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**ADiM BLOG**  
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**CASE LAW COMMENTARY**

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European Court of Human Rights, Judgement of 13 January 2022,  
*Hashemi and others v. Azerbaijan*, Applications no(s) 1480/16, 3936/16,  
15835/16, 28034/16, 34491/16, 51348/16, 15904/17

***Arbitrariness in the denial of nationality to children of foreign parents:  
Limits to national decisions in a system of ius soli.***

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***Keywords***

*Private life – Article 8 – deprivation of nationality – arbitrary refusal – procedural guarantees*

***Abstract***

*In the case Hashemi and others v. Azerbaijan, the ECtHR examines if a refusal to issue identity cards to children born on national territory to foreign parents could be considered an arbitrary refusal since they hold birth certificates recognizing them as Azerbaijani nationals. Although the right to acquire a particular nationality is not guaranteed by the Convention, in certain circumstances, arbitrary decisions raise an issue under Article 8 as they have a negative impact on private life. The Court analyzes the case taking into consideration national legislation regarding the acquisition of nationality (based on ius soli), its subsequent amendments, including exceptions to the acquisition, and the necessary procedural guarantees to determine whether or not there is a violation of Article 8.*

## A. FACTS OF THE CASE AND JUDGMENT

### *1. Facts*

The applicants are eight Afghan and Pakistani nationals. They fled their home countries during the 2000s and settled in Azerbaijan, where they registered with the Office of the UN High Commissioner for Refugees. They complain about the national authorities' refusal to issue identity cards to their children, who were born in Azerbaijan on different dates before 2014.

National courts held that children could not be considered citizens, given that their parents held another nationality, namely that of Afghanistan or Pakistan. The applicants claim that in the application of the principle of *ius soli*, the law in force at the time of the refusal giving rise to the case, the children are Azerbaijani citizens. The parents own an Azerbaijani birth certificate and consider that under Article 52 of the Constitution of Azerbaijan and Articles 6 and 11 of the Citizenship Law in force until 30 May 2014, their children are full nationals. Faced with the authorities' refusal to issue identity cards, the parents filed several appeals at the administrative level, which successively considered that the refusal was not illegal, applying the law in force after 30 May, which considers as an exemption for granting nationality that the children were born to two foreign parents. The Court of appeal upheld the decisions of the lower tribunals and did not even respond to the specific claims, a decision which was upheld by the Court of cassation. Considering the refusal as an unlawful deprivation of nationality, the applicants lodged an application complaining about the violation of their right to private and family life (art. 8 ECHR). Although the right to nationality is not guaranteed by the Convention or its Protocols, the Court has already dealt with issues related to nationality linked with this article.

It is essential for a clear understanding of the case to refer prior briefly to the national legislation. Citizenship Law of 30th September 1998 established how in accordance with article 52 of the Constitution of the Republic of Azerbaijan, any person born on the territory of the Republic of Azerbaijan is a citizen of the Republic of Azerbaijan. This law also stated that a birth certificate is a document that attests citizenship. This Law was amended by a new one that came into force on 30 May 2014 where several changes aimed at restricting the acquisition of citizenship were introduced. In particular, the birth certificate was removed from the list of documents, and a new disposition was added under which a child born in the territory of the Republic with two foreign parents shall not be considered a citizen of the Republic of Azerbaijan.

## 2. Judgment

### 2.1 *The notion of private life*

Although the right to nationality is not as such guaranteed by the Convention or its Protocols, arbitrary deprivation of nationality may, in certain circumstances, raise a problem under Article 8 as it impacts the private life of the person concerned. In the case, the Court notes that the domestic proceedings did not concern an application for deprivation of nationality, but the refusal to issue identity cards to the applicants' children. In these circumstances, the Court considers the refusal to issue an identity card as a refusal to recognize their nationality. The Court has recognized in its jurisprudence that the concept of "private life" established in Article 8 is broad and encompasses multiple aspects of a person's social identity including nationality or citizenship processes ([Genovese v. Malta](#), n. 53124/09, p. 30 -33 or [Ramadan v. Malta](#), n. 76136/12, p. 62).

### 2.2 *The Court's test on arbitrary*

To determine whether such interference violates Article 8, two separate issues must be addressed: whether the decision to deprive the person concerned of nationality was arbitrary (a stricter test than proportionality) and the consequences that such a decision may have for the applicant ([Ramadan v. Malta](#), [K2 v. the United Kingdom](#) n. 42387/13, p. 85 and 49 respectively). Arbitrary denial of nationality may, in some cases, raise a problem because of the impact of such denial on the private life of the person concerned. The applicants claim that the denial of Azerbaijani citizenship to their children has deprived them of a range of social and economic rights (right to free higher education, right to free medical assistance and social security or freedom of movement) ([Hashemi and others v. Azerbaijan](#), p. 41). Precisely in a case against the same country, the Court highlighted how this type of denegation has considerable negative consequences for individuals and the protection of their rights. The decision creates legal uncertainty that affects their social identity, regardless of whether it leads to a situation of statelessness or not ([Ahmadov v. Azerbaijan](#), n. 32538/10, p. 43-46). The uncertainty surrounding the legal status, or an arbitrary denegation, can impact as well on on many rights from access to healthcare to employment or the possibility to marry ([Sudita Keita v. Hungary](#), n. 42321/15, p. 34-37) .

