohm case (Liechtenstein v Guatemala)* 1955 ICJ Rep 4 at 23, where the Court stated that ‘the diversity of demographic conditions have thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each state’; Ruth Donner, ‘The Regulation of Nationality in International Law’ (1987) American J of International Law 2; see also Sloane, (n 8) 3.

¹⁴ *Nationality Decrees Issued in Tunis and Morocco (French Zone)* 1921 PCIJ Ser B No 4 para 40.

¹⁵ John Dugard, *International Law: A South African Perspective* (Juta 2011) 282.

¹⁶ Leti Volpp, ‘The Citizen and the Terrorist’ (2002) UCLA L Rev 578.

¹⁷ Linda Bosniak, ‘Citizenship Denationalized (The State of Citizenship Symposium)’ (2000) Indiana Journal of Global Legal Studies 456.

¹⁸ Sloane (n 8) 3.

INTERNATIONAL LAW AND PROTECTION OF CITIZENSHIP

In terms of international law, every person has the right to nationality that cannot be revoked.¹⁹ However, nationality can be revoked by consent when an individual voluntarily takes the initiative to terminate his or her nationality.²⁰ Furthermore, revocation may be triggered by the commission of serious offences by the individual against the state, such as the attacks on the state of which he or she is a national.²¹ It is only when the revocation of nationality is involuntary, that the protection of human rights becomes an issue. The protection of the right to nationality is supported by the provisions of the international instruments discussed below.

The Convention on Certain Questions Relating to the Conflict of Nationality Law 1930

The preamble to the Convention provides that it is in the general interest of the international community to ensure that all its members recognise that every person should have a nationality and should have one nationality only. The Convention discourages individuals from having more than one nationality. While discouraging more than one nationality, the Convention provides for individuals with more than one nationality to be regarded as a national of each state whose nationality he or she possesses.²²

The Convention further stresses that ‘it is for each state to determine under its law who are its nationals.’²³ These sentiments were echoed in the *Nottebohm* case,²⁴ where it was emphasised that the question of nationality is for each sovereign state to settle under its own legal system. However, the law of the state will be recognised by other states only if it is consistent with international conventions, international custom and the generally recognised principles of the law governing nationality.

Where an individual has the nationality of three states, the Convention provides that he or she should be regarded as having one nationality only.²⁵

Although the Convention does provide for a state to revoke its citizenship,²⁶ it makes no mention of the revocation of citizenship based on conviction for, or suspicion of, involvement in terrorist acts.

¹⁹ Art 15(1)–(2) of the Universal Declaration of Human Rights 1948 (UDHR).

²⁰ Myres McDougal, Harold Lasswell and Lung-chu Chen, ‘Nationality and Human Rights: The Protection of the Individual and External Arenas’ (1974) Yale Law School Legal Scholarship Repository 928.

²¹ *ibid* 941.

²² Art 3 of the Convention on Certain Questions Relating to the Conflict of Nationality Law 1930.

²³ *ibid* 1.

²⁴ *Nottebohm case* (n 13).

²⁵ Craig Forcese, ‘Tale of Two Citizenships: Citizenship Revocation for Traitors and Terrorists’ (2014) 39 *Queen’s LJ* 560.

²⁶ Art 6.

The Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights (UDHR) provides that everyone has the right to a nationality and guarantees that no one shall arbitrarily be deprived of his or her nationality, or denied the right to change his or her nationality.²⁷ The Declaration further ensures freedom of movement by providing that everyone has the right to leave and return to his or her country.²⁸ In *Colon v US Department of State*²⁹ the court stressed that one of the fundamental rights of citizenship is the right of the individual to travel freely throughout the world and, when he or she wishes to do so, to return and reside in the US. In supporting the right to citizenship, the preamble to the UDHR provides that the members of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, and have further determined to promote social progress, better standards of life and freedom. In summary, the aim of the Declaration is to prevent persons being rendered stateless.³⁰

The Convention Relating to the Status of Stateless Persons 1954

Under this Convention, a 'stateless person' means a person who is not considered a national by any state in terms of its laws.³¹

The aim of the Convention is to guarantee minimum rights to stateless persons. The Convention, therefore, obliges states to facilitate the assimilation and naturalisation of stateless persons.³² However, the provisions of Article 1(2) of the Convention exclude certain categories of person from its scope.³³ It is argued that persons suspected of involvement in terrorist-related crimes may be excluded from the application of the Convention. Of particular importance is the provision that the Convention does not provide any rule on the loss of citizenship.

