

THE UTILITY OF CITIZENSHIP STRIPPING LAWS IN THE UK, CANADA AND AUSTRALIA

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In three common law countries — the UK, Canada and Australia — recent legislation significantly expanded the grounds on which nationals can be stripped of their citizenship. In each country, two justifications were invoked to support the expanded grounds for citizenship deprivation: a symbolic justification, asserting that citizens who engage in particular behaviour do not deserve to retain their citizenship, and a security justification, which cast citizenship stripping as a necessary device to neutralise threats from within the citizenry. In this article, we examine the denationalisation laws introduced in each of the three countries and analyse the extent to which each law served these symbolic and security justifications.

CONTENTS

I	Introduction.....	2
II	Enactment, Justification and Efficacy of Revocation Laws in the UK, Canada and Australia.....	7
	A The UK.....	7
	1 Laws Enacted.....	7
	2 Justifications.....	11
	3 Use and Efficacy.....	13
	B Canada.....	20
	1 Laws Enacted.....	20
	2 Justifications.....	21
	3 Use, Efficacy and Repeal.....	22
	C Australia.....	27
	1 Laws Enacted.....	27
	2 Justifications.....	31

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3	Use and Efficacy.....	33
III	Themes and Observations.....	37
IV	Conclusion	44

I INTRODUCTION

In recent years, three common law countries, the UK, Canada and Australia, have enacted legislation to broaden the capacity for nationals to be stripped of their citizenship. This represents a reinvigoration of security-based denationalisation: a practice which has been largely unused for several decades. The laws have been introduced in response to heightened concerns about national security stemming from the foreshadowed return of radicalised ‘foreign fighters’,¹ terrorist attacks in Western nations,² and planned or attempted attacks on home soil.³

The case for introducing new citizenship revocation measures has been made on the basis that additional powers are needed to respond to these challenges. For instance, in a press statement in 2014 announcing that the UK threat level had been raised to ‘severe’, then-Prime Minister David Cameron noted that ‘[t]he ambition to create an extremist caliphate in the heart of Iraq and Syria is a threat to our own security here in the UK’.⁴ Cameron continued:

¹ See, eg, Lydia Khalil and Rodger Shanahan, ‘Foreign Fighters in Syria and Iraq: The Day after’ (Analysis, Lowy Institute for International Policy, September 2016) <http://web.archive.org/web/20160913001824/http://www.lowyinstitute.org/files/khalil_and_shanahan_foreign_fighters_in_syria_and_iraq_final_web_120916.pdf>.

² See, eg, Alice Foster, ‘Terror Attacks Timeline: From Paris and Brussels Terror to Most Recent Attacks in Europe’, *Express* (London, 18 August 2017) <www.express.co.uk/news/world/693421/Terror-attacks-timeline-France-Brussels-Europe-ISIS-killings-Germany-dates-terrorism>, archived at <<https://perma.cc/3JDX-MDGH>>.

³ See, eg, Natasha Bitá, ‘Sydney Siege Shows How the Screen Door of Citizenship Has Been Left Open to Criminal Elements’, *The Australian* (Sydney, 20 December 2014) <www.theaustralian.com.au/opinion/sydney-siege-shows-how-the-screen-door-of-citizenship-has-been-left-open-to-criminal-elements/news-story/929eb385f0325e4aa58b7a3b230d4160>, archived at <<https://perma.cc/8ZQN-ZRKQ>>; ‘Canada Revokes Citizenship of Toronto 18 Plotter’, *Huff-Post Canada* (Online, 26 September 2015) <www.huffingtonpost.ca/2015/09/26/toronto-18-terror-plotter-s-citizenship-revoked-by-federal-government_n_8200768.html>, archived at <<https://perma.cc/B95E-MTXA>>; Victoria Parsons, ‘Man Stripped of UK Citizenship over Fears of Paris-Style Terror Attack in London’, *The Independent* (London, 26 May 2016) <www.independent.co.uk/news/uk/crime/man-stripped-of-uk-citizenship-over-fears-of-paris-style-terror-attack-in-london-a7048986.html>, archived at <<https://perma.cc/QUA3-UXFP>>.

⁴ David Cameron, ‘Threat Level from International Terrorism Raised: PM Press Statement’ (Speech, Prime Minister’s Office, 29 August 2014) <www.gov.uk/government/speeches/threat-

We will always take whatever action is necessary to keep the British people safe here at home ... We are stopping suspects from travelling by seizing passports. We're barring foreign nationals from re entering the UK. We're depriving people of citizenship and we are legislating so we can prosecute people for all terrorist activity, even where that activity takes place overseas.⁵

In a similar vein, former Canadian Citizenship and Immigration Minister Chris Alexander said:

Our Government knows that there is no higher purpose for any government than to ensure the safety and security of its citizens and we have never been afraid to call jihadi terrorism exactly what it is. That is why we are taking steps to confront the ever evolving threat of jihadi terrorism by revoking citizenship of dual nationals who have been convicted of heinous crimes against Canada such as terrorism, espionage for foreign governments or taking up arms against Canada and our brave men and women in the Canadian Armed Forces. Our Government's changes to the *Citizenship Act* will ensure that those who wish to do us harm will not be able to exploit their Canadian citizenship to endanger Canadians or our free and democratic way of life.⁶

In announcing plans to introduce expanded citizenship stripping laws, former Australian Prime Minister Tony Abbott said:

It's worth recalling the citizenship pledge that all of us have been encouraged to recite: I pledge my commitment to Australia and its people; whose democratic beliefs I share; whose rights and liberties I respect; and whose laws I will uphold and obey. This has to mean something. Especially now that we face a home-grown threat from people who do reject our values.⁷

These statements suggest that the move to reinvigorate denationalisation laws in all three countries was underpinned by two justifications: a security rationale and a symbolic rationale. Both rationales take as their starting point the idea that recent events have produced an increased number of 'undesirable citizens',

level-from-international-terrorism-raised-pm-press-conference>, archived at <<https://perma.cc/T66A-E6QG>>.

⁵ Ibid.

⁶ Citizenship and Immigration Canada, Government of Canada, 'Protecting Canadians: Government of Canada Now Able to Revoke Citizenship of Dual Citizens Convicted of Terrorism', *Cision* (Web Page, 29 May 2015) <www.newswire.ca/news-releases/protecting-canadians---government-of-canada-now-able-to-revoke-citizenship-of-dual-citizens-convicted-of-terrorism-517764271.html>, archived at <<https://perma.cc/7HBA-9KZM>>.

⁷ Tony Abbott, 'National Security Statement' (Speech, Australian Federal Police Headquarters, 23 February 2015) 7 (emphasis omitted).

and that this requires a legislative response. The security rationale is based on the idea that these undesirable citizens may pose a threat to national security and that managing this risk of harm warrants removing them from the citizenry and, where possible, from the nation itself. By contrast, the symbolic rationale is less grounded in pragmatic considerations. It asserts that certain members of the citizenry do not deserve to hold citizenship, irrespective of whether or not the fact that they hold it presents an increased risk of harm.

In this article, we examine the efficacy of the recent moves to legislate for citizenship stripping in the UK, Canada and Australia in light of these stated goals. In Part II, we outline recent citizenship stripping legislation enacted in each of the three countries, and situate this in the context of other national security laws. We then seek to determine the extent to which expanding the grounds for citizenship stripping has served the security and symbolic justifications that the government in each country supplied in support of this move. In doing so, we recognise the limitations of our analysis. It is not possible to undertake a comprehensive assessment of the efficacy of these laws given our lack of access to intelligence and other sensitive information. It is also not possible to measure empirically the contribution that they have made to national security. Instead, we examine the extent to which the expanded citizenship stripping laws serve security justifications by looking at publicly available information about the use of such laws, as well as the extent to which they cover the same ground as other national security legislation.

A significant development that has occurred since this article was written is that the Canadian denationalisation legislation that we analyse has been repealed, just three years after its enactment.⁸ Interestingly, the decision to repeal this legislation, much like the decision to introduce it, appears to have been underpinned by a symbolic rationale: in this case one that emphasises the security of citizenship as a status, irrespective of the ‘deservingness’ of each individual citizen. Our analysis has been updated to take account of and to reflect upon this.

In Part III, we identify and explore some key themes that arise out of the cross-jurisdictional analysis conducted in Part II. The resurrection of denationalisation powers in the UK, Canada and Australia forms part of a broader global trend towards invoking citizenship stripping as a response to national security

⁸ See Bill C-6, *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, 1st Sess, 42nd Parl, 2016 (‘Bill C-6’), amending *Citizenship Act*, RSC 1985, c C-29, s 10(2) (‘*Canadian Citizenship Act*’).

concerns.⁹ While the recent repeal of these powers in Canada signifies a partial retreat from this trend, there is no evidence to date of this approach being mirrored in the UK, Australia or other countries. The increased tendency to invoke citizenship stripping as a national security tool raises the question of whether citizenship deprivation can ever be considered justified on security grounds. This question has been explored in a number of recent commentaries,¹⁰ and we do not address it in this article. Our focus is squarely on whether recent examples of such laws in the comparator countries have served as an effective means by which to pursue their stated goals.

This approach fills a meaningful gap in recent scholarship on citizenship stripping. Most existing work is directed towards one of two ends: exploring normative questions about how denationalisation affects the value of citizenship as a status,¹¹ or analysing some aspect of citizenship deprivation within a

⁹ In the last two years, several countries have enacted citizenship stripping laws as a response to security threats, including Austria, Azerbaijan, Belgium and The Netherlands: see, eg, Sang-eetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66 *International and Comparative Law Quarterly* 521, 522 n 8, citing: *Code de la Nationalité Belge 1984* [Belgian Nationality Code 1984] art 23(1)(ii); *Staatsbürgergesetz 1985* [Nationality Act Austria] § 33(2); Azad Hasanli, 'Azerbaijanis Engaged in Terrorist Activity to Lose Citizenship', *Trend News Agency* (Baku, 4 December 2015) <<https://en.trend.az/azerbaijan/society/2465160.html>>, archived at <<https://perma.cc/D678-SBT5>>; *Netherlands Nationality Act* (Netherlands) art 14(2)(b) [Olivier Vonk trans]. In this period, other countries have also resumed utilisation of citizenship stripping laws. For example, in Denmark, s 8B of the *Consolidation Act No 422 of 7 June 2004* (*Consolidated Act on Danish Nationality*) [Bertel Haarder and Oluf Engberg, Ministry of Refugee, Immigration and Integration Affairs trans, 7 June 2004] was employed for the first time to deprive Said Mansour of his Danish citizenship: 'Denmark Strips Man of Citizenship over "Terror Links"', *Al Jazeera* (Online, 11 June 2016) <www.aljazeera.com/news/2016/06/denmark-strips-man-citizenship-terror-links-160611080713219.html>, archived at <<https://perma.cc/CTJ8-JQAD>>. On 8 June 2016, the Supreme Court of Denmark upheld the decision to revoke Mansour's citizenship: see *Prosecution Service v T* (Højesterets Dom [Supreme Court of Denmark], Case No 211/2015, 8 June 2016).

¹⁰ See, eg, Matthew J Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 *Journal of Politics* 646; Christian Joppke, 'Terror and the Loss of Citizenship' (2016) 20 *Citizenship Studies* 728; Patti Tamara Lenard, 'Democracies and the Power to Revoke Citizenship' (2016) 30 *Ethics and International Affairs* 73.

¹¹ See, eg, Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control' (2010) 13 *New Criminal Law Review* 379; Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61 *University of Toronto Law Journal* 783; Rainer Bauböck and Vesco Paskalev, 'Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation' (2015) 30 *Georgetown Immigration Law Journal* 47; Patrick Sykes, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"' (2016) 20 *Citizenship Studies* 749.

single jurisdiction.¹² While our article touches on these themes, its primary contribution is to add to a smaller body of work that conducts cross-jurisdictional comparisons of approaches to citizenship stripping.

To date, there are a few published comparisons of this nature examining the UK and Canadian denationalisation laws,¹³ but there is minimal analysis factoring in the recent Australian legislation.¹⁴ Further comparison of the legislative experiences of these three countries, including Canada's move to repeal its laws, is worthwhile. The UK, Canada and Australia are the only common law countries to have recently reemployed citizenship stripping as a national security device. These countries are logical comparators because they share common foundations for their models of citizenship: Canada and Australia originated as UK colonies and imported the UK's conceptualisation of citizenship upon their inception.¹⁵ Moreover, as this article reveals, there are a number of similarities between the justifications invoked in the three countries for expanding the grounds for denationalisation, while the justifications for repealing these expansions in Canada serve as a useful counterpoint. In light of the historical and contemporary parallels between the three countries, examining their recent experience with denationalisation laws enables the early anticipation of themes and patterns that may underpin security-based citizenship stripping in common law countries. That is the larger project of this article.

¹² See, eg, Hina Majid 'Protecting the Right to Have Rights: The Case of Section 56 of the Immigration, Asylum and Nationality Act 2006' (2008) 22 *Journal of Immigration Asylum and Nationality Law* 27; Alice Ross, 'Deprivation of Citizenship: What Do We Know?' (2014) 28 *Immigration, Asylum and Nationality Law* 316; Matthew J Gibney, 'The Deprivation of Citizenship in the United Kingdom: A Brief History' (2014) 28 *Immigration, Asylum and Nationality Law* 326; Eric Fripp, Rowena Moffatt and Ellis Wilford (eds), *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart Publishing, 2015); Craig Forcese and Ani Mamikon, 'Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies' (2015) 48 *UBC Law Review* 305; Helen Irving and Rayner Thwaites, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)' (2015) 26 *Public Law Review* 143; Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 *European Journal of Migration and Law* 222; Kim Rubenstein and Jacqueline Field, *Australian Citizenship Law* (Lawbook, 2nd ed, 2017) 260–77.

