



ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 1: Nationality, Clause 9 Proposed Amendment – Notice of Decision to Deprive a Person of Citizenship

Summary

By Clause 9 of the Nationality and Borders Bill, the Government seeks to dispense with the requirement to give to the person concerned written notice of a decision to deprive them of British citizenship. The dispensation would apply in a large number of cases where the Secretary of State for the Home Department was satisfied it was not in the public interest. The proposed grounds for dispensing with notice are very wide (including in the interests of national security, the relationship between the United Kingdom and another country, or otherwise in the public interest); open to subjectivity on the basis of what ‘appears’ to the Secretary of State to be the case; and they lack any safeguards.

Clause 9 works by amending section 40 of the British Nationality Act 1981 and seeks to qualify the obligation to give written notice found in section 40(5) of that Act. It severely undermines procedural fairness for those who stand to lose British citizenship. Clause 9 offends the common law, international legal standards, and human rights incorporated into domestic law. It should not stand part of the Bill and should be omitted. [The Immigration Law Practitioners' Association urges members of the House of Lords to oppose the Question that Clause 9 stand part of the Bill.](#)

Background

The Immigration Law Practitioners' Association ('ILPA') is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Proposed Amendment to Clause 9 - Notice of decision to deprive a person of citizenship

Page 11, line 26, leave out Clause 9

British Citizenship: A Constitutional right

Possession of British citizenship is in the nature of a constitutional right not to be subject to arbitrary deprivation. In *Ahmed and Others (deprivation of citizenship)* [2017] UKUT 00118 (IAC), the Upper Tribunal stated at [26]:

'The effect of modern British nationality laws is that loss of the right of abode in the United Kingdom is the main consequence of depriving a person of British citizenship. The affected subject also suffers the loss of associated and consequential rights, duties and opportunities – in particular voting, standing for election, jury service, military service, eligibility for appointment to the Civil Service and access to state benefits, state financed healthcare and state sponsored education. Fundamentally, the relationship between the individual and the State, which lies at the heart of citizenship and nationality, is extinguished.'

There is significant further case law in support of this constitutional principle, as detailed in a joint opinion on Clause 9 by Raza Husain QC, Eleanor Mitchell and Jason Pobjoy¹.

For example, in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61:

- Lord Rodger accepted that it was a fundamental principle of English common law, 'the right of a "belonger" not to be excluded from the territory to which he belonged', referencing chapter 29 of Magna Carta, and the statement of Blackstone, *Commentaries on the Laws of England* (15th edition, 1809) vol 1, p 137, that "no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal" (para 87);
- Lord Carswell agreed with Lords Rodger and Hoffmann, stating '[i]t has been part of the law of England at least since Magna Carta, chapter 29 of which provides that no freeman shall be

¹ Raza Husain QC, Eleanor Mitchell and Jason Pobjoy, 'Nationality and Borders Bill Clause 9 Joint Opinion', page 13-14, para 45 <<https://drive.google.com/file/d/1t5FQ2MtMb4gWpWWuOra-gzJYFYWtwIW6/view>> accessed 19 January 2022.

'exiled otherwise than by the lawful judgment of his peers or by the law of the land' (para 124);

- Lord Mance stated '[t]he right [of abode] is fundamental and, in the informal sense in which that term is necessarily used in the United Kingdom context, constitutional' (para 151); and
- Lord Hoffmann stated 'I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right' (para 45).

At Common Law

Notice of a decision is a fundamental feature for it to have legal effect:

'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule, it is simply an application of the right of access to justice.'

(per Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department* [\[2003\] UKHL 36](#), at para 26).

By relieving the Secretary of State for the Home Department of the obligation to give written notice, Clause 9 offends against this fundamental feature of the common law.

International Legal Standards: The United Kingdom's International Commitments

Depriving a person of British citizenship without notice is arbitrary not only because it offends the common law (see the case of *Anufrijeva* above) but also because it violates international legal standards.

If enacted and thereafter used in individual cases, Clause 9 risks the United Kingdom being in breach of international legal standards found in international treaties by which it is bound, including the United Nations' International Covenant on Civil and Political Rights and the 1961 Convention on the Reduction of Statelessness.