²⁷ (n 19) Art 15(1) and (2).

²⁸ *ibid* Art 13(2).

²⁹ *Colon v US Department of State* 2 F Supp 2nd 43 (1988) 46.

³⁰ (n 19) 246.

³¹ Art 1(1) of the Convention Relating to the Status of Stateless Persons 1954.

³² *ibid* Art 32.

³³ *ibid* Art 1(2) provides that: 'The Convention shall not apply (i) to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance; (ii) to persons who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; (iii) to persons with respect to whom there are serious reasons for considering that: (a) They have committed a crime against peace, a war crime, or a crime against humanity; (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country; or (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.'

The Convention on the Reduction of Statelessness 1961

In terms of this Convention, nationality shall be granted to a person born in the territory of a state who would otherwise be stateless.³⁴ Therefore, the Convention obliges a state party to grant nationality to a person who would be stateless and who is unable to acquire the nationality of the state in whose territory he was born.³⁵

Furthermore, a state party may not revoke the citizenship of a person if such revocation would render him or her stateless, save where nationality has been obtained by misrepresentation or fraud.³⁶ Where a person has conducted himself or herself in a manner that is seriously prejudicial to the interest of a state, this may be a ground for the revocation of nationality.³⁷

Noteworthy is that the Convention specifically prohibits the loss of citizenship. Although the Convention does not specifically stipulate involvement in terrorist activities as a ground for revocation of nationality, such action may be included as conduct that is seriously prejudicial to the security interests of a state.

The International Convention on the Elimination of All Forms of Racial Discrimination 1963

One of the aims of the International Convention on the Elimination of All Forms of Racial Discrimination³⁸ is to reduce statelessness. The Convention further guarantees not only the right to nationality without distinction as to race, colour, or national or ethnic origin, but also the right to equality before the law.³⁹ The Convention prohibits any interpretation of its provisions that may in any way affect the interpretation of the legal provisions of state parties concerning nationality, citizenship, or naturalisation, provided such provisions do not discriminate against any particular nationality.⁴⁰

The International Covenant on Civil and Political Rights 1966

The preamble to the International Covenant on Civil and Political Rights (ICCPR)⁴¹ states as follows: '[i]n accordance with the principles proclaimed in the Charter of the United Nations, [and in] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' All state

³⁴ Art 1 of the Convention on the Reduction of Statelessness 1961.

³⁵ *ibid* Art 1(4).

³⁶ *ibid* Art 8(2)(b).

³⁷ *ibid* Art 8(3)(a)(ii); see also *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62, where the Home Secretary Office notified Al-Jedda of its intention to revoke his British citizenship on the ground that it will be conducive for the public good.

³⁸ International Convention on the Elimination of All Forms of Racial Discrimination 1963 <www.ohchr.org/EN/ProfessionalInterest/pages/CERD.aspx> accessed 2 June 2016.

³⁹ *ibid* Art 1(3).

⁴⁰ *ibid* Art 1(2).

⁴¹ ICCPR 1966.

members of the United Nations are obliged to promote universal respect for and observance of the human rights and freedoms.

The ICCPR guarantees the right to citizenship without any distinction.⁴² The ICCPR further strengthens the right to citizenship by providing equal protection of the law for everyone without distinction. Based on the importance of equal protection of the law, the ICCPR prohibits any discrimination and guarantees to all persons equal and effective protection against any form of discrimination based on race, colour, sex, nationality, birth or any other status.⁴³

REVOCATION OF NATIONALITY: LEGAL FRAMEWORKS IN SELECTED JURISDICTIONS

Although there already are a few states, that have shown an interest in the withdrawal of citizenship based on involvement in terrorist activities, I focus only on those set out below.