¹³ See, eg, Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"' (2014) 39 *Queen's Law Journal* 551; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' (2014) 40 *Queen's Law Journal* 1.

¹⁴ But see Pillai and Williams (n 9).

¹⁵ See *ibid* 523–5.

II ENACTMENT, JUSTIFICATION AND EFFICACY OF REVOCATION LAWS IN THE UK, CANADA AND AUSTRALIA

A *The UK*

1 *Laws Enacted*

Of the three countries in our study, the UK has had the longest history of relatively broad denationalisation laws. Such laws were first introduced in the aftermath of World War I and have since remained on UK statute books in some form.¹⁶ Prior to 2002, the Home Secretary was empowered to revoke the citizenship of a naturalised citizen where their citizenship had been acquired through fraud or misrepresentation, or on the basis of prescribed disloyalty grounds.¹⁷ However, this power could only be exercised where the Secretary was satisfied that retention of citizenship would not be ‘conducive to the public good’.¹⁸

In the post-World War II period, the power to revoke citizenship on disloyalty grounds was exercised very rarely, with the last instance of deprivation on disloyalty grounds in the 20th century occurring in 1973.¹⁹ In 1981, UK nationality law was redrafted in the form of the *British Nationality Act 1981* (UK). Following vigorous parliamentary debate,²⁰ this Act broadly retained the Secretary of State’s citizenship deprivation powers. However, this did not lead to any new uses of the power to revoke citizenship on disloyalty grounds, and UK denationalisation laws came to be regarded as ‘moribund’.²¹

In the 21st century, the UK has expanded and invoked denationalisation powers, and ‘has emerged as a global leader in using citizenship deprivation as a counterterrorism measure’.²² During this period, it broadened ministerial

¹⁶ See Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 329–30.

¹⁷ See *ibid.*

¹⁸ *British Nationality Act 1981* (UK) s 40(2). See also *ibid.* 328.

¹⁹ The last citizen deprived of citizenship was Nicholas Prager, for spying for Czechoslovakia: United Kingdom, *Parliamentary Debates*, House of Lords, 9 October 2002, vol 639, col 281 (Lord Filkin); Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 329.

²⁰ See, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 23 July 1981, vol 423, cols 366–411; United Kingdom, *Parliamentary Debates*, House of Lords, 13 October 1981, vol 424, cols 261–365. See also Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330.

²¹ Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330.

²² Pillai and Williams (n 9) 532.

powers to revoke citizenship in 2002, 2006 and 2014.²³ On each of these three occasions, the expansions to revocation laws were introduced in the aftermath of events that heightened national security concerns: the September 11 terrorist attacks on the World Trade Centre in 2001, the 2005 London bombings, and increased foreign fighter engagement in the conflicts in Syria and Iraq from 2011 onwards.²⁴

The UK's 21st-century reinvigoration of the practice of disloyalty based citizenship revocation commenced in the aftermath of the 11 September 2001 terrorist attacks. In 2002, a government White Paper was published, 'recommending that denationalization laws be "update[d]" and used to illustrate the State's "abhorrence" of certain crimes'.²⁵ Following this, Parliament passed legislation replacing the assortment of specific denaturalisation powers that the Home Secretary had held under the *British Nationality Act*²⁶ with a broad executive power to revoke a person's citizenship, exercisable whenever the Secretary believed that it would be 'seriously prejudicial to the vital interests of ... the United Kingdom' for that person to continue to hold citizenship.²⁷ Additionally, citizenship revocation was no longer confined to naturalised citizens — the deprivation power was also exercisable against natural-born citizens.²⁸ However, in practice only UK citizens with dual citizenship were vulnerable to denationalisation as the legislation precluded citizenship deprivation where this would result in statelessness.²⁹ Matthew Gibney has noted that the introduction of a broad denationalisation power was tempered by the high threshold of the

²³ *Nationality, Immigration and Asylum Act 2002* (UK) s 4; *Immigration, Asylum and Nationality Act 2006* (UK) s 56; *Immigration Act 2014* (UK) s 66; Pillai and Williams (n 9) 532.

²⁴ See generally Pillai and Williams (n 9) 532–6.

²⁵ Ibid 532, quoting Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Cm 5387, 2002) 35 [2.23].

²⁶ The grounds that gave rise to denationalisation powers in the 1981 Act related to 'loyalty, criminality and trading with the enemy': Gibney, 'The Deprivation of Citizenship in the United Kingdom' (n 12) 330; see generally at 329–30.

²⁷ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(2).

²⁸ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(1).

²⁹ *Nationality, Immigration and Asylum Act 2002* (UK) s 4(1), amending *British Nationality Act 1981* (UK) s 40(4).

‘vital interests of the United Kingdom’ test, as well as a number of other safeguards, such as the protection against statelessness and provision for automatic legal appeals.³⁰

In 2006, following the London suicide bombings on 7 July 2005, the threshold for citizenship deprivation was further lowered by granting the Home Secretary the power to revoke citizenship whenever he or she believed that citizenship deprivation would be ‘conducive to the public good’.³¹ The legislative protections against statelessness remained intact so, in practice, the deprivation power could only be exercised against dual citizens.

The ‘conducive to the public good’ standard remains the general threshold for citizenship revocation today. However, in controversial changes introduced in 2014, the Home Secretary was granted the power to revoke in certain circumstances the citizenship of UK nationals with no other citizenship.³²

Section 40(4A) of the *British Nationality Act* now provides that the Home Secretary may deprive a naturalised British citizen of their citizenship where he or she believes this would be ‘conducive to the public good’, even if that person would become stateless as a result. However, this power can only be exercised if the Home Secretary is satisfied that depriving the person of citizenship is for ‘the public good’ because, while they held citizenship status, they conducted themselves ‘in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory’.³³ Additionally, the Home Secretary must have ‘reasonable grounds for believing that the person is able ... to become a national of [a foreign] country or territory’ under the law of that country or territory.³⁴

While the threshold for revocation is much higher when statelessness may ensue, the 2014 expansions to UK revocation law have been regarded as remarkable in their breadth. As a result of these expansions, it has been suggested

³⁰ See Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 330–2. Gibney explains that the ‘combination of expansion and contraction’ of the UK’s citizenship stripping powers in the 2002 Act was influenced by a desire to comply with the *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000): Gibney, ‘The Deprivation of Citizenship in the United Kingdom’ (n 12) 332.

³¹ *Immigration, Asylum and Nationality Act 2006* (UK) s 56(1), amending *British Nationality Act 1981* (UK) s 40(2).

³² *Immigration Act 2014* (UK) s 66(1), inserting *British Nationality Act 1981* (UK) s 40(4A).

³³ *British Nationality Act 1981* (UK) s 40(4A)(b).

³⁴ *Ibid* s 40(4A)(c). For an analysis of the UK citizenship-stripping provisions and the circumstances in which they are used, see Terry McGuinness and Melanie Gower, ‘Deprivation of British Citizenship and Withdrawal of Passport Facilities’ (Briefing Paper No 06820, 9 June 2017) 5.

that 'UK governments now have at their disposal laws to strip citizenship that are arguably broader than those possessed by any other Western democratic state'.³⁵ These powers have even been used outside of the counterterrorism context to revoke the citizenship of leaders of the Rochdale child sex grooming gang.³⁶ Despite this breadth, the UK is considering further expansions to its denationalisation laws, with the Home Office signalling in October 2015 an intention to consider how to 'more easily revoke citizenship from those who reject our values'.³⁷

The UK denationalisation legislation does not require consideration of international law principles, nor judicial involvement prior to a ministerial decision to revoke citizenship. Individuals who have their citizenship revoked have a right of appeal,³⁸ and are entitled to written notice outlining this right, as well as the reasons for the deprivation order.³⁹ However, the efficacy of this appeal right can be limited. For instance, the right to appeal does not prevent a person from being subject to the consequences of citizenship deprivation, such as deportation from the UK, with no right to re-enter. This can make the practical

³⁵ Gibney, 'The Deprivation of Citizenship in the United Kingdom' (n 12) 326. This comment preceded the enactment of Australia's citizenship-stripping legislation, which is, in some respects, even broader than the UK legislation as it provides for citizenship-deprivation in a way that bypasses the need for a ministerial decision. Despite this, it can still be argued that the denationalisation powers held by the UK government are the broadest in any Western democracy, given the capacity to use these powers to render individuals stateless and the flexibility inherent in the 'conducive to the public good' standard for citizenship-stripping. Indeed, in his April 2016 report, *Citizenship Removal Resulting in Statelessness*, the UK Independent Reviewer of Terrorism Legislation, David Anderson, noted that the UK power to revoke the citizenship of persons with no other citizenship was 'unusually strong' in international terms and that it 'extends further than the laws of most comparable countries in Europe, North America or Australasia': David Anderson, *Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons Who Have No Other Citizenship* (Report, April 2016) 17 [4.1] <www.gov.uk/government/uploads/system/uploads/attachment_data/file/518390/David_Anderson_QC_-_CITIZENSHIP_REMOVAL__print_.pdf>, archived at <<https://perma.cc/6WFT-L9AY>>.

³⁶ See, eg, 'Shabir Ahmed: Sex Gang Leader Appeals over Deportation', *BBC News* (London, 16 February 2016) <www.bbc.com/news/uk-england-manchester-35590906>, archived at <<https://perma.cc/3RNH-M59A>>.

³⁷ Secretary of State for the Home Department, *Counter-Extremism Strategy* (Cm 9148, 2015) 33 [104].

³⁸ The right of appeal is either to a court (*British Nationality Act 1981* (UK) s 40A(1)) or to the Special Immigration Appeals Commission (*Special Immigration Appeals Commission Act 1997* (UK) s 2B), depending on whether the decision was made in reliance on closed material.

³⁹ *British Nationality Act 1981* (UK) s 40(6).

exercise of appeal rights very difficult.⁴⁰ The rights are also difficult to exercise where a person is stripped of their citizenship while they are outside UK territory.⁴¹ Even where appeal rights are exercised, as Lucia Zedner has noted, their utility is ‘weakened by the tendency of judges to defer to the executive in respect of decisions relating to national security’.⁴² Additionally, the wide breadth of the Home Secretary’s revocation powers significantly reduces the likelihood that any appeals brought will be successful.⁴³

2 Justifications

Two justifications were invoked to support the UK’s 21st-century citizenship stripping expansions. The first was symbolic, and was reflected in presentations of the expanded laws as affirming particular features of the state–citizen relationship. For instance, statements made in Parliament and by the government in relation to the revocation laws described citizenship as a ‘privilege’ rather than a right, and emphasised that citizens owe a duty of allegiance to the state.⁴⁴

⁴⁰ See Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (n 12) 237.

⁴¹ See Alice Ross and Patrick Galey, ‘Rise in Citizenship-Stripping as Government Cracks Down on UK Fighters in Syria’, *The Bureau of Investigative Journalism* (London, 23 December 2013) <www.thebureauinvestigates.com/2013/12/23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-in-syria/>, archived at <<https://perma.cc/5KZF-23WA>>, discussed in McGuinness and Gower (n 34) 11.

⁴² Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (n 12) 230.

⁴³ A survey of the Special Immigration Appeals Commission’s published decisions reinforces this. Since 2007, there have been 10 appeals in which the Commission has examined the validity of a decision to deprive an individual of their citizenship. All but two of these appeals were predominantly concerned with the question of whether the deprivation decision rendered the appellant stateless: ‘Outcomes 2007 Onwards’, *Tribunals Judiciary* (Web Page) <<http://siac.decisions.tribunals.gov.uk/#top>>, archived at <<https://perma.cc/S48P-S9EZ>>. The introduction in 2014 of a power to deprive a person of citizenship even when statelessness may ensue minimises the potential for future challenges to be brought on this ground. The two appeals that did not concern questions of statelessness were, notably, both dismissed by the Commission: *M2 v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/124/2014, Mr Justice Irwin, Upper Tribunal Judge Southern and Dame Holt, 22 December 2015); *K2 v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/96/2010, Mr Justice Irwin, Upper Tribunal Judge Jordon and Mr Fell, 22 December 2015).

⁴⁴ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 24 April 2002, vol 384, col 413 (Marsha Singh); United Kingdom, *Parliamentary Debates*, House of Commons, 6 January 2015, vol 590, cols 165–210; ‘The UK’s Unacceptable Obsession with Stripping British Citizens of Their UK Nationality’, *Andy Worthington* (Blog Post, 25 March 2014) <www.andyworthington.co.uk/2014/03/25/the-uks-unacceptable-obsession-with-stripping-british-citizens-of-their-uk-nationality/>, archived at <<https://perma.cc/E994-VNKW>>.

Professor Clive Walker, Special Adviser to the Independent Reviewer of Terrorism Legislation, has said that the UK's citizenship-stripping powers respond to a 'growing importance attached to loyalty within core values (such as "Britishness") as the citizen's reciprocal duty towards the state which grants the prize of citizenship'.⁴⁵

The second justification presented the revocation expansions as necessary to meet the UK's national security needs. This is reinforced by the fact that each expansion was introduced either in the wake of terrorist activity or following failed attempts to deal with particular individuals of concern under the prior law.