It is worth noting that the Court is not in itself an organ that should replace the domestic courts, as it is the latter who best interpret national law and know the social and legal environment, but in this case, the interpretation given by the domestic courts is contrary to the positive law at the time of the facts. The Court also demonstrates how the national courts do not sufficiently explain what legal basis they use to deny the issuance of the document nor do

they consider the fact that they are in possession of a birth certificate at any point.

To determine whether or not the measure was arbitrary, the Court analyzed whether it was lawful, whether the applicants benefited from procedural safeguards, whether they had access to adequate judicial review, and whether the authorities acted with due diligence and promptness. By doing this exam on the national decision, the Court found out how legislative provisions were not interpreted by the national authorities in a manner compatible with the Convention and that the national judicial review did not afford the applicants' children the necessary procedural guarantees. Thereof the Court concludes how the denegation was neither lawful nor accompanied by the necessary procedural safeguards, and that it must be regarded as arbitrary.

## B. COMMENT

### 1. *The right to nationality*

The international framework on the right to nationality is briefly referenced in the case. The Judgment mentions several international documents, including a report of the UN Secretary-General entitled "Arbitrary deprivation of nationality" ([A/HRC/10/34](#)). It should be added to this report what was said in a later report of 2015: «The arbitrary deprivation of nationality of children is in itself a human rights violation, with statelessness its possible and most extreme consequence.» ([A/HRC/31/29](#)). It must not be forgotten how Article 15 of the Universal Declaration of Human Rights protects the right to a nationality. The right of everyone to a nationality is enshrined in article 15 of the Universal Declaration of Human Rights and is recognized in many other international and regional human rights ([A/HRC/13/34](#), p. 3-18). The fundamental nature of the right to a nationality and the prohibition of arbitrary deprivation of nationality has been reaffirmed by the General Assembly in its resolution 50/152 ([A/RES/50/152](#), p. 4). Specifically, on children's rights, article 7 of the Convention on the Rights of the Child must be mentioned. According to it, children should be registered immediately after birth and have the right from birth to acquire a nationality.

As the UN Human Rights Council recalled: «Any interference with the enjoyment of nationality has a significant impact on the enjoyment of rights» ([A/HRC/19/43](#)). However, States are sovereign in deciding to whom they grant or withdraw nationality. That is why different national laws establish different provisions, some based on *ius sanguinis*, others on *ius soli*, or a mixture of both. In order to ensure that nationality rules are applied correctly, States should ensure that appropriate procedural rules are in place. Otherwise, they would be taking an arbitrary decision. The protection of the right to nationality, especially to avoid situations of statelessness, is strongly anchored in international human rights law, but it is at the national level that laws must be articulated to avoid such situations, especially in cases of

minors. Arbitrary or discriminatory treatment of minors in matters of nationality must be avoided and strongly monitored at the judicial level.

As this case demonstrates, nationality issues must be treated with all legal and procedural safeguards because of the dangers to the rights of individuals that they entail. Beyond situations of statelessness, a correct application of the positive law with a proportionate interpretation would save many states the embarrassment of having to deal with such intimate issues as nationality before international tribunals.

### C. SUGGESTED READING

#### To read the text of the judgment:

[European Court of Human Rights \(Fifth Section\), Judgement of 13 January 2022, \*Hashemi and others v. Azerbaijan\*](#), Applications no(s) 1480/16, 3936/16, 15835/16, 28034/16, 34491/16, 51348/16, 15904/17) (only available in French by February 2022)

#### Case law:

[ECHR \(Fourth Section\), 11 October 2011, \*Genovese v. Malta\*](#), Application no. 53124/09.

[ECHR \(Fourth Section\), 21 June 2016, \*Ramadan v. Malta\*](#), Application no. 76136/12.

[ECHR \(Decision\) \(First Section\), 7 February 2017, \*K2 v. United Kingdom\*](#), Application no. 42387/13.

[ECHR \(Fifth Section\), 30 January 2020, \*Ahmadov v. Azerbaijan\*](#), Application no. 32538/10

[ECHR \(Fourth Section\), 12 May 2020, \*Sudita Keita v Hungary\*](#), Application no. 42321/15.

#### Literature:

H. LAMBERT, [Nationality and Statelessness Before The European Court Of Human Rights: A Landmark Judgment But What About Article 3 ECHR?](#), on <https://strasbourgobservers.com/> \_May 16th, 2018.

J. LEPOUTRE, *La déchéance de la nationalité à l'épreuve de la Convention européenne des droits de l'homme. Cour européenne des droits de l'homme, 7 février 2017, n° 42387/13*, in *Revue critique de droit international privé*, Vol. 3, n. 3, 2017, pp. 381-388.

#### Other Materials:

Council of Europe/European Court of Human Rights, [Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence, 2021](#), available at: <https://www.echr.coe.int/>

Council of Europe, *La nationalité des enfants (Recommandation CM/Rec(2009) 13 et exposé des motifs)*, available at: <https://www.refworld.org/docid/4dc7bf1c2.html>

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