Canada

Canada has been at the forefront in implementing laws that enable the state to revoke the citizenship of those convicted of terrorist offences through measures allowing for the expulsion of terrorists from its area of jurisdiction.⁴⁴ The Canadian government has often revoked citizenship and rendered stateless persons, whom they believe to have failed to disclose their former German allegiance.⁴⁵ Since 2014, Canada has embarked on strengthening legislation allowing it to revoke the citizenship of those deemed undesirable through their involvement in terrorist activities. By introducing the new legislative measures, such as the Canadian Citizenship Act of 2014, the Canadian government has evidenced its commitment to protect the safety and security of Canadian citizens. The right to enter and remain in Canada has often been restricted by the Canadian government. For example, the Canadian authorities have withheld the reissuing of passports so as to deny citizens entry into Canada.⁴⁶ The Canadian government has prevented Canadian citizens, such as Omar Khadar, Suod Mohammed and others entry into Canada.⁴⁷ The case of *R v Alizadeh*⁴⁸ is an example of a recent decision in which the citizenship of an individual was revoked. Alizadeh, holding both Canadian and Iranian citizenship, was convicted of possessing explosive material with the aim of damaging the properties and

⁴² *ibid* Art 25.

⁴³ *ibid* Art 26.

⁴⁴ Sangeetha Pillai, 'More to Lose than Gain in Stripping Citizenship' (2015) <<http://indaily.com.au/opinion/2015/02/25/lose-gain-stripping-citizenship>> accessed 27 September 2016.

⁴⁵ Weissbrodt (n 10) at 260.

⁴⁶ Ramzi Kassem, 'Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases' (2014) Fordham LR 2102.

⁴⁷ See Macklin (n 3) at 2.

⁴⁸ *R v Alizadeh* [2014] ONSC 5421.

life of Canadian citizens. It came to light that while visiting Iran, Alizadeh received terrorist training. The Canadian court sentenced him to twenty-four years imprisonment. Thereafter the government took a decision to deport Alizadeh and withdraw his Canadian citizenship.

The Canadian Citizenship Act also provides for a list of national security-related offences.⁴⁹ Accordingly, in terms of the provisions of section 10(2) (b) of the Canadian Citizenship Act, a conviction of a terrorism offence outside of Canada would also constitute the offence of terrorism under Canadian law. The provisions of section 10 of the Act apply retrospectively and therefore empower the Minister to revoke citizenship even if the person involved was convicted of one of the listed security-related offences before the adoption of the Citizenship Amendment Bill. More disturbing is the fact that where a person has misrepresented a fact related to non-admission into Canada under the Immigration and Refugee Protection Act's (IRPA)⁵⁰ national security and terrorism provisions, a declaration of citizenship revocation also constitutes an automatic deportation order.⁵¹ Revocation of citizenship in Canada has been viewed as violating the Canadian Charter of Rights and Freedoms.⁵²

United States of America

With regard to citizenship the US Constitution provides, that:

All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.⁵³

The US Constitution protects the right to citizenship and guarantees equal protection of the law to every citizen of the country. However, although the Constitution indeed protects the right to citizenship, revocation of citizenship is not without precedent—in fact, US revocation of citizenship can be traced back to 1907 when the Expatriation Act⁵⁴ came into force. The Expatriation Act provided for loss of citizenship where an individual pledged allegiance to a foreign state.⁵⁵

⁴⁹ S 10 of the Citizenship Act.

⁵⁰ Immigration and Refugee Protection Act of 2001 (CA).

⁵¹ *ibid* s 10(5).

⁵² Art 6 of the Canadian Charter of Human Rights and Freedoms of 1982 provides that 'every citizen of Canada has the right to enter, remain and leave Canada'.

⁵³ Fourteenth Amendment of the US Constitution of 1798.

⁵⁴ Expatriation Act of 1907.

⁵⁵ Peter Spiro, 'Expatriating Terrorists' (2014) Fordham LR 2171.

The US can, therefore, be seen as a democratic state, eager to have legislation revoking the citizenship of individuals as a counter-terrorism measure in place. The Expatriate Terrorist Bill⁵⁶ is legislation aimed at facilitating the revocation of citizenship. However, the opponents of the Bill are of the view that it infringes the human rights of individuals and is therefore unconstitutional.⁵⁷ They argue that the US Constitution guarantees citizenship as a constitutional right, while the proponents of the Bill see citizenship as a privilege rather than a right.⁵⁸ Revocation of citizenship is thus seen as cruel and unusual punishment.⁵⁹ Furthermore, the revocation of citizenship falls squarely within the domain of the executive, which implies that the decision to revoke citizenship will not be subject to review.