The justifications offered for each of the three expansions cast pre-existing denationalisation laws as insufficient to deal with pressing threats. For instance, prior to the passage of the 2002 amendments, the House of Lords Select Committee on the Constitution reported that the prior deprivation powers failed to reflect 'the types of activity that might threaten [the UK's] democratic institutions and [its] way of life'.⁴⁶ In parliamentary debate over the 2006 expansions, Immigration, Citizenship and Nationality Minister Tony McNulty stated that the government viewed it as 'essential' that, in light of the London terrorist attacks, powers to exclude non-citizens whose presence was 'not to be conducive to the public good' should be extended to enable the removal of British nationality,⁴⁷ and that, 'it is appropriate to have [this] power ... in the locker — if nothing else — given the way circumstances are'.⁴⁸ Shortly after the introduction of the 2014 expansions, then-Prime Minister David Cameron made reference to a growing threat from Britons travelling to fight with Islamic State, and stated that 'gaps in [the UK's] armoury' required strengthening.⁴⁹

Such statements cast pre-existing laws as inadequate from a security standpoint. However, they did not identify precise security needs that the proposed expansions were designed to meet, but rather asserted their necessity in general, often rhetorical, terms. Moreover, since 2002, the UK has enacted a wide range of other national security measures, a number of which serve similar objectives to citizenship stripping. The government's security-based justifications for each of the three revocation expansions engaged only minimally with the

⁴⁵ Anderson, *Citizenship Removal Resulting in Statelessness* (n 35) 11 [3.1], quoting Clive Walker (private communication to Anderson).

⁴⁶ House of Lords Select Committee on the Constitution, *Nationality, Immigration and Asylum Bill* (House of Lords Paper No 129, Session 2001–02) 6 app 2.

⁴⁷ United Kingdom, *Standing Committee Debates*, House of Commons, 27 October 2005, col 254.

⁴⁸ *Ibid* col 271.

⁴⁹ Cameron (n 4).

question of what the revocation expansions would add to such laws.⁵⁰ The following section outlines the way in which the UK's citizenship revocation powers have been used in the 21st century, examines their overlap and interaction with other security-based legislation, and analyses their utility as a means of serving the justifications supplied for them.

3 *Use and Efficacy*

The three 21st-century expansions of UK denationalisation powers have been characterised by ever-broadening executive discretion and limited safeguards. As noted above, a key justification for this was that each set of expansions was a necessary update that would serve to make UK law better adapted to meet contemporary challenges.

Despite this, for several years the expanded laws did not see significant use, but rather were invoked only sparingly. Moreover, where revocation powers were invoked, they did not necessarily provide targeted and effective responses to security challenges.

This is demonstrated by the only attempt to invoke the power granted to the Home Secretary in 2002 to revoke a person's citizenship where the Secretary reasonably believed that they had conducted themselves in a manner seriously prejudicial to the vital interests of the UK. Three days after this revocation power entered into force, it was used to revoke the citizenship of Abu Hamza al-Masri,⁵¹ a radical cleric who had publicly praised the September 11 terrorist attacks and Osama bin Laden.⁵² At this time, Abu Hamza was a dual citizen of the UK and Egypt, and therefore susceptible to denationalisation. The legislation at the time, however, provided that deprivation did not come into effect until a person had exhausted all of their appeal avenues. Abu Hamza lodged an

⁵⁰ A criticism of the 2002 law was that most conduct seriously prejudicial to the vital interests of the UK was already criminalised and penalised through treason offences. The government's response was that it wanted to retain the power to revoke citizenship even where a criminal conviction was not or could not be secured; for instance, due to a lack of sufficient admissible evidence: see, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 9 October 2002, vol 639, cols 279–81 (Lord Filkin).

⁵¹ *Hamza v Secretary of State for the Home Department* (Special Immigration Appeals Commission, Appeal No SC/23/2003, Mr Justice Mitting (Chairman), Senior Immigration Judge Goldstein and Mr Smith, 5 November 2010) [2].

⁵² Lena Jakobsson, 'Jury Finds Radical Islamic Cleric Abu Hamza al-Masri Guilty in Terror Trial', CNN (Online, 20 May 2014) <<http://edition.cnn.com/2014/05/19/justice/new-york-terror-trial/index.html>>, archived at <<http://perma.cc/7ZBN-FFYD>>.

appeal, which was not concluded until 2010, almost eight years after the original deprivation order was made.⁵³ During this time, Egypt had taken steps to divest him of his dual Egyptian citizenship.⁵⁴ As a result, the Special Immigration Appeals Commission found that the Secretary of State lacked the power to revoke Abu Hamza's UK citizenship as doing so would render him stateless.⁵⁵

It was not until the introduction of the 'conducive to the public good' threshold for revocation in 2006 that denationalisation saw a resurgence. Even this power was sparingly used in its early years: between 2006 and 2009, only four people were stripped of their citizenship.⁵⁶ In 2010, however, the election of the Cameron government signified a major shift in the exercise of citizenship deprivation powers. Within its first year, the government stripped five people of their citizenship.⁵⁷ Since 2010, there have been 33 denationalisations on security grounds.⁵⁸

It has been reported that the vast majority of denationalised persons were stripped of their UK citizenship while abroad.⁵⁹ In 2013, *The Bureau of Investigative Journalism* reported that this had occurred '[i]n all but two known cases'.⁶⁰ This creates considerable practical barriers for those who wish to appeal the revocation decision. Once an appeal is lodged, however, the process can be protracted and can be complicated by intervening events.

For example, in 2007 the UK moved to revoke the citizenship of Hilal al-Jedda, an asylum seeker from Iraq, who had been granted British citizenship in 2000.⁶¹ Under Iraqi law at the time, al-Jedda automatically lost his Iraqi citizenship upon attaining a foreign citizenship. On this basis, he appealed against the revocation order on the ground that depriving him of his UK citizenship would leave him stateless. In 2013 the matter reached the Supreme Court, before

⁵³ *Hamza* (n 51) [2].

⁵⁴ See especially *ibid* [11]–[14].

⁵⁵ See *ibid* [22]. In 2004, amendments were introduced to allow deprivation to take effect as soon as a notice to deprive was issued. While this gave greater flexibility to the government with respect to the use of citizenship deprivation powers, it did not lead to new uses of these powers.

⁵⁶ Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (Standard Note No SN/HA/6820, House of Commons Library, 30 January 2015) 5.

⁵⁷ *Ibid*.

⁵⁸ Victoria Parsons, 'Theresa May Deprived 33 Individuals of British Citizenship in 2015', *The Bureau of Investigative Journalism* (London, 21 June 2016) <www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>, archived at <<https://perma.cc/L44Y-AQLD>>.

⁵⁹ *Ibid*. See also Ross and Galey (n 41).

⁶⁰ Ross and Galey (n 41).

⁶¹ *Al-Jedda v Secretary of State for the Home Department* [2014] AC 253.

which the Home Secretary noted that, due to a change in Iraqi law after al-Jedda attained UK citizenship, he had the opportunity to reacquire Iraqi citizenship.⁶² The Home Secretary argued that, consequently, the deprivation order did not make al-Jedda stateless, as he was entitled to obtain another citizenship.⁶³ The Court dismissed this submission, noting that it would 'mire the application of the [provision] in deeper complexity',⁶⁴ and unanimously found in al-Jedda's favour. The introduction in 2014 of a power to revoke citizenship in certain circumstances even if statelessness would ensue was a direct response to the government's lack of success in this case.

A number of inferences can be drawn from the way in which the UK's denationalisation laws have been employed and expanded. First, the continued expansion of citizenship revocation powers, coupled with sparing, inefficient use of these powers between 2002 and 2009, suggests that the impetus for the changes made during this period was more symbolic than security based. Each revision to the law served as a symbolic statement that particular types of citizens did not deserve to retain their citizenship and remain members of the community. This was underlined by statements in Parliament and by the government describing citizenship as a 'privilege' rather than a right, and affirming that citizens owe a duty of allegiance to the state.⁶⁵ At the same time, the modest use of the citizenship stripping powers, at least prior to 2009, suggests that in a practical sense, the powers were not critical to achieving the UK's national security objectives.⁶⁶

A question arises as to what factors precipitated the sharp increase in use of the revocation laws from 2010 onwards. In part, the higher number of revocations may be a response to the new security risk posed by increased numbers of foreign fighters. However, significant increases in foreign fighter activity only commenced in 2011.⁶⁷ This suggests that, at least initially, the increase in use of

⁶² Ibid 266–7 [23], [25].

⁶³ See *ibid* 255.

⁶⁴ Ibid 269 [32].

⁶⁵ See n 44.

⁶⁶ A less obvious point is that the laws also mark a shift away from the idea that citizenship is tethered to allegiance. The current revocation threshold in UK law generally allows a person to be stripped of their citizenship whenever this would be 'conducive to the public good': *British Nationality Act 1981* (UK) s 40(2). This does not require any non-allegiant conduct on the citizen's part. Thus, attempts to justify the revocation laws as an affirmation of the fact that citizens owe a duty of allegiance to the state do not seem to provide an adequate explanation for their enactment.

⁶⁷ See, eg, Institute for Economics and Peace, *Global Terrorism Index: Measuring and Understanding the Impact of Terrorism* (Report No 36, November 2015) 45.

the powers was triggered by a difference in political perspectives and priorities between the Cameron government and the prior Blair and Brown governments.

The idea that broad use of citizenship stripping powers has not been critical to ensuring national security in the UK could, in part, be explained by the fact that, since 2002, the UK has enacted a wide range of other national security measures of greater utility.⁶⁸ Indeed, a number of other more targeted measures serve similar objectives to citizenship stripping, such as those for the detention and removal from the UK of persons deemed to pose a security risk, and the prevention of their re-entry.

Initially, such exclusionary mechanisms were directed towards non-citizens resident in the UK. However, they have increasingly included citizens within their scope. For instance, the Home Secretary enjoys under the royal prerogative an executive discretion to withdraw or refuse passports.⁶⁹ Historically, these powers are thought to have been used very sparingly.⁷⁰ However, in April 2013, the criteria for using the prerogative were updated.⁷¹ Between the update and November 2014, the Home Secretary invoked the passport refusal and cancellation powers 29 times to ‘disrupt the travel of people planning to engage in terrorist-related activity overseas’.⁷²

The UK’s prerogative passport cancellation powers, while broad in scope, may be less effective as a tool to prevent citizens who pose security risks from returning to the UK from abroad. This is because the *Immigration Act 1971* (UK) grants UK citizens a ‘right of abode’, allowing them to enter the UK ‘without let or hindrance’.⁷³ Thus, a citizen who travels to the UK using a foreign passport or fraudulent travel document has a prima facie legal right to enter.⁷⁴

⁶⁸ See generally Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) ch 5; Helen Fenwick and Gavin Phillipson, ‘UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms’ in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 481.

⁶⁹ McGuinness and Gower (n 34) 12 [4]; Theresa May, ‘The Issuing, Withdrawal or Refusal of Passports’ (Written Statement to Parliament, 25 April 2013).

⁷⁰ For instance, the power is ‘reported to have been used only 16 times between 1947 and 1976’: McGuinness and Gower (n 34) 14 [4.3].

⁷¹ May, ‘The Issuing, Withdrawal or Refusal of Passports’ (n 69).

⁷² Theresa May, ‘Home Secretary Theresa May on Counter-Terrorism’ (Speech, Royal United Services Institute, 24 November 2014) <www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism>, archived at <<https://perma.cc/Y9XE-SSBB>>.

⁷³ *Immigration Act 1971* (UK) s 1(1); see also at s 2(1)(a).

⁷⁴ Notably, s 1(1) of the *Immigration Act* also confers a right to leave the UK without let or hindrance. Where a citizen’s UK passport is their sole travel document, however, cancelling their passport effectively renders this right redundant.

The right of abode can be limited by restrictions that are lawfully imposed.⁷⁵ In January 2015, the *Counter-Terrorism and Security Act 2015* (UK) ('CTSA') introduced a suite of new administrative powers designed to facilitate exclusion and the disruption of the mobility of persons deemed to pose a security risk. One of the key features of the CTSA is the Temporary Exclusion Order ('TEO') — an order which the Home Secretary may issue to prevent a citizen outside the UK from returning to the UK for a two-year period.⁷⁶ After, or during, this period additional TEOs may be imposed.⁷⁷ In order to issue a TEO, the Home Secretary must be satisfied of five criteria.⁷⁸ Most significantly, he or she must 'reasonably suspect[] that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom',⁷⁹ and 'reasonably consider[] that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism'.⁸⁰

The TEO regime has the capacity to lock a citizen out of the UK indefinitely. There is no limit to the number of times that an additional TEO can be imposed on top of the initial two-year order. However, the primary purpose of the scheme is not exile but is to provide a mechanism via which excluded citizens can return to the UK in a managed way. A citizen subject to a TEO can apply for a permit to re-enter the UK, which will typically be granted,⁸¹ but can be made subject to conditions with which the citizen must comply for the permit to remain valid.⁸² Such conditions can include obligations incumbent upon the

⁷⁵ *Ibid.*

⁷⁶ *Counter-Terrorism and Security Act 2015* (UK) ss 2(1), 2(5), 4(3)(b) ('CTSA'). TEOs can also apply to non-citizens who have a right of abode in the UK: at s 2(6).

⁷⁷ *Ibid* s 4(8).

⁷⁸ *Ibid* ss 2(2), 2(3)–(7).

⁷⁹ *Ibid* s 2(3).