The International Covenant on Civil and Political Rights

In addition to the United Kingdom's human rights commitments found in the European Convention on Human Rights ('ECHR') (which are provided for in domestic law in part by the Human Rights Act 1998), the UK has also ratified another general human rights treaty: the United Nations' International Covenant on Civil and Political Rights ('ICCPR').

The UK does not make provision to give the ICCPR effect in domestic law and thus the ICCPR has much lower visibility in domestic political and legal discussions than the ECHR. However, the UK is bound by the ICCPR in international law and must comply with its requirements.

Article 12(4) of the [ICCPR](#) provides that, 'No one shall be arbitrarily deprived of the right to enter his own country.'

This provision protects those deprived of British citizenship but for whom the UK remains their 'own country'. Depriving a person outside of the UK of their British citizenship without written notice may likely breach this provision.

The United Nations' Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR. In its General Comment (No 27): Article 12 (Freedom of Movement)² it noted:

'19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country [...]

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. *This would be the case, for example, of*

² Office of the High Commissioner of Human Rights, *CCPR General Comment No. 27: Article 12 (Freedom of Movement) adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999* <<https://www.refworld.org/pdfid/45139c394.pdf>> accessed 19 January 2022.

nationals of a country who have there been stripped of their nationality in violation of international law [...]

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.'

(emphasis added)

1961 Convention on the Reduction of Statelessness

The United Kingdom is also bound by the [United Nations' 1961 Convention on the Reduction of Statelessness](#). The United Nations High Commissioner for Refugees ('UNHCR') has a mandate to address statelessness. In its *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, the UNHCR considers the position of those who stand to be deprived of citizenship and be left stateless as well as considering the procedural requirements for any deprivation of nationality (even where not left stateless) to avoid the charge that it is *arbitrary* and thereby unlawful.³

Article 8 of the UN Convention on the Reduction of Statelessness only permits a person to be deprived of citizenship in narrow circumstances if they are made stateless as a result (generally speaking, not including on grounds of conduct, something which - by contrast - is allowed in UK law). Article 8(4) contains the procedural safeguard that '[a] Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body'.

³ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05 <<https://www.refworld.org/docid/5ec5640c4.html>> accessed 19 January 2022.

The UNHCR *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality* about the approach to deprivation of citizenship have relevance to *all* cases in which deprivation of citizenship action is taken (even where not left stateless). Written notice of a decision to deprive is a key requirement to avoid the decision being characterised as arbitrary:

'B. The Prohibition of Arbitrary Deprivation of Nationality'

91. ... the minimum content of the prohibition of arbitrary deprivation of nationality is that withdrawal of nationality conforms to what is prescribed by law; be the least intrusive means of achieving a legitimate purpose; *and follow a due process...* Examples of arbitrary deprivation of nationality include [...] *the withdrawal of a person's nationality without a fair trial before a court or independent body [...]*

Withdrawal of nationality must take place in accordance with the law

92. The prohibition of arbitrary deprivation of nationality requires that any withdrawal of nationality by a State must have a clear basis in law. This element of the prohibition of arbitrary deprivation of nationality is reflected in Article 8 of the 1961 Convention. The legislation in question must sanction the State's ability to withdraw nationality and be sufficiently precise so as to enable citizens to reasonably foresee the consequences of actions which trigger a withdrawal of nationality. *As a matter of good practice, domestic legislation on withdrawal of nationality should, at a minimum, have safeguards equivalent to those found in the 1961 Convention.*

[...]

Withdrawal of nationality is arbitrary where there is no due process

97. In order to avoid arbitrary deprivation of nationality, it is necessary for States to implement procedural safeguards *in all cases of withdrawal of nationality regardless of whether or not they result in statelessness*. Accordingly, due process requirements must be met in all cases of withdrawal of nationality.

98. [...] *Decisions by States which infringe upon a person's right to a nationality are subject to due process protections as a matter of international law.* The minimum content of the requirement of due process in this context is that an individual is able to understand the reasons why their nationality has been withdrawn and has access to legal and/or administrative avenues through which they may challenge the withdrawal of nationality.