The provisions of section 349 of the US Immigration and Nationality Act (INA) specifies grounds on which nationality may be lost. These include: declaring allegiance to another state on reaching the age of eighteen years; where citizenship was obtained fraudulently;⁶⁰ committing offences such as treason; attempting to conspire to overthrow the US government; or working for another government after revocation of citizenship.⁶¹

Committing terrorist acts against the US is a further ground on which citizenship may be lost. The rationale behind this ground is that terrorist acts against the US affect the interests of the state. Therefore, involvement in the commission of terrorist acts against the US is also a basis on which acquisition of US citizenship may be denied.⁶²

⁵⁶ Expatriate Terrorist Bill 2014.

⁵⁷ Gabriel Malor, 'How Not to Fight Terrorism' (2015) <<http://nationalreview.com/article/412888/how-not-to-fight-terrorism-gabriel-malor>> accessed 2 June 2016.

⁵⁸ Audrey Macklin and Rainer Bauböck (eds), *The Return of Banishment: 'Do the New Denationalisation Policies Weaken Citizenship?' (February 2015)* Robert Schuman Centre for Advanced Studies Working Paper No RSCAS 2015/14 at 2.

⁵⁹ *Trop v Dulles* 356 US 86 (1958) where the US Supreme Court held that the expatriation provision of the INA constitutes 'cruel and unusual punishment in violation of the Eighth Amendment of the US Constitution as it involves a total disregard of the individual's status in the society'; see further *Afroyim v Rusk* 387 US 253 (1967) where the US Supreme Court held that citizens of the US may not be deprived of their citizenship involuntarily. The Court further held that Afroyim's right to retain citizenship was guaranteed by the citizenship clause of the Fourteenth Amendment of the US Constitution; see also Alexander Aleinikoff, 'Theories of Loss of Citizenship' (1986) Michigan LR 148; Leti Volpp (n 16) 2581.

⁶⁰ *Knauer v United States* 328 US 654 (1946) where the Court approved the application for denaturalisation of the German born applicant, on the ground that he fraudulently obtained his US citizenship by falsely swearing renunciation of German allegiance to the US.

⁶¹ Aleinikoff (n 59) 1477.

⁶² Ted Cruz, 'Stripping Suspected Terrorist of Citizenship' (2016) <<https://if.then.fund/a/50/stripping-suspected-terrorist-citizenship>> accessed 3 May 2016.

United Kingdom

Revocation of citizenship is a weapon used by the United Kingdom (UK) to counter terrorism in its area of jurisdiction. Those involved in the commission of terrorist acts are stripped of their citizenship and expelled from the UK. The UK has already processed twenty-seven citizenship revocation orders on national security grounds.⁶³ Under the British Nationality Act,⁶⁴ the revocation of citizenship is subject to certain conditions. First, the Home Secretary must be satisfied that revocation of citizenship is in the public good, because the individual concerned is involved in activities that are seriously prejudicial to the UK.⁶⁵ *Secretary of State for Home Department v Al-Jedda*⁶⁶ illustrates this aspect. In this case, Al-Jedda, an Iraqi citizen, came to the UK as an asylum seeker in 1992 and acquired British citizenship in 2000. In 2004 he visited Iraq, where he was arrested by US troops and transferred into British custody. After his release from custody in 2007, Al-Jedda was notified by the Home Secretary of the intention to revoke his British citizenship on the ground that it would be conducive to the public good.

Noteworthy is the discretionary power of the Home Secretary, which has come under severe criticism as revocation of citizenship under these circumstances is not based on conviction for a terrorist offence.⁶⁷ In revoking citizenship on this ground, the Home Secretary must be satisfied that the person to be deported will acquire nationality in another country. Furthermore, the person suspected of involvement in terrorist activities must have acquired his or her citizen status through naturalisation, registration, fraud, or by not disclosing a material fact⁶⁸—for example, that he or she had been convicted of a serious crime or had been denied citizenship by a different country. The new Counter-Terrorism and Security Act⁶⁹ empowers

⁶³ Melanie Glower, 'Deprivation of British Citizenship and Withdrawal of Passport Facilities; House of Commons' (2015) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06820>> accessed 3 May 2016.