⁸⁰ *Ibid* s 2(4). Other conditions are that the Secretary of State reasonably considers that the individual is outside the UK, and that the individual has a right of abode in the UK: at ss 2(5)–(6). Finally, the Secretary of State must either obtain permission to impose a TEO, or 'reasonably consider[] that the urgency of the case requires a [TEO] to be imposed without obtaining [prior judicial] permission': at s 2(7). See also Zedner, 'Citizenship Deprivation, Security and Human Rights' (n 12) 228; Jessie Blackbourn and Clive Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 *Modern Law Review* 840, 849–56; Helen Fenwick, 'Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counter-Terrorism and Security Act 2015' (2016) 30 *International Review of Law, Computers and Technology* 174, 176–8.

⁸¹ *CTSA* (n 76) s 6(1). The permit can, however, be denied if the Secretary of State requests that the citizen attend an interview with a constable or immigration officer and the citizen fails to attend: at s 6(2).

⁸² *Ibid* ss 5(2)–(3).

citizen after their return to the UK, such as reporting to police and attending a deradicalisation program.⁸³ Where a citizen subject to a TEO is deported from a foreign country to the UK, the TEO scheme does not authorise their exclusion.⁸⁴ Moreover, where ‘the Secretary of State considers that [such an] individual is to be deported to the United Kingdom’, a permit to return must be issued.⁸⁵

It is not clear that the Home Secretary’s citizenship deprivation powers add significantly to the protection against security threats that is already achievable via these other broad exclusionary controls. This is especially so because the majority of citizenship revocations are issued while a citizen is overseas,⁸⁶ such that a TEO could be used to prevent or manage their return to the UK. Notably, citizenship revocation seems to be employed more frequently than the TEO scheme, which Prime Minister Theresa May and Home Secretary Amber Rudd recently admitted had only been used once since its enactment.⁸⁷ This may be because denationalisation provides a more straightforward means to permanently exile a high-risk citizen from the UK. However, it is not clear that exile serves the UK’s security needs better than the conditional managed return scheme implemented via the CTSA. For instance, as Jessie Blackbourn and Clive Walker have suggested, discouraging the voluntary return of citizens deemed to be security risks carries with it the danger of such individuals adopting terrorism as a way of life, which opens up further risks that they may contribute to the escalation of foreign conflicts or seek to instigate terrorist attacks in the UK from overseas.⁸⁸ Certainly, in the lead-up to each expansion of the UK’s denationalisation powers, no considered justification for prioritising permanent removal as an anti-terror tool was articulated.

It might also be argued that citizenship stripping avoids the problem of having to admit an excluded citizen who is deported to the UK by a foreign country — a feature of the TEO scheme that some commentators have described as a

⁸³ *Ibid* s 9.

⁸⁴ *Ibid* s 2(1)(b).

⁸⁵ *Ibid* s 7(1).

⁸⁶ Ross and Galey (n 41).

⁸⁷ Peter Walker, ‘Rudd Admits Anti-Terror Exclusion Powers Used Only Once since 2015’, *The Guardian* (London, 29 May 2017) <www.theguardian.com/uk-news/2017/may/29/uk-used-anti-terror-exclusion-powers-once-since-2015-amber-rudd-admits>, archived at <<https://perma.cc/V3CR-FCS8>>; Fiona Hamilton and Lucy Fisher, ‘Jihadist Ban: Theresa May Says Use of Temporary Exclusion Orders Is “a Matter for Police”’, *The Times* (London, 30 May 2017) <www.thetimes.co.uk/article/may-defends-single-use-of-jihadist-ban-dnxnqr6p3>, archived at <<https://perma.cc/F48Z-CCC9>>.

⁸⁸ Blackbourn and Walker (n 80) 852.

limit to its effectiveness.⁸⁹ However, whether citizenship stripping actually avoids this prospect is not clear. Guy Goodwin-Gill, for instance, has argued that, under international law, '[a]ny State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom'.⁹⁰

Where a citizen is within the UK, citizenship stripping facilitates their permanent removal, an outcome which is not achievable via other mechanisms. However, the very small number of revocations in this context suggests that this is not generally seen as critical to maintaining national security. Moreover, there can be practical challenges to removing a denationalised person from the UK, as this depends upon finding a country willing to take them. This is likely to be particularly challenging where revocation results in statelessness. Even where this is not the case, deportation can prove practically difficult. For instance, in *Pham v Secretary of State for the Home Department*, the applicant was a naturalised British citizen who had not renounced his prior Vietnamese citizenship.⁹¹ The Home Secretary ordered that he be stripped of his British citizenship and deported to Vietnam. Deportation was frustrated when the Vietnamese government responded that it did not recognise the applicant as a Vietnamese citizen.⁹² Cases such as this demonstrate the problematic nature of citizenship revocation as an effective counterterrorism tool and why such a power may be of limited utility compared to other measures.

The analysis above illustrates that, through each of its recent iterations, UK denationalisation law has made a powerful statement about what citizenship entails and which citizens should lose the privilege to hold it, but that it has been of questionable utility as a national security device. This raises the question of whether a strong symbolic rationale is sufficient justification for the laws in light of their expansive nature and the weakness of the security rationale that underpins them. This question is discussed further in Part III.

⁸⁹ Ibid 851–2.

⁹⁰ Guy S Goodwin-Gill, 'Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law' (Opinion, 12 March 2014) 12 [24] (emphasis omitted) <<https://assets.documentcloud.org/documents/1086878/guy-s-goodwin-gill-legal-opinion-on-deprivation.pdf>>, archived at <<https://perma.cc/3T8Z-TYTD>>.

⁹¹ [2015] 1 WLR 1591.

⁹² Ibid 1595–6 [3].

B Canada

1 *Laws Enacted*

In mid-2014, the Canadian federal Parliament followed in the UK's footsteps by passing the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, which introduced a number of new disloyalty-based citizenship revocation grounds into the *Citizenship Act*, RSC 1985, c C-29 ('*Canadian Citizenship Act*').⁹³ Prior to this, Canadian citizenship was, by global standards, a very secure status: naturalised citizens could have their citizenship revoked by ministerial discretion on grounds of fraud or where there was a concealment of material circumstances, but Canadians could not otherwise lose their citizenship against their will.⁹⁴

The *Strengthening Canadian Citizenship Act* expanded the grounds for revocation considerably to include three new circumstances. First, it created a ministerial power to revoke a person's citizenship where an individual is convicted of any of a series of prescribed offences under Canadian law relating to national security.⁹⁵ Secondly, it made revocation possible where a citizen had been convicted in a foreign jurisdiction of an offence committed outside Canada that, had it been committed in Canada, would qualify as a 'terrorism offence' under s 2 of the *Criminal Code*, RSC 1985, c C-46.⁹⁶ Finally, the Minister was granted the power to revoke citizenship where he or she had reasonable grounds to believe that the person concerned, while holding Canadian citizenship, served in the armed forces of a country or 'as a member of an organized armed group' where 'that country or group was engaged in an armed conflict with Canada'.⁹⁷

Before exercising this final power, the Minister was required to obtain a judicial declaration that the person engaged in the activity in question.⁹⁸ A degree of protection against statelessness was also provided for: the three new grounds for citizenship revocation did not authorise revocation that 'conflict[ed] with

⁹³ Pillai and Williams (n 9) 540.

⁹⁴ *Ibid* 529.

⁹⁵ *Strengthening Canadian Citizenship Act*, SC 2014, c 22, s 8, amending *Canadian Citizenship Act* (n 8), the latter as repealed by *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, SC 2017, c 14, s 3(1) ('*Canadian Citizenship Amendment Act*').

⁹⁶ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

⁹⁷ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.1(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 4(2).

⁹⁸ *Ibid*.

any international human rights instrument regarding statelessness to which Canada is signatory'.⁹⁹ However, the person affected bore the burden of proving, on the balance of probabilities, that they were 'not a citizen of any country of which the Minister ha[d] reasonable grounds to believe the person [was] a citizen'.¹⁰⁰

In most cases, the *Strengthening Canadian Citizenship Act* left the decision of whether or not a person's citizenship was to be revoked with the Minister, rather than with a court. The judiciary only played a role in the process in the sense that revocation could not occur without a conviction (albeit not necessarily in a Canadian court) or by a judicial declaration that the citizen concerned had engaged in particular conduct. Unlike in the UK, the requirement of both an executive and a judicial decision served as a safeguard against abuses of power.

Ministerial revocation decisions were also subject to judicial review, where leave of the court was obtained.¹⁰¹ However, as in the UK, the ability to access such review may have been limited where the citizen seeking review was outside national borders.

2 Justifications

Justifications for the Canadian citizenship revocation provisions drew on a symbolic rationale much more heavily than on a security rationale. This is clear from the parliamentary discussion of the *Strengthening Canadian Citizenship Act* prior to its passage. The Act was presented as being directed towards 'strengthen[ing] and protect[ing] the value of Canadian citizenship'.¹⁰² In his second reading speech, then-Citizenship and Immigration Minister Chris Alexander said that the legislation would help 'maintain[] the integrity of citizenship ... [by] deterring disloyalty'.¹⁰³ At a press conference, Alexander said that '[c]itizenship is not a right; it is a privilege'.¹⁰⁴ When introducing the legislation into the upper house, Senator Nicole Eaton said:

⁹⁹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.4(1), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 5.

¹⁰⁰ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10.4(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 5.

¹⁰¹ *Canadian Citizenship Act* (n 8) s 22.1(1).

¹⁰² Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3310 (Chris Alexander).

¹⁰³ *Ibid* 3311.

¹⁰⁴ Susana Mas, 'New Citizenship Rules Target Fraud, Foreign Terrorism', *CBC News* (Online, 6 February 2014) <www.cbc.ca/news/politics/new-citizenship-rules-target-fraud-foreign-terrorism-1.2525404>, archived at <<https://perma.cc/YGJ7-5JHW>>.

Citizenship is based on allegiance. Those granted citizenship pledge allegiance to our monarch, the Queen of Canada, and to our system of government and its laws. Betrayal of this allegiance comes with a price.¹⁰⁵

By contrast, security justifications for the Act were canvassed only briefly and — as in the UK — were invoked in very general terms. A government back-grounder to the *Strengthening Canadian Citizenship Act* states that its provision for citizenship revocation ‘underscore[s] the government’s commitment to protecting the safety and security of Canadians and promoting Canadian interests and values’ and ‘reinforce[s] the value of Canadian citizenship’.¹⁰⁶ Additionally, in his second reading speech, Alexander said that the *Strengthening Canadian Citizenship Act* was ‘about deterring disloyalty’.¹⁰⁷ He also noted that ‘130 Canadians are fighting with extremists somewhere in the world, with terrorist groups that have been listed by Canada or that face listing by Canada’,¹⁰⁸ but did not suggest that the Act would help combat this problem, other than by reinforcing the value of Canadian citizenship.

3 Use, Efficacy and Repeal

The Canadian revocation provisions reflected the symbolic justifications invoked prior to their enactment, which emphasised that citizens who demonstrate disloyalty or a lack of allegiance do not deserve to retain their Canadian citizenship. Enabling revocation only where a person has served with a country or group engaged in conflict with Canada or been convicted of terrorism or national security offences ensures that revocation is predicated on a lack of allegiance.

On the other hand, parts of the Act remained unsupported by this allegiance-based justification. For instance, s 10(2)(b) rendered a person convicted of particular national security offences in a foreign country susceptible to citizenship revocation.¹⁰⁹ While such conduct may be reprehensible, it does not inherently indicate disloyalty to Canada. Additionally, disloyal conduct did not

¹⁰⁵ Canada, *Parliamentary Debates*, Senate, 17 June 2014, 1932.

¹⁰⁶ ‘Strengthening Canadian Citizenship Act: Protecting and Promoting Canada’s Interests and Values’, *Government of Canada: News* (Web Page, 6 February 2014) <www.canada.ca/en/news/archive/2014/02/strengthening-canadian-citizenship-act-protecting-promoting-canada-interests-values.html>, archived at <<https://perma.cc/HF6A-25DT>>.

¹⁰⁷ Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3311.

¹⁰⁸ *Ibid* 3313.

¹⁰⁹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

lead to the same consequences for all citizens, as only dual citizens were vulnerable to citizenship revocation.

By contrast, the revocation provisions did not seem particularly well-adapted to any security purpose. A major reason for this was the requirement of a criminal conviction before most grounds for citizenship revocation could take effect.¹¹⁰ While this was an important safeguard in the Canadian law, it arguably weakened any security justifications for citizenship stripping as any security threat posed could be neutralised by criminal sanction. Each of the conviction-based grounds for denationalisation had a minimum sentence threshold that had to be met before a person became a candidate for citizenship revocation. For most offences a sentence of life imprisonment was required, with the result that the additional consequence of citizenship stripping was likely to be of minimal practical utility.¹¹¹ However, for some offences, a minimum sentence of five years' imprisonment sufficed to trigger the possibility of denationalisation.¹¹²

Additionally, as is the case in the UK, Canada's citizenship stripping laws overlapped with other powers that can be used to exclude Canadian citizens from Canadian territory on national security grounds. The Canadian government holds a prerogative power over passports.¹¹³ The *Canadian Passport Order*, SI/81-86 clarifies that this includes a ministerial power to revoke a passport where the Minister 'has reasonable grounds to believe that [this] is necessary to prevent the commission of a terrorism offence ... or for the national security of Canada or a foreign country or state'.¹¹⁴ Though details of Canadian passport revocation decisions are not publicly available, the Canadian government stated

¹¹⁰ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1). See also Forcese and Mamikon (n 12) 334–5.

