Immigration Bill Ping Pong House of Lords 12 May 2014

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association 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 an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other, consultative and advisory groups.

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In this briefing address matters that have changed in the House of Commons Consideration. There are two: guardians for trafficked children where the Commons has rejected the Lords' amendment and deprivation of citizenship resulting in statelessness where the Commons has disagreed the Lords amendment but has proposed new provisions.

In terms of the substance of the provisions, ILPA would like to see the House of Lords insist on both its amendments although we recognise that in the case of guardians for trafficked children matters of procedure are likely to have dictated the approach taken.

Guardians for trafficked children

Motion A Lord Taylor of Holbeach to move, That this House do not insist on its Amendments 16 and 24, to which the Commons have disagreed for their Reasons 16A and 24A.

Motion A1 Baroness Butler-Sloss to move, as an amendment to Motion A, at end to insert "but do propose Amendment 16B in lieu".

Before Clause 60

16B Insert the following new Clause—

> **"Report on provision of child trafficking guardians for child victims of trafficking in human beings**
>
> Within twelve months of the date of dissolution of the current Parliament, the Secretary of State shall report to both Houses of Parliament on the provision of child trafficking guardians for child victims of trafficking in human beings."

Purpose

Motion A would remove all reference to guardians for trafficked children from the Bill. Motion A1 does not seek to reinstate what was before the Lords but does seek replace it with provision for the Secretary of State to report to both Houses on guardians for trafficked children within 12 months of the dissolution of the current parliament.

Briefing

The reason given by the House of Commons for disagreeing the Lords' amendment was that it would involve a charge on public funds. The amendment would involve a charge on public funds and we are mindful of the convention that the Lords does not insist on a question to which the Commons would give the same answer[1] which is, we assume at the root of motion A1 in the name of Baroness Butler Sloss.

It is extremely important that the responses given by the Minister in the House of Commons are scrutinised both in the House of Lords and in a report such as that proposed in Motion A1. An accurate and clear statement of the Government's position is needed.

The Minister suggested that a reason to reject the amendment was that it dealt only with children under immigration control and that he would wish in the Modern Slavery Bill to craft provisions covering all trafficked children[2]. There is nothing to prevent the Government accepting this amendment and then repealing the provision, whether it had been brought into force or not, when it replaces the clause with one in the Modern Slavery Bill. Trafficking legislation has a long history of being passed between immigration legislation and legislation covering all groups in this manner[3]. However, trafficked children under immigration control have very particular and specific needs. Like all trafficked children, they may be involved in criminal investigations, prosecutions and trials of their traffickers. Like all trafficked children they will need to recover, to rehabilitate and to build a present and a future. But unlike British citizen and settled trafficked children, those under immigration control will be doing all this alongside determining whether their future lies in the UK or overseas and if the former quite possibly fighting for their right to stay, including in the tribunals and courts. They will often face age disputes and often be accused of not telling the truth in other respects as well. It may be difficult or impossible to trace their families. These particular needs, of course, are not the needs of trafficked children only but of all children under immigration control. Just as the Minister wishes any provision to extend to all trafficked children so we wish it to extend to all unaccompanied children under immigration control. That is why we wish to see it in this bill.

The Minister promised an "enabling provision" in the Modern Slavery Bill, under which a scheme of guardians for trafficked children could be set up. He made reference to the Government's proposed trial of non-statutory advocates for trafficked children[4].

We are concerned that a non-statutory scheme, or a powers afforded by means of secondary legislation only, may be insufficient to meet one of ILPA's main concerns, which is for a guardian in legal proceedings.

A child presenting an immigration case, whether for asylum or for leave under other provisions of immigration law will need support in gathering evidence, getting to appointments on time, thinking through the choices s/he must make. We agree that all that could be done by a non-statutory guardian. But the difficulty we have is in cases where a child is not competent to give a

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[1] We are guided by the undated *Explanatory note on Financial Privilege by the Clerk of the House of Commons and the Clerk of Legislation*, see http://www.parliament.uk/documents/commons-information-office/financial-privilege.pdf

[2] HC Report 7 March 2014 col 219.

[3] See e.g. ss 145 (and 146) of the Nationality, Immigration and Asylum Act 2002, where the offence of Traffic in Prostitution was created as an interim measure pending the passage of sexual offences legislation. In the Sexual Offences Act 2003, the government produced a whole part of the Act on trafficking (sections 57 to 60).

[4] 7 May 2014 : Column 219.

legal representative instructions in his/her case. We have presented before the real life example of an eight year boy. The man he called his father the Home Office said was his trafficker. There was no person competent to give instructions to the lawyers. Insofar as the child was giving instructions that he was not competent to give, these were that the man was his father. Where the case is before the higher courts, the court in the exercise of its inherent jurisdiction, can appoint a person to be a litigation friend[5]. Presumably it could appoint one of the Government's guardians. But what happens before the Tribunal or before the Home Office? A person with parental responsibility could give instructions. But all too often there is no one with parental responsibility for the child. Local authorities all too often do not take a care order in respect in these children. If there is no care order, there is no one with parental responsibility for the child. We find it hard to imagine a case where a British citizen trafficked child could not return to the care of his/her parents or did not have parents where the local authority would not take out a care order. Again this highlights that children under immigration control stand in particular need of guardians.