⁶⁴ British Nationality Act 1981.

⁶⁵ *ibid* s 40(2); see also Volpp (n 16) 2583; Lavi (n 8) 404; see further the Convention on the Reduction of Statelessness (n 34) Art 8(3), which provides for revocation of citizenship; Art 7 of the European Convention on Nationality 1997, which provides for revocation of citizenship for conduct seriously prejudicial to the vital interest of the state party.

⁶⁶ (n 37); see also *Secretary of State for the Home Department v AP* [2010] UKSC 24 where the appellant, an Ethiopian national, who was detained in Ethiopia on suspicion of involvement in terrorist acts, was excluded from the UK; *Secretary of State for the Home Department v David Hicks* [2006] EWCA Civ 400.

⁶⁷ David Anderson, 'Citizenship Removal Resulting in Statelessness: First Report on the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalization from Persons Who Have No Other Citizenship' (2016) <www.gov.uk/government/uploads/system/uploads/attachmentatachment/18390/David-Anderson-QC-CITIZENSHIP-REMOVAL-print.pdf> accessed 3 December 2016.

⁶⁸ S 40 (3) of the British Nationality Act 1981.

⁶⁹ Counter-terrorism and Security Act 2015.

the Secretary of the Home Department to issue exclusion orders.⁷⁰ However, in issuing exclusion orders, the Secretary is obliged to give notice of the intended imposition of the temporary exclusion order to the individual on whom it is to be imposed.⁷¹ In terms of the Act, the Secretary of the Home Department can seize passports from persons suspected of involvement in terrorist activities⁷²—for example, where a person intends leaving Britain or the UK to take part in terrorist-related activity, such as furthering the campaign of the Islamic State (ISIS).

Furthermore, the Home Secretary may revoke British citizenship if doing so would not render that person stateless.⁷³

Australia

The recent terrorist attacks on Australia by the Islamic State (ISIS) prompted the Australian government to reconsider its security legislation.⁷⁴ One such statute is the Australian Citizenship Amendment Bill,⁷⁵ which amends the Citizenship Act.⁷⁶ The Bill was passed in December 2015, immediately after the Sydney terrorist attacks.⁷⁷ The aim of the Australian Citizenship Amendment Bill was to expel terrorists and their organisations by revoking the terrorists' citizenship. Revocation of citizenship is set out in section 4 of the Australian Citizenship Amendment Bill.⁷⁸ In terms of this Bill, a national or citizen of Australia may have his or her citizenship revoked if he or she acts inconsistently with his or her allegiance to Australia by engaging in specified conduct.⁷⁹ 'Specified conduct' includes the following acts: engaging in international terrorist activities by using explosives or

⁷⁰ *ibid* s 3(1)(a).

⁷¹ *ibid* s 4; see also *LI v The Secretary of the Home Department* [2013] EWCA Civ 906, where the Secretary of the Home Department waited for the appellant to leave the UK for Sudan and then made a decision to give notice of the decision to revoke citizenship. The Court's concern was that the decision appeared to be deliberate to manipulate the relevant laws protecting the rights of the individual; see further *B2 v Secretary for the Home Department* [2013] EWCA civ 616.

⁷² Counter-terrorism and Security Act 2015, s 1.

⁷³ British Nationality Act 1981, s 40(2).

⁷⁴ Michael Safi, 'ISIS Members Can Now be Stripped of Australian Citizenship' *The Guardian* (London, 5 May 2016) <www.theguardian.com/Australia-news/2016/may/05/isis-members-can-now-be-stripped-of-australian-citizenship> accessed 30 June 2016.

⁷⁵ Australian Citizenship Amendment Bill 2015.

⁷⁶ Australian Citizenship Act 2007.

⁷⁷ Siobhan Forgarty, 'Two Arrested in Sydney Counter-Terrorism Raids: Woollomooloo Naval Base Among Locations Discussed' *ABC News* (Sydney, 2 April 2015) <www.abc.net.au/news/2015-12-23/two-charged-after-sydney-counter-terrorism-raids/7049918> accessed 21 September 2016.