¹¹¹ *Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) ss 10(2)(a), (c)–(e), (g)–(h), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1).

¹¹² This lower threshold applied to terrorism offences under s 2 of the *Criminal Code*, RSC 1985, c C-46 (or offences committed overseas that, if committed in Canada would qualify as such) (*Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(b), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1)) and to terrorism offences as defined in s 2(1) of the *National Defence Act*, RSC 1985, c N-5 (*Strengthening Canadian Citizenship Act* (n 95) s 8, amending *Canadian Citizenship Act* (n 8) s 10(2)(f), the latter as repealed by *Canadian Citizenship Amendment Act* (n 95) s 3(1)).

¹¹³ See, eg, *Canadian Passport Order*, SI/81-86, s 4(3).

¹¹⁴ *Ibid* s 10.1.

in 2014 that the revocation power had been used to prevent the exit from Canada of citizens seeking to travel to conflict regions as well as the return of citizens who were already abroad in such regions.¹¹⁵

It is worth noting that, as in the UK, there are legal limits on the way in which the Canadian executive's passport control powers can be exercised. These stem from s 6(1) of the *Canadian Charter of Rights and Freedoms*, which grants Canadian citizens the constitutional 'right to enter, remain in and leave Canada'.¹¹⁶ This right is subject to such 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹¹⁷ The Canadian courts have held that s 10.1 of the *Canadian Passport Order* is a valid law that is compatible with the *Charter*. However, executive decisions made under s 10.1 may be held invalid by the courts if they fail to comply with the *Charter*.¹¹⁸ An example is the case of *Abdelrazik v Minister of Foreign Affairs*, in which the Canadian government refused to issue a passport to a citizen overseas who, fearing detention, wished to return to Canada, despite having no evidence that his return to Canada would endanger the national security of Canada or another country.¹¹⁹ The Federal Court found that this decision was invalid.

It is unlikely that a government decision to revoke the passport of a Canadian who qualified as a candidate for citizenship revocation would have met such a fate. This is because satisfaction of the criteria for citizenship stripping — conviction of a terrorism or national security offence, or serving in the armed forces of a group engaged in armed conflict with Canada — would seem to have provided clear evidence of an elevated threat to national security. It is thus likely that the passport revocation powers in s 10.1 of the *Canadian Passport Order* can be employed to achieve the same effects as citizenship stripping, calling into question any security rationale for the revocation legislation.¹²⁰

¹¹⁵ Stewart Bell, 'Canadian Government Begins Invalidating Passports of Citizens Who Have Left to Join Extremist Groups', *National Post* (Toronto, 20 September 2014) <<http://news.nationalpost.com/news/canada/canadian-government-revoking-passports-of-citizens-trying-to-join-extremist-groups>>.

¹¹⁶ *Canada Act 1982* (UK) c 11, sch B pt I s 6(1) ('*Canadian Charter of Rights and Freedoms*').

¹¹⁷ *Ibid* s 1.

¹¹⁸ See, eg, *Veffler v Minister of Foreign Affairs* [2008] 1 FCR 641, 654 [23], quoting *Black v Prime Minister* (2001) 54 OR (3d) 215, [46]; *Abdelrazik v Minister of Foreign Affairs* [2010] 1 FCR 267, 323 [133], quoting *Attorney General of Canada v Kamel* [2009] 4 FCR 449, 455–6 [11].

¹¹⁹ *Abdelrazik* (n 118).

¹²⁰ See Forcese and Mamikon (n 12) 336–8.

The lack of any clear security benefit in Canada's denationalisation laws was underlined by the sole instance of revocation under the now-repealed legislation. In late September 2015, the Harper government revoked the citizenship of Zakaria Amara, the ringleader of the unsuccessful Toronto 18 bomb plot. Amara is currently serving a sentence of life imprisonment, so poses no foreseeable threat to Canadian security.¹²¹ The Harper government also issued notices to nine other citizens, signalling an intention to deprive them of their citizenship. Most were, like Amara, members of the Toronto 18 group.¹²² However, no further deprivation orders were ultimately issued due to a change in government and a policy shift with respect to citizenship.

In October 2015, a new government was elected in Canada, under the leadership of Justin Trudeau. In the lead-up to the election, Trudeau voiced his opposition to the *Strengthening Canadian Citizenship Act*, arguing that 'as soon as you make citizenship for some Canadians conditional on good behaviour, you devalue citizenship for everyone'.¹²³ Like the justifications for the Act, Trudeau's opposition was anchored around a symbolic point about the value of citizenship: one that reiterated the security and equality elements of common law citizenship that were minimised by proponents of the Act.

Shortly after its election, the Trudeau government took steps to undo key elements of the *Strengthening Canadian Citizenship Act*. In February 2016, Bill C-6 was introduced into Parliament. The Bill purported to repeal all the new national security grounds for citizenship revocation,¹²⁴ as well as to restore the citizenship of any person denationalised under those grounds.¹²⁵ Consequently, the nine further citizens flagged for denationalisation by the previous Harper government were not subject to deprivation orders.

As was the case with the *Strengthening Canadian Citizenship Act*, parliamentary debate over the Bill focused overwhelmingly on the value of citizenship.

¹²¹ See, eg, 'Canada Revokes Citizenship of Toronto 18 Plotter' (n 3).

¹²² Stewart Bell, 'Canada Working to Revoke the Citizenship of Nine More Convicted Terrorists,' *National Post* (Toronto, 30 September 2015) <<http://news.nationalpost.com/news/canada/government-working-to-revoke-citizenship-of-nine-more-canadians-convicted-of-terrorist-offences>>. However, there are some exceptions, including a citizen serving a sentence for a conviction in the US courts.

¹²³ Ryan Maloney, 'Bill C-24: Trudeau Says Terrorists Shouldn't Be Stripped of Citizenship in Leaked Audio,' *HuffPost Canada* (Online, 28 September 2015) <www.huffingtonpost.ca/2015/09/28/bill-c-24-trudeau-audio-conservatives_n_8206798.html>, archived at <<https://perma.cc/3VZ9-9U9J>>.

¹²⁴ Bill C-6 (n 8) cls 3–5.

¹²⁵ *Ibid* cl 20. Fraud-based revocation, which predates the Harper government's changes, was retained.

The contrast between these two pieces of legislation showcases deep philosophical differences in the way in which the Harper and Trudeau governments have conceived of citizenship. In stark contrast to the rhetoric about citizenship being a 'privilege' that accompanied the introduction of the *Strengthening Canadian Citizenship Act*, the Trudeau government defended Bill C-6 as a measure necessary to preserve the principles of secure citizenship and equality between all citizens, which stem from the common law. In his second reading speech for the Bill, former Minister of Immigration, Refugees and Citizenship John McCallum, said: '[w]hen we say a Canadian is a Canadian ... that includes good and bad Canadians'.¹²⁶ McCallum went on to say:

The place for a terrorist is in prison, not at the airport. It is our strong belief that if a person is sent to prison for terrorism, there should not be two classes of terrorists: those who go to prison and have their citizenship revoked and those who only go to prison.¹²⁷

Similarly, Independent Senator Raymonde Gagné argued that citizenship deprivation on national security grounds creates an unequal citizenship. Gagné also suggested that any security rationale that underpins such measures is unconvincing:

What would we accomplish? Some say that we would be sending a message, but what message? That we have two classes of citizens? I find that response counter-productive. The message I would like us to promote is the message in the bill that every Canadian who legitimately obtains Canadian citizenship is a Canadian for better or for worse. Think about it. Who do we want to send this message to, to terrorists?

I'm not so sure that the prospect of losing one's citizenship might convince a radicalized person to refrain from committing a terrorist act. The message is going out to our fellow citizens, to immigrants who are being told that no matter what, their status as citizens will always be different.¹²⁸

Notably, those who argued against Bill C-6 also focused on maintaining the 'value' of Canadian citizenship. For instance Conservative MP Garnett Genuis said:

¹²⁶ Canada, *Parliamentary Debates*, House of Commons, 9 March 2016, 1647.

¹²⁷ *Ibid.*

¹²⁸ Canada, *Parliamentary Debates*, Senate, 3 May 2017, 2940.

What this bill would do, in my view, is reduce the value of citizenship by allowing someone to be involved in terrorism, which completely goes against Canadian values ... This potentially toxic combination would reduce the value of our citizenship.¹²⁹

Bill C-6 was passed on 13 June 2017,¹³⁰ and received Royal Assent on 19 June. As a result of its passage, s 20 of the *Canadian Citizenship Act* now provides that Zakaria Amara, the sole person to lose his citizenship pursuant to the *Strengthening Canadian Citizenship Act*, is deemed never to have lost his citizenship. Like the UK law, the Canadian law was underpinned by a clear symbolic rationale — one that was reversed with the passage of Bill C-6, but a weak security rationale. The implications of this are explored in Part III.

C Australia

1 Laws Enacted

In December 2015, the Australian federal Parliament passed the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*'Allegiance to Australia Act'*). This introduced new avenues for citizenship loss into the *Australian Citizenship Act 2007* (Cth), and made Australia the most recent common law country to enact legislation enabling citizenship stripping on national security grounds.

Prior to these changes, the grounds for citizenship loss in Australia were limited. A citizen by naturalisation could have their citizenship revoked if they committed certain offences in relation to their application for citizenship,¹³¹ or where their citizenship was obtained by fraud.¹³² Additionally, those who obtained their citizenship by application and 'conferral' could have it revoked if they were convicted of a 'serious offence' in the window between lodging an application for citizenship and having citizenship conferred, provided this would not render them stateless.¹³³ In all these cases, revocation took place via the exercise of ministerial discretion, which required the Minister to be satisfied that it would be 'contrary to the public interest for the person to remain an

¹²⁹ Canada, *Parliamentary Debates*, House of Commons, 9 March 2016, 1653.

¹³⁰ Canada, *Parliamentary Debates*, House of Commons, 13 June 2017, 12600–1.

¹³¹ *Australian Citizenship Act 2007* (Cth) s 34(1)(b)(i).

¹³² *Ibid* s 34(2)(b)(iv).

¹³³ *Ibid* ss 34(2)(b)(ii), (3)(b).

Australian citizen'.¹³⁴ In addition, an Australian citizen with dual citizenship automatically lost their Australian citizenship if they 'serve[d] in the armed forces of a country at war with Australia'.¹³⁵ This provision has been part of Australian citizenship legislation since its introduction in 1948 but has never operated to deprive a person of their citizenship.¹³⁶

The *Allegiance to Australia Act* created three new avenues for citizenship deprivation that apply to Australians with dual citizenship. Two of these avenues provide for citizenship loss to take place automatically upon fulfilment of particular criteria. First, a dual citizen can lose citizenship by committing prescribed conduct with the intention of: 'advancing a political, religious or ideological cause';¹³⁷ 'coercing, or influencing by intimidation, ... [a] government';¹³⁸ or 'intimidating the public'.¹³⁹ The conduct that triggers citizenship loss is defined by reference to terrorism and foreign incursions and recruitment offences.¹⁴⁰

Secondly, the longstanding provision providing for automatic citizenship-loss for dual citizens who 'serve[] in the armed forces of a country at war with Australia'¹⁴¹ is updated to include 'fight[ing] for, or ... in the service of, a declared terrorist organisation'.¹⁴² However, the law specifies that being in the service of such an organisation does not include the provision of 'neutral and independent humanitarian assistance',¹⁴³ unintentional actions,¹⁴⁴ or actions committed under duress or force.¹⁴⁵ These two grounds are triggered automatically when a citizen engages in particular activity and do not require a conviction or the exercise of a ministerial discretion. However, the Minister does have an obligation to take reasonable steps to inform a person who has lost their

¹³⁴ Ibid ss 34(1)(c), (2)(c).

¹³⁵ Ibid s 35(1).

¹³⁶ See, eg, Kim Rubenstein, Submission No 35 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (20 July 2015) 3.

¹³⁷ *Australian Citizenship Act 2007* (Cth) s 33AA(3)(a).

¹³⁸ Ibid s 33AA(3)(b)(i).

¹³⁹ Ibid s 33AA(3)(b)(ii).

¹⁴⁰ Ibid s 33AA(6).

¹⁴¹ Ibid s 35(1)(b)(i).

¹⁴² Ibid s 35(1)(b)(ii).

¹⁴³ Ibid s 35(4)(c).

¹⁴⁴ Ibid s 35(4)(a).

¹⁴⁵ Ibid s 35(4)(b).

citizenship of this, the reasons for citizenship loss and their rights of review.¹⁴⁶ Both automatic-deprivation provisions apply only to dual citizens over the age of 14.¹⁴⁷

The idea that these provisions are ‘self-executing’ has been described as a ‘legal fiction’.¹⁴⁸ As Helen Irving has noted, ‘[t]he law cannot apply itself. Someone or some authority must make a determination.’¹⁴⁹ In practice, it appears that such determinations will be made by the Citizenship Loss Board, an executive body created in early 2016, which Immigration and Border Protection Minister Peter Dutton has said will

consider individual cases that have been worked up through ASIO, ASIS, the Department of Defence, [the] Department of Immigration and Border Protection, Justice, [and] obviously the Attorney-General, Prime Minister and Cabinet.¹⁵⁰

Despite it wielding this considerable power, no mention is made of the Citizenship Loss Board in Australian legislation. This shrouds its operation in secrecy, makes its legal mandate unclear, and suggests that it operates according to its own rules, free from typical administrative law constraints such as the requirement to make decisions reasonably and without bias.¹⁵¹ The Board is composed of senior departmental secretaries from various government departments —

¹⁴⁶ Ibid ss 33AA(10)–(11), 35(5), (6); s 35A(5)–(6), 35B(1)–(2). Notice is not required where the Minister has determined that providing it could ‘prejudice the security, defence or international relations of Australia, or Australian law enforcement operations’: at ss 33AA(12), 35(7), 35A(7).