99. State decisions involving the acquisition, retention or renunciation of nationality should be issued in writing and open to effective administrative and judicial review. *The individual whose nationality is withdrawn should also be provided with written reasons for the withdrawal in a language they understand.'*

(emphasis added)

In the Guidelines, the UNHCR refers to the Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary General* of 19 December 2013 (A/HRC/25/28), which states at paragraph 31:

'To ensure that nationality regulations are not applied arbitrarily and relevant safeguards against statelessness are implemented effectively, States should ensure that adequate procedural standards are in place. In particular, decisions relating to nationality should be "issued in writing and open to effective administrative or judicial review". International law thus obliges States to provide for an opportunity for the meaningful review of nationality decisions, including on substantive issues.'⁴

Accordingly, Clause 9 contravenes the procedural safeguards contained in international legal standards. These are further undermined by the fact that the ability of an individual to exercise a right of appeal against a deprivation decision, and thus ensure the fair hearing required by Article 8(4) of the 1961 Convention, is linked to receipt of notice. A person cannot take note, exercise a right of appeal, or instruct representatives to challenge a decision, if they are not informed that such a decision exists.

We further note that UNHCR has explicitly expressed the view that 'Clause 9 risks contravening the United Kingdom's obligations under the 1961 Convention and international law'.⁵

⁴ UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 19 December 2013', A/HRC/25/28, page 14, para 31
<https://www.refworld.org/docid/52f8d19a4.html> accessed 19 January 2022.

⁵ UNHCR, 'UNHCR Updated Observations on the Nationality and Borders Bill, as amended' (January 2022), page 23, para 76 <https://www.unhcr.org/61e7f9b44> accessed 19 January 2022.

The United Kingdom's Human Rights Commitments

In addition to the affront that Clause 9 poses to the common law, and international legal standards, it is highly likely to breach the United Kingdom's human rights commitments under the European Convention of Human Rights ('ECHR'), which have been incorporated into domestic law by the Human Rights Act 1998.

We note that in a joint opinion on Clause 9, Raza Husain QC, Eleanor Mitchell and Jason Pobjoy state 'the use of the powers conferred by clause 9 is highly likely to give rise to deprivation decisions that are incompatible with Article 6 and 8 ECHR, and potentially Article 14 ECHR'.⁶

The powers to deprive an individual of British citizenship have been expanded over the years so that they may be exercised in relation to any British citizen, including British citizens from birth who are dual nationals, as well as naturalised British citizens, even where they are not dual nationals if they are able, under the law of a country or territory outside the United Kingdom, to become a national of that country or territory. The joint opinion highlights that the power to deprive citizenship 'has an overwhelmingly disproportionate impact on people of non-white racial and ethnic backgrounds – as they are substantially more likely to have or be eligible for another nationality'.⁷ It advances the view that 'the prospective impact of s.5A [a new subsection proposed by Clause 9 to section 40 of the British Nationality Act 1981] – which effectively expands the circumstances in which the deprivation power can lawfully be exercised, as well as exacerbating the adverse consequences of a deprivation order for the person affected – would also fall disproportionately on a group which shares a protected characteristic for the purposes of Article 14'.⁸

Is this a proportionate means of achieving a legitimate aim? The opinion states that 'there would be a strong argument that [...] the provisions of s.5A are broader in scope, and incorporate fewer safeguards, than is necessary to ensure that valid deprivation orders can be made even where a person's whereabouts are unknown and/or they cannot immediately be contacted'.⁹

The opinion also concludes that Clause 9 'authorises breaches of Article 6 ECHR because it permits the disproportionate frustration of the right to access to court: *Ashingdane v UK* (1985) 7 EHRR 528,

⁶ Raza Husain QC, Eleanor Mitchell and Jason Pobjoy, 'Nationality and Borders Bill Clause 9 Joint Opinion', page 4, para 10 <<https://drive.google.com/file/d/1t5FQ2MtMb4gWpWWuOra-gzJYFYWtwIW6/view>> accessed 19 January 2022.

⁷ ibid, page 35, para 98.

⁸ ibid, page 37, para 103.

⁹ ibid, pages 37-38, para 107.

§57'¹⁰ and that ‘there is a very significant likelihood that decisions taken in reliance on the Secretary of State’s new powers would result in serious breaches of Article 8’ [ECHR].¹¹

Conclusion

Clause 9 offends against the common law, international legal standards, and the United Kingdom’s human rights commitments. It should not stand part of the Bill. It should be omitted.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners’ Association at info@ilpa.org.uk.

¹⁰ ibid, page 31, para 88.

¹¹ ibid, page 33, para 92.