⁷⁸ S 4 of the Australian Citizenship Amendment Bill 2015 provides as follows: 'This Bill is passed because the Australian Parliament recognises that Australian Citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia.'

⁷⁹ *ibid* s 33AA(1).

lethal devices; engaging in a terrorist act; providing or receiving training connected with preparation for engagement or assistance in a terrorist act; directing activities for a terrorist organisation; recruiting for a terrorist organisation; or financing a terrorist organisation or a terrorist.⁸⁰ The devastating effect of the Australian Citizenship Amendment Bill is that it applies retrospectively to offences committed before its adoption.⁸¹

The new Bill is considered unconstitutional, more particularly in that, amongst other things, it makes no provision for transparency and fails to recognise the right to a fair trial. Section 35A of the Bill also provides for automatic termination of citizenship for certain conduct. In clear contravention of the natural-justice principle of *audi alteram partem*, citizenship may be terminated, although the case has not been heard or adjudicated upon by a court of law. Furthermore, revocation of Australian citizenship is subject to ministerial decision, which lacks transparency. Although the ministerial decision is reviewable, the minister is not obliged to furnish reasons for his or her decision.

France

France has a long history in the struggle against terrorism. It has suffered repeated terror attacks by both international and domestic terrorist organisations. The summer of 2014 saw France reeling under a series of terror attacks by ISIS. On 13 November 2014 Paris suffered attacks by terrorists in different areas of the city, which left 130 people dead and 31 injured.⁸² These attacks, for which ISIS claimed responsibility, were followed by a three-day period of national mourning. They were soon followed by the Charlie Hebdo terrorist attacks on, 7 January 2015, in which twelve people were killed. As a result of these terror attacks, the French President, Francois Hollande, called for new legal measures to counter terrorism. One such measure was the Strengthening Provisions on the Fight against Terrorism,⁸³ which deprived French citizens, involved in terrorist activities, of their citizenship. The law allowed French citizens, holding dual citizenship, to have their French citizenship revoked and to be expelled from France. France has since abandoned the revocation of citizenship as a result of disagreement between the two houses of the French parliament with regard to the effect of the legislation.⁸⁴

⁸⁰ *ibid* s 33AA(2)(a)–(g).

⁸¹ *ibid* s 35A.

⁸² Tony Todd, 'French 2015 Terror Attacks a "Dress Rehearsal" for 2016 Experts Say' *France 24* (12 January 2016) <www.france24.com/en/20160111-france-november-13-paris-attacks-terrorism> accessed 28 September 2016.

⁸³ Law no 2014-1353 of 13 November 2014.

⁸⁴ Kim Willsher, 'Hollande Drops the Plan to Revoke Citizenship of Dual National Terrorists' *The Guardian* (London, 30 March 2016) <www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists> accessed 28 September 2016.

The Republic of South Africa

The Republic of South Africa is a democratic state, governed by a supreme Constitution.⁸⁵ The Constitution provides for citizenship.⁸⁶ Section 20 of the Constitution prohibits deprivation of citizenship. Furthermore, the South African Citizenship Act⁸⁷ also prohibits the loss of South African citizenship by nationals without acquisition of foreign nationality.⁸⁸ The Constitution also provides for the right to enter and remain in the country.⁸⁹ The Constitution, therefore, obliges South Africa to accept its citizens and to allow them to remain in the country.⁹⁰ Revocation or loss of citizenship has always been viewed as a serious issue that require utmost care and consideration. The rationale behind this is that a revocation of citizenship renders an individual stateless, which further results in the loss of international diplomatic protection as required by section 3(2) of the Constitution. Section 3(2) guarantees equal entitlement to the rights, privileges and benefits of citizenship. This includes the right to request protection from the state, as was the position in *Kaunda v President of the Republic of South Africa*,⁹¹ where the Constitutional Court held that the South African privileges and benefits of citizenship are such that nationals will be entitled to request protection of South Africa in the case of need.⁹²

Although section 20 of the Constitution protects nationality, it is worth noting that South Africans residing in foreign countries who have not acquired the written permission to retain their citizenship may lose it by default.⁹³ The loss of citizenship in this manner may be classified as an unconstitutional and arbitrary act on the part of the government.