¹⁴⁷ Ibid ss 33AA(1), 35(1).

¹⁴⁸ Paul Farrell, ‘Government Officials of Secretive Citizenship Loss Board Named’, *The Guardian* (Sydney, 22 July 2016) <www.theguardian.com/australia-news/2016/jul/22/government-members-of-secretive-citizenship-loss-board-named>, archived at <<https://perma.cc/BB9R-DV7P>>, quoting George Williams.

¹⁴⁹ Helen Irving, ‘Bill Relies on Legal Fiction of Self-Executing Law to Revoke Citizenship’, *The Conversation* (Online, 17 August 2015) <<https://theconversation.com/bill-relies-on-legal-fiction-of-self-executing-law-to-revoke-citizenship-46017>>, archived at <<https://perma.cc/4863-PZKV>>.

¹⁵⁰ Santilla Chingaipe, ‘What Is the Citizenship Loss Board and How Will It Work?’, *SBS News* (Sydney, 13 April 2016) <www.sbs.com.au/news/article/2016/04/14/what-citizenship-loss-board-and-how-will-it-work>, archived at <<https://perma.cc/L9G6-MB2Q>>, quoting Peter Dutton, ‘Press Conference, Melbourne’ (Speech, Melbourne, 8 April 2016) <www.minister.border.gov.au/peterdutton/2016/Pages/press-conference-8-april.aspx>, archived at <<https://perma.cc/U3A9-8WED>>. See also George Williams, ‘Stripping of Citizenship a Loss in More Ways than One’, *The Sydney Morning Herald* (Sydney, 17 April 2016) <www.smh.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html>, archived at <<https://perma.cc/72M9-ABBL>>.

¹⁵¹ Williams, ‘Stripping of Citizenship a Loss in More Ways than One’ (n 150).

information that was only revealed as the result of a *Guardian Australia* freedom of information request.¹⁵²

The final avenue for denationalisation introduced via the *Allegiance to Australia Act* creates a ministerial discretion to revoke citizenship where a dual citizen is convicted of a prescribed offence.¹⁵³ In order to exercise this power, the Minister must be satisfied that citizenship revocation would be in the public interest and that the conviction demonstrates a repudiation of allegiance to Australia.¹⁵⁴ The prescribed offences relate to terrorism, treason, treachery, sabotage, espionage, and foreign incursions and recruitment.¹⁵⁵ The possibility of citizenship revocation on the basis of conviction only arises for citizens who have been sentenced to at least six years' imprisonment.¹⁵⁶

The Minister is empowered to revoke a person's citizenship on the basis of a conviction recorded prior to the commencement of the legislation.¹⁵⁷ However, this retrospective aspect of the law is subject to additional safeguards: it only applies in regard to convictions that have occurred no more than 10 years before the legislation's entry into force, and a higher sentencing threshold of 10 years applies.¹⁵⁸

The offences that trigger a ministerial discretion to revoke citizenship upon conviction include the forms of conduct, such as acts of terrorism, that also give rise to automatic citizenship loss on the first ground.¹⁵⁹ In this sense, there is an overlap between the 'conduct-based' and 'offence-based' grounds for citizenship loss. The legislation deals with this by altering the fault element for 'conduct-based' citizenship loss¹⁶⁰ and specifying that it only applies in limited circumstances: where a person has committed the relevant conduct outside Australia or where they have left Australia before they can be brought to trial.¹⁶¹ In all other cases, only the offence-based grounds for citizenship loss apply.

¹⁵² Farrell (n 148).

¹⁵³ *Australian Citizenship Act 2007* (Cth) s 35A.

¹⁵⁴ *Ibid* s 35A(1)(d)–(e).

¹⁵⁵ *Ibid* s 35A(1)(a).

¹⁵⁶ *Ibid* s 35A(1)(b).

¹⁵⁷ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 1 s 8(4) ('*Allegiance to Australia Act*').

¹⁵⁸ *Ibid* sch 1 s 8(4)(b).

¹⁵⁹ *Australian Citizenship Act 2007* (Cth) s 35A(1)(a).

¹⁶⁰ See *ibid* ss 33AA(3), (6).

¹⁶¹ *Ibid* s 33AA(7).

2 Justifications

In the time since the September 11 bombings, Australia has passed a larger number of national security statutes than any other democratic nation, some 66 to date at the federal level alone.¹⁶² This has led to Australia's response to terrorism being characterised as one of 'hyper-legislation'.¹⁶³

The denationalisation provisions introduced via the *Allegiance to Australia Act* were justified as a necessary addition to these laws on the grounds that they would symbolically affirm important features of the state–citizen relationship. In particular, it was emphasised that citizenship involves duties of allegiance, and that violation of these duties warrants exclusion from the citizenry. For instance, a purpose provision included in the *Allegiance to Australia Act* states:

This Act is enacted because the 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.¹⁶⁴

Similarly, in an interview, Immigration and Border Protection Minister Peter Dutton said that

[Australian citizenship] confers a great advantage on people and if people are going to swear an allegiance to our country and then go beyond that to — and in opposition to the words that they've just spoken at their citizenship ceremony ... attempt to attack Australians, there's a consequence to pay for that.¹⁶⁵

In addition to this symbolic justification, the *Allegiance to Australia Act* was portrayed as an important security measure. The Act was introduced in the wake of increased numbers of Australian foreign fighters partaking in overseas conflicts, and was presented as a direct response to the threats that stem from this. When first announcing government plans to expand revocation laws, then-Prime Minister Tony Abbott noted that 'at least 110 Australians [had] travelled overseas to join the death cult in Iraq and Syria', that within Australia

¹⁶² By mid-2013, Parliament had enacted 61 pieces of anti-terrorism legislation: George Williams, 'The Legal Legacy of the "War on Terror"' (2013) 12 *Macquarie Law Journal* 3, 7. A further 5 anti-terrorism statutes have been enacted since then.

¹⁶³ Roach (n 68) 310.

¹⁶⁴ *Allegiance to Australia Act* (n 157) s 4.

¹⁶⁵ Interview with Peter Dutton, Minister for Immigration and Border Protection (Leigh Sales, 23 June 2015) <www.abc.net.au/7.30/content/2015/s4260728.htm>, archived at <<https://perma.cc/399Y-2NJH>>.

there were ‘over 400 high-priority counter-terrorism investigations’ on foot,¹⁶⁶ and that ‘all too often the threat comes from someone who has enjoyed the hospitality and generosity of the Australian people’.¹⁶⁷

Mirroring the UK and Canadian experience, the security justification for the *Allegiance to Australia Act* was framed in fairly general terms. For instance, in his second reading speech for the legislation, Dutton said:

Regrettably, some of the most pressing threats to the security of the nation and the safety of the Australian community come from citizens engaged in terrorism. It is now appropriate to modernise provisions concerning loss of citizenship to respond to current terrorist threats. The world has changed, so our laws should change accordingly.¹⁶⁸

No attempt was made, however, to justify how the legislation would assist in mitigating terrorist threats or securing community safety, or how it would fill a gap in the existing law. Notably, even when purporting to speak directly to the necessity of the legislation as a security measure in parliamentary debates, proponents tended to invoke symbolic and rhetorical justifications, rather than providing any reasoned case for how the changes would improve public safety. For instance, in the context of explaining why the legislation was ‘prudent and pragmatic’ in ‘targeting [the threat of] resurgent terrorism’,¹⁶⁹ Andrew Nikolic, a member of the Joint Parliamentary Committee on Intelligence and Security, drew on the symbolic rationale that non-allegiant citizens deserve to be denationalised:

Around 110 Australians are currently fighting or are engaged with terrorist groups in Syria and Iraq. And almost 200 people in Australia are enabling terrorism in the Syria-Iraq conflict through financing and recruitment or are seeking to travel there. Supporting and engaging in terrorist activities against Australia’s interests is a clear breach of a person’s commitment and allegiance to our country — a bond that should unite all citizens. So the new powers in this bill are a necessary, measured and appropriate response.¹⁷⁰

In the Senate debate, Attorney-General George Brandis also appealed to rhetoric as a means of justifying the national security value of the laws. In response

¹⁶⁶ Abbott (n 7).

¹⁶⁷ Ibid.

¹⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369.

¹⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13034 (Andrew Nikolic).

¹⁷⁰ Ibid.

to comments by Senator Nick McKim that the proposed legislation, in particular its retrospective provisions, could actually function to undermine, rather than promote, national and global security,¹⁷¹ Brandis said:

It will keep Australians safe. Senator McKim, if you were to apply the famous pub test to this and you asked your average Australian whether they would feel safer or less safe if people who have been convicted and sentenced for more than 10 years imprisonment for committing a terrorist crime were to be booted out of Australia and whether Australians would approve of it, I dare say they would say yes.¹⁷²

3 *Use and Efficacy*

The Australian law was enacted in a climate of urgency, with the government suggesting that it, among other measures, was required to deal with immediate threats to the Australian community.¹⁷³ Once enacted, the citizenship-revocation measure came into force on 12 December 2015.¹⁷⁴ In February 2016 the Citizenship Loss Board held its inaugural meeting.¹⁷⁵ In February 2017 it was confirmed that the laws had been used for the first time to strip the citizenship of Islamic State militant Khaled Sharrouf.¹⁷⁶ As with Canada's decision to revoke the citizenship of Zakaria Amara, Australia's decision to denationalise Sharrouf carries greater symbolic weight than practical utility in securing Australian national security. Sharrouf left Australia for Syria in 2013 and has made no attempts to return to Australia. In 2015, unconfirmed media reports claimed

¹⁷¹ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9937–8 (Nick McKim).

¹⁷² *Ibid* 9938.

¹⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton, Minister for Immigration and Border Protection).

¹⁷⁴ *Allegiance to Australia Act* (n 157) s 2.

¹⁷⁵ The minutes of this meeting have been obtained via *The Guardian Australia's* freedom of information request (Farrell (n 148)): Citizenship Loss Board IDC, 'Draft Minutes of Meeting Held on Tuesday, 23 February 2016 at DIBP, 2 Constitution Avenue Canberra' (Minutes, 23 February 2016) <http://gimc.org.au/wp-content/uploads/2016/07/20160520_FA160401379_Documents_Released.pdf>, archived at <<https://perma.cc/P4BL-RJRE>>.

¹⁷⁶ Paul Maley, 'Khaled Sharrouf Stripped of Citizenship under Anti-Terror Laws', *The Australian* (Sydney, 11 February 2017) <www.theaustralian.com.au/national-affairs/immigration/khaled-sharrouf-stripped-of-citizenship-under-antiterror-laws/news-story/c82f008e768ae74f7798af983c4d2051>.

that he had died.¹⁷⁷ This was later reported to perhaps be incorrect,¹⁷⁸ however fresh reports that Sharrouf had died in an airstrike surfaced in January 2017.¹⁷⁹

The fact that Sharrouf's case is the only known example of the *Allegiance to Australia Act* being used reflects the fact that it is not clear that this new measure is actually useful in protecting the community from national security threats. In part, this is because other measures already provide such protection.

Australia's new denationalisation law operates alongside a wide range of other national security legislation, which already achieves many of the security objectives towards which the *Allegiance to Australia Act* is directed. As in the UK and Canada, broad passport suspension and cancellation powers provide the government with a considerable practical capacity to prevent Australians abroad from returning home when they are considered to pose a security risk.¹⁸⁰

There is an open question as to whether a citizen who presents at the Australian border has a right of entry into Australia, irrespective of whether they have a valid passport.¹⁸¹ There is evidence to suggest that this was a point of concern for the Australian government when the *Allegiance to Australia Act* was drafted. For instance, Dan Tehan, chair of the Parliamentary Joint Committee on Intelligence and Security inquiry into the legislation, remarked during proceedings that citizenship revocation, in contrast to passport revocation,

¹⁷⁷ See, eg, Dylan Welch, 'Khaled Sharrouf and Mohamed Elomar Killed Fighting with Islamic State in Mosul, Reports Say', *ABC News* (Online, 23 June 2015) <www.abc.net.au/news/2015-06-22/khaled-sharrouf-and-mohammed-elomar-killed-in-iraq-reports-say/6565162>, archived at <<https://perma.cc/E7XT-ZU7P>>.

¹⁷⁸ See, eg, Paul Bibby, 'Australian Terrorist Khaled Sharrouf May Be Alive, His Family's Barrister Says', *The Sydney Morning Herald* (Sydney, 15 February 2016) <www.smh.com.au/nsw/australian-islamic-state-fighter-may-be-alive-his-family-barrister-says-20160213-gmtkii.html>, archived at <<https://perma.cc/TU46-LMVC>>.

¹⁷⁹ See, eg, Paul Toohey, 'Australian ISIL Brigade and Notorious Executioner, Khaled Sharrouf, Killed in Mosul Air Strike', *Herald Sun* (Melbourne, 13 January 2017) <www.heraldsun.com.au/news/world/australian-isil-brigade-and-notorious-executioner-khaled-sharrouf-killed-in-mosul-air-strike/news-story/c2a2f945e29a81cd2e269f3d66897953>. This article notes that at the time, Australian government departments said that they were unable to 'verify the [fresh] report[s] of Sharrouf's death, as they had 'limited capacity to confirm deaths in the war zone'.