⁸⁵ Constitution of the Republic of South Africa Act 108 of 1996.

⁸⁶ S 3 of the Constitution provides as follows: (1) There is a common South African Citizenship; (2) (a) All citizens are equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship; (3) National legislation must provide for the acquisition, loss and restoration of citizenship.'

⁸⁷ South African Citizenship Act 88 of 1995.

⁸⁸ *ibid* s 11.

⁸⁹ S 21 of the Constitution.

⁹⁰ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta 2013) 453.

⁹¹ *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 CC at 303. See also *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C). See further *Mavrommatis Palestine Concessions* 1924 PICJ Reports Series A 12 where the Court held as follows: 'It is an elementary principle of international law that a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through ordinary channels.'

⁹² *Kaunda* (n 91) 316.

⁹³ Janice Roberts, 'Expats Loss of SA Citizenship "Unconstitutional"' *MoneyMarketing* (Cape Town, 5 January 2016) <www.moneymarketing.co.za/expats-loss-of-sa-citizenship-unconstitutional> accessed 13 September 2016.

Comparison of the Revocation of Citizenship in Canada, the US, the UK, Australia, France and the RSA

First, it is important to note that the Constitution of the Republic of South Africa, 1996, prohibits the revocation of citizenship. To date, South Africa has not introduced measures that include revocation of citizenship as a weapon in the fight against terrorism.

Secondly, Canada, the US, the UK and Australia have introduced legislation enabling the government to revoke citizenship on the ground of involvement in terrorist activities. France introduced measures to revoke the citizenship of those involved in terrorist acts, but has subsequently decided to abandon the policy.

Thirdly, in all these countries, the decision to revoke citizenship has been left in the hands of the executive, without, however, any provision being made for compliance with due processes. This means that those affected are not afforded an opportunity to defend their right to citizenship. In Canada and Australia, the decision to revoke citizenship is at the discretion of the relevant Minister, while in the UK, the Secretary of the Home Department decides the matter.

Lastly, the decision to revoke citizenship the six jurisdictions considered, is often made against people of foreign origin, which may be regarded as being tainted by an element of discrimination.

Human Rights Challenges

While protecting the security of the state and its citizens against any danger that may result from acts of terrorism, revocation of citizenship has not been accepted as an appropriate vehicle. According to the opponents of revocation of citizenship, the approach violates the human rights of those convicted or suspected of involvement in terrorist acts. In the discussion which follows, I focus on the effect revocation of citizenship has on the individual.

First, revocation of citizenship is tantamount to taking away the right of the individual to remain in a country and to enjoy the protection of the laws of his or her native country. This amounts to banishment, which is an illegitimate and cruel form of punishment.⁹⁴ There is also a danger that those whose citizenship are revoked, may be deported to a country where they would be exposed to human-rights violations, such as torture and other cruel, inhuman or degrading treatment or punishment.⁹⁵ Revocation of citizenship disrupts private and family life in that those stripped of their

⁹⁴ Macklin (n 3) 3.

⁹⁵ Stephanie Zosak, 'Revoking Citizenship in the Name of Counterterrorism: The Citizenship Review Commission Violates Human Rights in Bosnia and Herzegovina' (2010) *Northwestern J of International Human Rights* 227.

citizenship are forced to abandon their home countries, which is in violation of article 13 of the UDHR.⁹⁶

Secondly, the practice of revoking citizenship discriminates against persons of different origin who become citizens as a result of naturalisation.⁹⁷ This form of discrimination is common in the UK where persons of Muslim descent often have their citizenship revoked on suspicion of involvement in terrorist acts and are then deported from Britain.⁹⁸ Those against revocation of citizenship are further of the view that the measure is discriminatory, as it differentiates between citizens who are, according to the human-rights law, entitled to be treated equally.⁹⁹

Third, the liberty of those whose citizenship have been revoked, is infringed through their detention, more particularly if there is no country to which they can be deported to.¹⁰⁰

In the fourth instance, the decision to revoke citizenship is often dealt with by the executive whose decision is subject to review.¹⁰¹ Although the decision of the executive is subject to review, the measure of transparency involved in the process cannot be equated with that in a public court of law. Denial of the right to a fair trial is in contravention of article 10 of the UDHR.¹⁰²

CONCLUSION

Although certain of the states that I have considered regard revocation of citizenship as an appropriate measure to prevent the commission of terrorist acts, it appears that France and South Africa are holding back. The

⁹⁶ (n 19) Art 13 provides that: '(1) Everyone has the right to freedom of movement and residence within the borders of each state, (2) everyone has the right to leave any country, including his own, and to return to his country'. See further ICCPR (n 41) art 12, which provides that: 'everyone lawfully within the territory of a state shall within that territory, have the right to liberty of movement and the freedom to choose his residence, (2) everyone shall be free to leave any country, including his own. ... and (4) no one shall be arbitrarily deprived of the right to enter his own country.' See also Elspeth Guild 'Terrorism and Migration Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elger 2014) 501; Ganczer, (n 8).

⁹⁷ Laura van Waas, 'Fighting Statelessness and Discriminatory Nationality Law in Europe' (2012) *J of Migration Law* 245.

⁹⁸ See *Secretary for the Home Department* (n 37).

⁹⁹ See UDHR (n 19) Art 7, which provides that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' See also View on the Ground, 'United Kingdom Mulls Revoking Citizenship for Jihadis' (2014) <<http://viewontheground.com/2014/08/21/united-kingdom-mulls-revoking-citizenship-for-jihadis>> accessed 12 September 2016.

¹⁰⁰ Leslie Esbrook, 'Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool' (2016) *University of Pennsylvania J of International Law* 1309.

¹⁰¹ Kasseem (n 46) 2106.

¹⁰² UDGR (n 19) Art 10 provides that everyone has the right to a fair and public hearing by an independent and impartial tribunal, in determination of rights and obligations.

revocation of citizenship seems to be somewhat arbitrary and to contravene international law as laid down in international instruments, such as the UDHR, the ICCPR and the Convention on the Reduction of Statelessness, to name but a few. Revocation of citizenship must therefore, be viewed in a serious light as it violates the fundamental rights of those affected.¹⁰³

The revocation of citizenship infringes the rights of persons to enter and remain in the country of their choice, to freedom of movement in entering and leaving the country and, most importantly, the persons' right to family. Persons who have their citizenship revoked are forced to leave their countries of residence, often leaving behind their families, as revocation applies only to the affected persons. More importantly, the decision to revoke citizenship is in the hands of the executive, which implies that there is no due process afforded to those affected. In revoking citizenship, states renounce their international obligations to prosecute and punish those who commit offences in their jurisdictions.¹⁰⁴ It is argued that, instead of withdrawing citizenship and deporting those involved in the commission of terrorist activities, states should rather undertake to prosecute and punish the perpetrators in terms of their domestic law. In respect of those suspected of involvement in terrorist activities, they may be placed under supervision or their movements may be monitored by means of electronic tags as already practised in the UK, where legislation, such as the Prevention of Terrorism Act¹⁰⁵ that provides for the monitoring of the movements of suspected terrorists, has been enacted. Although the imposition of control orders amounts to a violation of the right to privacy, such violation is justifiable for the protection of the security of the state. It is important to advance the argument that the decision to withdraw citizenship must be subject to review to eliminate the abuse of the discretion. The withdrawal of citizenship must be legitimate to avoid violation of international-law norms. Lastly, it is still not certain whether revocation of citizenship and deportation of those affected will serve as an appropriate tool in the fight against terrorism.

¹⁰³ ICCPR (n 41) Art 26, which provides that 'All persons are equal before the law'; UDHR (n 19) Art 15, which provides that 'no one shall arbitrarily be deprived of his nationality.' See further, Alison Harvey, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness' (2014) 28/4 *Immigration, Asylum and Nationality Law* <<http://sprc.info/wp-content/uploads/2015/02Harvey-article.pdf>> accessed 7 May 2016.

¹⁰⁴ Bauböck and Paskalev (n 4).

¹⁰⁵ (n 71) s 1, which provided for the imposition of control orders on suspected terrorists with the aim of protecting the public from the risk of terrorist acts.