¹⁸⁰ *Australian Passports Act 2005* (Cth) ss 22, 22A.

¹⁸¹ For an academic argument advancing this position, see Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 133. Cf Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39 *Monash University Law Review* 568, 597; Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736, 759–61. To date, there has not been a case in which a court has been required to directly confront this question.

would leave ‘no doubt whatsoever’ as to the government’s power to exclude a person from Australian territory.¹⁸² As a number of constitutional lawyers have noted, however, there are doubts about the scope of the Commonwealth’s constitutional power to revoke citizenship.¹⁸³

Within Australia, terror-related offences carry high criminal penalties.¹⁸⁴ Moreover, in addition to the offence of engaging in a terrorist act, of which a person can only be convicted after an act of terrorism has been carried out, there are a wide range of offences that are designed to mitigate the risk of terrorism eventuating. For instance, there are offences that criminalise conduct preparatory to a terrorist act, including: ‘[p]roviding or receiving training connected with terrorist acts’;¹⁸⁵ ‘[p]ossessing things connected with terrorist acts’;¹⁸⁶ ‘[c]ollecting or making documents likely to facilitate terrorist acts’;¹⁸⁷ and doing any ‘[o]ther acts ... in preparation for, or planning, terrorist acts’.¹⁸⁸ These offences carry lengthy maximum penalties, ranging from 10 years’ imprisonment to life imprisonment. In addition, it is a crime, punishable by life imprisonment, to ‘engage[] in a hostile activity in a foreign country’,¹⁸⁹ to make preparations for such activity,¹⁹⁰ or to ‘enter[] a foreign country with the intention of engaging in [such] activity’.¹⁹¹ It is also an offence, with a maximum penalty of 10 years’ imprisonment, for a person to enter or remain in particular areas that are designated by the executive as no-go zones, on the basis that they are hotbeds for terrorist training and activity.¹⁹² Such offences are designed to

¹⁸² Commonwealth, *Parliamentary Debates*, Parliamentary Joint Committee on Intelligence and Security, 4 August 2015, 23.

¹⁸³ See, eg. Sangeetha Pillai, ‘The Allegiance to Australia Bill and the Constitution: Legislative Power and Membership of the Constitutional Community’, *AUSPUBLAW* (Blog Post, 21 July 2015) <<https://auspublaw.org/2015/07/the-allegiance-to-australia-bill-and-the-constitution/>>, archived at <<https://perma.cc/8TSY-2XCU>>; Irving and Thwaites (n 12); Sangeetha Pillai, ‘Citizenship-Stripping Reforms Open to Challenge in Spite of Safeguards’ (2016) 3(19) *LSJ: Law Society of NSW Journal* 74, 75.

¹⁸⁴ See, eg. *Criminal Code Act 1995* (Cth) divs 101–3, 119.

¹⁸⁵ *Ibid* s 101.2.

¹⁸⁶ *Ibid* s 101.4.

¹⁸⁷ *Ibid* s 101.5.

¹⁸⁸ *Ibid* s 101.6. See generally George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 *Melbourne University Law Review* 1136.

¹⁸⁹ *Criminal Code Act 1995* (Cth) s 119.1(2)(a).

¹⁹⁰ *Ibid* s 119.4.

¹⁹¹ *Ibid* s 119.1(1)(a).

¹⁹² *Ibid* s 119.2(1).

decrease the likelihood that terrorist activity will eventuate.¹⁹³ As Whealy J noted in *R v Elomar*,

[t]he broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. ... The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community.¹⁹⁴

It has been noted that where an Australian citizen commits an offence in foreign territory, gathering enough admissible evidence to secure a conviction can be very challenging.¹⁹⁵ To the extent that this weakens the national security value of the criminal law, it is mitigated by div 104 of the *Criminal Code Act 1995* (Cth). Division 104 creates a 'control order' regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions (potentially amounting to house arrest) if those restrictions are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of ... protecting the public from a terrorist act'.¹⁹⁶

Collectively, these factors operate to circumvent the risk of terrorist attacks and to reduce the risk to national security posed by citizens and non-citizens who seek to harm Australia, irrespective of whether or not a conviction has been secured. In this context, as in the UK and Canada, it is difficult to see how Australia's new citizenship-revocation laws will be of more than marginal practical utility from a security perspective. This is reinforced by the fact that, during the debate over the legislation, no clear case was made that it was needed to fill a particular gap in Australian law.

The Australian denationalisation laws may have greater utility as a symbolic statement that disloyalty or lack of allegiance will be met with exclusion from the Australian citizenry. This casts Australian citizenship as a conditional status, contingent upon good behaviour. As with the UK and Canadian laws, however, aspects of the Australian denationalisation legislation dilute the clarity of this symbolic statement. First, the fact that denationalisation only applies to Australian citizens with dual citizenship means that disloyal conduct attracts different consequences for different citizens. This casts doubt over the

¹⁹³ See Keiran Hardy and George Williams, 'Australian Legal Responses to Foreign Fighters' (2016) 40 *Criminal Law Journal* 196, 197, 201.

¹⁹⁴ (2010) 264 ALR 759, 779 [79].

¹⁹⁵ See, eg, Bret Walker, *Annual Report* (Report, Independent National Security Legislation Monitor, Australian Government, 28 March 2014) 31–6.

¹⁹⁶ *Criminal Code Act 1995* (Cth) s 104.4(1)(d).

manner in which allegiance is central to the state–citizen relationship. Secondly, while many of the grounds for citizenship-loss hinge upon conduct that suggests a lack of allegiance to Australia, this is not true of all grounds. For instance, the ground that enables citizenship-revocation on the basis of a conviction for entering an area declared a no-go zone does not require any repudiation of allegiance.

As in the other two jurisdictions examined in this article, Australia’s broad denationalisation laws make a clear symbolic statement about the nature of Australian citizenship, but are not tailored to serve any clear national security purpose. Part III below reflects on the implication of this combination of factors in all three countries.

III THEMES AND OBSERVATIONS

While there are significant differences in the ways in which the UK, Canada and Australia considered in this article provided for denationalisation, the recent citizenship stripping expansions in the three countries are marked by a number of points of symmetry. All three countries made recent and dramatic expansions to the grounds for involuntary citizenship loss, resulting in very broad citizenship stripping regimes. The UK and Australian regimes, which remain in force, are amongst the broadest in the world. Moreover, the UK, Canada and Australia each justified their respective denationalisation expansions via a similar double-barrelled rationale.

First, all three countries invoked a symbolic justification for the expanded laws. This justification cast citizenship as a ‘privilege’, the possession of which is conditional upon adherence to a particular code of behaviour. Citizens who do not adhere to this code — particularly in ways that threaten the state, or that indicate a lack of allegiance or loyalty on the citizen’s part — are regarded as unfit to retain citizenship. For instance, David Cameron described returning jihadists as ‘enemies of the state’.¹⁹⁷ Tony Abbott was even more blunt. In addition to calling on all migrants to embrace ‘Team Australia’,¹⁹⁸ he said:

¹⁹⁷ Ben Farmer and Peter Dominiczak, ‘David Cameron: Returning Jihadists are “Enemies of the State”’, *The Telegraph* (London, 17 November 2014) <www.telegraph.co.uk/news/politics/david-cameron/11237012/David-Cameron-Returning-jihadists-are-enemies-of-the-state.html>.

¹⁹⁸ Jared Owens, “Don’t Migrate unless You Want to Join Our Team”: Abbott Meets Islamic Community’, *The Weekend Australian* (Sydney, 18 August 2014) <www.theaustralian.com.au/national-affairs/dont-migrate-unless-you-want-to-join-our-team-abbott-meets-islamic-community/news-story/d4046a301a9b65267801ae160331b404>.

There's been the benefit of the doubt at our borders, the benefit of the doubt for residency, the benefit of the doubt for citizenship and the benefit of the doubt at Centrelink. ... We are a free and fair nation. But that doesn't mean we should let bad people play us for mugs, and all too often they have.¹⁹⁹

In the three countries, the expansion of citizenship stripping, coupled with this symbolic rationale, had the effect of shifting citizenship from a relatively secure status to one that is conditional. As Audrey Macklin has argued, '[c]itizenship emerges as an enhanced form of conditional permanent residence, revocable through the exercise of executive discretion'.²⁰⁰

Secondly, all three countries asserted that the expanded denationalisation powers and the shift towards a more conditional citizenship were necessary 'modernisations' of citizenship law. In the UK and Australia, proponents of these changes have strongly asserted that they are essential to mitigate increased threats to national security posed by contemporary challenges such as the foreign fighters phenomenon.²⁰¹ This security argument was also invoked in the Canadian context but with somewhat less emphasis. Nonetheless, the Canadian citizenship stripping expansions were also presented as essential to modernise the law: when introducing the legislation into Parliament, the government stressed the fact that citizenship legislation had not been updated since 1977.²⁰²

The discussion in Part II assessed the utility of the revocation laws in each country in light of these justifications. This analysis shows that the security arguments supplied as justifications for the expanded laws are unsatisfactory and weak. Such justifications have tended only to invoke national security in general terms, rather than providing a persuasive and specific explanation of why citizenship stripping is a necessary or desirable means via which to pursue national

¹⁹⁹ Liam Mannix, "Bad People" Treating Us as Mugs: Abbott's National Security Warning, *The Sydney Morning Herald* (Sydney, 15 February 2015) <www.smh.com.au/federal-politics/political-news/bad-people-treating-us-as-mugs-abbotts-national-security-warning-20150215-13f3bd.html>, archived at <<https://perma.cc/U3UQ-KDTR>>. For extracts of similar statements expressed by Defence Minister Jason Kenney in the Canadian context, see, eg, Stewart Bell, 'Canada Revokes Citizenship of Toronto 18 Ringleader Using New Anti-Terror Law', *National Post* (Toronto, 26 September 2015) <<http://news.nationalpost.com/news/canada/canada-revokes-citizenship-of-toronto-18-ringleader>>.

²⁰⁰ Macklin (n 13) 29.

²⁰¹ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 2 December 2014, vol 589, col 207 (Theresa May, Secretary of State for the Home Department); Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9930 (George Brandis, Attorney-General).

²⁰² Canada, *Parliamentary Debates*, House of Commons, 27 February 2014, 3310 (Chris Alexander).

security objectives. Each country had extensive pre-existing laws directed towards the same set of problems. While governments in all three countries asserted that citizenship stripping laws were needed to supplement and fill gaps in these existing laws, no reasoned argument was made for why this was the case, or what specific value the new laws would add to the national security toolkits of the three nations.

Moreover, the use of the laws in each country shows that they have not, in practice, served as a useful national security device. This conclusion flows in part from the fact that the laws themselves have been so little used, despite the fact their breadth means they could be very broadly applied. In Australia, the laws have only been used once, against an individual whose whereabouts are unknown and who has been reported dead. In Canada, the laws' sole use while in force was against an individual who posed no foreseeable security threat because he was serving a sentence of life imprisonment. In the UK, denationalisation laws saw very infrequent use for several years but since 2010 have come to be much more regularly employed. Despite this, documented examples showcase a number of instances in which invocation of the Home Secretary's revocation powers has had insignificant or negative effect. Several of the citizenship stripping cases in the UK showcase protracted and expensive legal battles that can take years to resolve.²⁰³ These cases demonstrate that citizenship stripping efforts can be frustrated when foreign governments take steps to divest a person of their second citizenship or deny the existence of this citizenship.²⁰⁴ Moreover, the UK denationalisation laws have predominantly been used against persons outside the UK, whose return to the UK could have been prevented or at least managed via other measures, such as TEOs and passport cancellation orders.

Collectively, the experiences in the three countries suggest that the new citizenship revocation powers have done little to meaningfully enhance national security. Indeed, several commentators, including those who adopt the view

²⁰³ See, eg, *Hamza* (n 51); *Al-Jedda* (n 61).

²⁰⁴ See, eg, *Hamza* (n 51); *Pham* (n 91); While the introduction of a power to revoke UK citizenship even where a person does not have a foreign citizenship mitigates this, it does not resolve the question of where a denationalised person goes, in practice, if no foreign government is willing to accept them: Goodwin-Gill, 'Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law' (n 90) 7, quoting United Kingdom, *Parliamentary Debates*, House of Commons, 30 January 2014, vol 574, col 1081 (Pete Wishart).

that new, targeted laws are necessary in order to manage the risks posed by foreign fighters,²⁰⁵ have argued that citizenship stripping is a particularly unhelpful national security tool.²⁰⁶ In the Canadian context, this is arguably underlined by the ultimate repeal of the expanded citizenship stripping laws.

Despite doing little to meaningfully improve national security, the denationalisation laws enacted in the UK, Canada and Australia convey a powerful message that citizens who may seek to harm their countries are undeserving of the privilege of citizenship. This raises the question of whether the symbolic value of making such a statement is itself a sufficient justification for such laws. Indeed, it has been suggested that, in certain instances and when employed in moderation, measures that appear to be targeting threats that attract high levels of anxiety can play a helpful role in engendering a feeling of security, even if their risk-minimisation effect is low.²⁰⁷ Echoes of such an agenda can be found in some of the justifications invoked in defence of the recent denationalisation laws — such as Australian Attorney-General George Brandis's suggestion that applying 'the famous pub test' would reveal that the 'average Australian' would feel safer if people convicted of serious terrorism offences could be 'booted out'.²⁰⁸

We suggest that, for a number of reasons, the symbolic rationale underpinning the recent denationalisation laws in the UK, Canada and Australia does not, in and of itself provide sufficient justification for their enactment. First and foremost, the laws enacted in all three countries were extremely broad, especially in regard to the conferral of power upon the executive. The laws enabled the revocation of one of the most fundamental rights in any democratic society

²⁰⁵ See, eg, Forcese and Mamikon (n 12).

²⁰⁶ See, eg, Gordon Clubb, 'Removing Citizenship Will Only Encourage UK Jihadists', *The Conversation* (Online, 29 August 2014) <<https://theconversation.com/removing-citizenship-will-only-encourage-uk-jihadists-30754>>, archived at <<https://perma.cc/8L4W-GPSP>>; Ben Saul, 'Plan to Strip Citizenship Is Simplistic and Dangerous', *The Drum, ABC News* (Online, 27 May 2015) <www.abc.net.au/news/2015-05-27/saul-plan-to-strip-citizenship-is-simplistic-and-dangerous/6499710>, archived at <<https://perma.cc/T2KT-GUXY>>; George Williams, 'Why Malcolm Turnbull Must Dump the Citizenship Bill', *The Sydney Morning Herald* (Sydney, 4 October 2015) <www.smh.com.au/comment/why-malcolm-turnbull-must-dump-the-citizenship-bill-20151004-gk0rgx.html>, archived at <<https://perma.cc/HHG4-D9G9>>.

²⁰⁷ Bruce Schneier, 'In Praise of Security Theater', *Wired* (San Francisco, 25 January 2007) <www.wired.com/2007/01/in-praise-of-security-theater/>, archived at <<https://perma.cc/3EQM-S8T9>>. See also Bruce Schneier, 'Beyond Security Theatre', *New Internationalist* (Oxford, November 2009) 10. Note, however, that Schneier makes this argument with several qualifications, and argues that an excess of 'security theatre' can increase the anxiety of a population: at 12.

²⁰⁸ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2015, 9938.

in a broad and ill-defined range of circumstances. This is highlighted by the use of vague criteria such as ‘conducive to the public good’ in the UK. Such criteria can often be applied without the person affected having the opportunity to put their case in court or otherwise having a right to natural justice. In Australia, citizenship can be revoked in a way that even bypasses the need for a ministerial decision. These features erode fundamental tenets of the rule of law²⁰⁹ in a manner that is not proportionate to the achievement of national security or any other practical objective. This is not an outcome that should be accepted to achieve purely symbolic ends.

Secondly, not all citizens are equally vulnerable to citizenship loss. In the denationalisation laws in each of the three countries surveyed, disloyal behaviour has rendered dual citizens (and, in the UK, naturalised sole citizens) vulnerable to the prospect of denationalisation, while other citizens are subject to lesser penalties for identical conduct. This creates an unequal, two-tiered citizenship. Moreover, it dilutes any symbolic statement that citizenship is a privilege conditional upon allegiant behaviour, because this conditionality only applies to select citizens. In his April 2016 report on the UK’s denationalisation laws, the Independent Reviewer of Terrorism Legislation, David Anderson, noted that citizenship deprivation powers ‘are said to make law-abiding immigrants feel unwelcome because they encourage the notion that naturalised citizens who have retained their citizenship of origin do not enjoy the same security as those who have always been citizens’.²¹⁰

In a similar vein, it has been argued that singling out dual citizens for citizenship revocation is ‘counter-productive’ to domestic national security objectives because it ‘reinforces the identity issues that drive radicalisation’.²¹¹ This undermines key counter-radicalisation measures aimed at building community cohesion and social harmony, which have been implemented in all three of the countries surveyed as a critical component of counter-radicalisation policy.²¹²

²⁰⁹ Martin Krygier, ‘On the Rule of Law: What It Is, Why It Matters, and What Threatens It’, *The Monthly* (Blog Post, 20 August 2015) <www.themonthly.com.au/blog/martin-krygier/2015/20/2015/1440049152/rule-law>, archived at <<https://perma.cc/2AZ3-TLUS>>.

²¹⁰ Anderson, *Citizenship Removal Resulting in Statelessness* (n 35) 12 [3.5] (emphasis omitted).

²¹¹ Rachel Olding, ‘Stripping Dual Citizenship “Completely Counter-Productive” to Fighting Terrorism: UK Expert’, *The Sydney Morning Herald* (Sydney, 21 July 2015) <www.smh.com.au/nsw/stripping-dual-citizenship-completely-counterproductive-to-fighting-terrorism-uk-expert-20150721-giha2k.html>, archived at <<https://perma.cc/S6A6-NLZY>>. See also Williams, ‘A Decade of Australian Anti-Terror Laws’ (n 188) 1172–5.

²¹² In the UK, this is dealt with via the *Prevent* counter-radicalisation strategy: Secretary of State for the Home Department, *Prevent Strategy* (Cm 8092, 2011). This was supplemented in 2015

It has been well documented in other contexts that the effectiveness of such measures can suffer when the measures are perceived as creating division and discrimination within a population, rather than as genuinely consultative and community-driven.²¹³

Thirdly, the practice of citizenship stripping on disloyalty or security grounds produces further negative effects. An individual who is stripped of citizenship may suffer severe consequences, including isolation from their home and family, the loss of democratic rights, detention and deportation. Additionally, the practice of citizenship stripping has the potential to undermine accountability for actions taken against individuals by states. At least two former British citizens, Mohamed Sakr and Bilal al-Berjawi, have been killed by US

by a *Counter-Extremism Strategy*: Secretary of State for the Home Department, *Counter-Extremism Strategy* (n 37). In Canada, this is dealt with via the *Prevent* limb of the government's counterterrorism strategy: Government of Canada, *Building Resilience against Terrorism: Canada's Counter-Terrorism Strategy* (Strategy, 2nd ed, 2013) 15–17 <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsln-c-gnst-trrrsm/rsln-c-gnst-trrrsm-eng.pdf>, archived at <<https://perma.cc/ZGU5-TQLB>>. In Australia, funding for community-based programs to counter violent extremism was first introduced in 2010 by the Rudd government. This was initially discontinued by the Abbott government, but was reintroduced in the 2014 budget: see Cat Barker, 'Australian Government Measures to Counter Violent Extremism: A Quick Guide', *Parliament of Australia* (Web Page, 10 February 2015) <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Quick_Guides/Extremism>, archived at <<https://perma.cc/JF83-QJX5>>. The Attorney-General's department notes that '[s]tate and territory-led intervention programmes [(with Commonwealth financial support)] have been established or are under development across Australia to identify radicalised and at-risk individuals, and provide tailored services to address the root causes of their radicalisation': 'CVE Intervention Programmes', *Australian Government: Attorney-General's Department* (Web Page) <www.ag.gov.au/NationalSecurity/Counteringviolentextremism/Pages/Intervention-programmes.aspx>, archived at <<https://perma.cc/A3MJ-6DYV>>.

²¹³ This has been a significant problem with the UK's *Prevent* strategy for counter-radicalisation. The coupling of community development measures focused predominantly on Muslim communities, with a counterterrorism agenda and surveillance practices, has produced a community perception that *Prevent's* community development goal is a 'pretext for [government] "spying" on potential terrorists': Keiran Hardy, 'Resilience in UK Counter-Terrorism' (2015) 19 *Theoretical Criminology* 77, 87 (citations omitted). See also Arun Kundnani, *Spooked! How Not to Prevent Violent Extremism* (Report, Institute of Race Relations, October 2009). In February 2016, the Independent Reviewer of Terrorism Legislation 'sent a supplementary submission to the Home Affairs Select Committee in respect of its inquiry into countering extremism', in which he argued that *Prevent* could benefit from independent review because it was 'clearly suffering from a widespread problem of perception, particularly in relation to the statutory duty on schools and in relation to non-violent extremism': Joint Committee on Human Rights, *Counter-Extremism* (House of Lords Paper No 39, House of Commons Paper No 105, Session 2016–17) 13 [36], quoting David Anderson, Supplementary Written Evidence to the Home Affairs Select Committee, *Inquiry into Countering Extremism* (29 January 2016) 2 [7].

drone strikes shortly after being stripped of their UK citizenship.²¹⁴ While this may be mere coincidence, revoking a person's citizenship absolves a country from any responsibility for their fate.

Where citizenship revocation has the potential to render a person stateless, as in the UK, this danger is exacerbated, as affected individuals may be in a situation where they are not afforded protection by any country. Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights, noted this in evidence to the UK Joint Committee on Human Rights. He said that stateless individuals are placed at 'a very substantial disadvantage' as they have no recourse to 'diplomatic protection' and 'no right[s] of entry or abode'.²¹⁵ Emmerson stressed that this inherent vulnerability is made worse when the reason an individual is rendered stateless is that they are suspected of involvement in terrorism.²¹⁶ In a world where national security measures are typified by wide executive discretion with sometimes inadequate oversight, the absolution from accountability for an individual facilitated by citizenship stripping is a cause for concern.

Finally, the trend towards citizenship stripping has the potential to have negative consequences for international relations and for national security ventures on a broader scale. Efforts to permanently offload unwanted or high-risk citizens onto foreign states is likely to produce tensions between governments, as well as undermine the cohesion needed to tackle cross-jurisdictional security issues. It is also significant that the effect of nations such as the UK, Canada and Australia revoking citizenship may be to cast responsibility for dangerous individuals onto nations with far fewer resources or capacity to deal with them. Indeed, the measure may even strengthen the hand of terrorist organisations. People who might return home to face prosecution may instead be left at large overseas, perhaps with nowhere to go but to remain with Islamic State or another terrorist group.²¹⁷

These factors illustrate that the laws enacted in the three jurisdictions surveyed, and that remain in place in the UK and Australia, threaten the rule of law and human rights and, in some ways, undermine the security objectives

²¹⁴ See, eg, Chris Woods and Alice Ross, 'Former British Citizens Killed by Drone Strikes after Passports Revoked', *The Bureau of Investigative Journalism* (London, 27 February 2013) <www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked/>, archived at <<https://perma.cc/8822-HMCJ>>.

²¹⁵ Joint Committee on Human Rights, *Uncorrected Transcript of Oral Evidence: Counter-Terrorism and Human Rights* (House of Commons Paper No 1202, Session 2013–14) 22.

²¹⁶ *Ibid.*

²¹⁷ See, eg, Clubb (n 206); Saul (n 206).

they are said to pursue. In light of this, the symbolic rationale drawn upon to support the laws is woefully inadequate.

IV CONCLUSION

Citizenship is often regarded as the most fundamental of human rights. In addition to signifying formal membership of a national community, it is often a gateway to a host of basic entitlements, including political rights, mobility rights and rights to consular assistance. It is a concept with a strong rhetorical dimension in forging understandings of what it is to belong to a community and in shaping a country's sense of its own identity. It is for such reasons that nations have often exercised caution in respect of laws that enable people to have their citizenship revoked.

Much has changed since the terrorist attacks of 11 September 2001. Within short succession, the UK, Canada and Australia introduced significant new citizenship stripping laws, creating a modern framework for banishing individuals seen to be a risk to public safety and the common good. The laws introduced in the three countries were striking in a number of respects. Courts were afforded little or no role in determining whether a person should be deprived of their citizenship. Instead, extraordinary powers have been conferred upon the executive to determine the status of the person in a way that will impact upon the person's fundamental human rights, including their right to vote, their entitlement to the protection of the state, and their capacity to enter and exit the nation.

The extreme breadth of the recent denationalisation laws threatens fundamental human rights and the rule of law. In light of these effects, the laws should be supported by strong and cogent justifications. Unfortunately, our analysis shows that any justifications invoked to support these laws ring hollow in light of the laws' experience post-enactment.

The UK, Canada and Australia all justified their expanded denationalisation laws via both a symbolic rationale, which cast citizenship as conditional upon allegiant behaviour, and a security rationale, which asserted that citizenship deprivation is a necessary part of a national security toolkit. Our analysis suggests that the security rationale has not been well served by the laws in any of the three countries surveyed. At the time of their introduction and thereafter, these laws have, at best, added little to other national security laws and, at worst, actually functioned to undermine security, particularly on a global scale.

The symbolic rationale for the laws has been better served: the laws enacted in each country achieved the symbolic effect of recasting citizenship as a privilege that citizens deserve to be stripped of if they demonstrate disloyalty or pose

a risk to their country. However, we suggest that, even if it is accepted that re-configuring citizenship as a conditional status may serve a meaningful purpose in certain circumstances, it does not singlehandedly provide an adequate rationale for the citizenship stripping laws examined in this article, which are characterised by extremely broad executive power and minimal safeguards, and which exist in the context of pre-existing legislation directed towards the same ends. This is especially true given the capacity for the laws to actually undermine, on a global scale, the security objective they are said to pursue.

Given this, the recent repeal of the 2014 denationalisation laws in Canada marked a welcome retreat from the emerging trend of utilising citizenship stripping as a symbolic and security device. There is, however, no indication that any such retreat will be mirrored in the UK and Australia. Indeed, the convening of the Citizenship Loss Board and use of the new citizenship deprivation powers in Australia, and the recent significant increase in the employment of citizenship stripping powers in the UK, along with the government's suggestion that these powers could be further broadened in the future, suggest quite the opposite.