If a local authority did take parental responsibility for the child there is still be the question of whether there is a conflict of interest given that if the child gains the right to stay in the UK then this will impose additional obligations on the local authority. Parental responsibility is not as we understand it divisible so one could not say "the local authority has parental responsibility for all matters except the immigration case, whereas the guardian has parental responsibility". Thus it appears to us that primary legislation would be required for the guardian to be able to give instructions to a lawyer where the child was incapable of doing so (in the higher courts children under 18 are all "under a disability" in this regard, they cannot bring legal proceedings) including where it was necessary to give instructions in the child's best interests that did not align with the views being expressed by the child. That is why we consider that primary legislation is needed**.** We agree with Lisa Nandy MP, a former Chair of both the Refugee Children's consortium and of ILPA's Refugee subcommittee that:

> *Children … accommodated under section 20 of the Children Act 1989 do not have anybody with parental responsibility to instruct their lawyer, which is why this debate really matters.*[6]

We ask peers to ask the Government to reflect on these concerns and whether an enabling provision would be sufficient.

The Minister also highlighted that the non-statutory scheme of personal advocates will only apply to children to age 18[7]. We consider this insufficient. We have worked with children given notice to quit their accommodation and the UK on their 18th birthday. There continue to be struggles to get children under immigration control the support to which they are entitled as care leavers. The amendment is focused on a group of children who have been subject to human trafficking and it is very far from fanciful that they will need extra support to age 21. **We ask peers to press the Government to extend its trial scheme to 21 year olds.**

The Minister said of his trial that it "was"[8] due to start on 1 July**. It would be helpful to know whether, if this Bill is not amended to make provision for guardians, the trial will still start on that date.** He said that it would cover 23 local authorities[9]. **Will all**

[5] Civil Procedure Rules, Part 21, Children and Protected Parties see http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part21
[6] HL Report 7 May 2014, col 212.
[7] HL Report 7 May 2014, col 219.
[8] *Ibid.*
[9] *Ibid.*

trafficked children be placed with those authorities? If not, what will happen to those who are not?

Finally, we observe that in the cases of lifting the reservation to the UN Convention on the Rights of the Child in respect of refugee children and in the case of placing the Home Office in the exercise of its immigration functions under a duty to safeguard and promote the best interests of the child it was the perseverance of the House of Lords over many years that led to changes in the law. For example the section 55[10] duty to safeguard and promote the welfare of children started life as an amendment laid to the children bill by Earl Howe in 2004[11]

Deprivation of citizenship resulting in statelessness

Motion B Lord Taylor of Holbeach to move, That this House do not insist on its Amendment 18 and do agree with the Commons in their Amendments 18A and 18B.

Motion B1 Baroness Smith of Basildon to move, as an amendment to Motion B, leave out from "House" to end and insert "do insist on its Amendment 18".

Purpose

Motion B **r**estores the provisions in the Bill as to deprivation of citizenship as they were pre Lords report but with the addition of provision that deprivation of citizenship resulting in statelessness can take place only when the Home Secretary has reasonable grounds to believe that, under the laws of a country or territory, an individual is able to become a national of that country or territory and provision for a report on the operation of powers of deprivation of citizenship resulting in statelessness although not of powers of deprivation of citizenship more generally. The report would be produced after one year and thence every three years. The amendment is silent on whether the person carrying out the review would be independent. The review must be laid before parliament but the Secretary of State can withhold from parliament such provisions as she is of the opinion (a subjective test) that it would be not only "prejudicial to national security" but also "contrary to the public interest" to be made public.

Motion B1 Restores the Bill as it last left the House of Lords, with no powers to deprive persons of their citizenship where this would result in statelessness but provision to convene a committee to examine the question of deprivation resulting in statelessness.

Briefing

We urge peers to insist on their amendments. We do not consider that the new provisions introduced by the House of Commons provide the necessary protection against statelessness.

The "loophole" argument

The Minister James Brokenshire MP repeatedly referred in the debates in the Commons to closing a "loophole" in UK law that prohibits deprivation. It is not a "loophole". It is an exception to the power to deprive that acknowledges what the UK Supreme Court called in *Al Jedda* "the evil of statelessness", the US Supreme Court held to be, in *Trop v Dulle*s, "cruel and

[10] Borders, Citizenship and Immigration At 2009.
[11] HL Deb 17 June 2004 vol 662 col 989 see http://hansard.millbanksystems.com/lords/2004/jun/17/children-bill#S5LV0662P0_20040617_HOL_639

unusual punishment" and what Lord Deben referred to in debates on this Bill one of the most terrible things that can befall anyone[12]." The Minister's comment suggests that either he has not grasped or that he is unimpressed by, the gravity of the matters at stake. This is in stark contrast to the way the home Secretary introduced the provision at Commons Report:

> *Depriving people of their citizenship is a serious matter. It is one of the most serious sanctions a state can take against a person and it is therefore not an issue that I take lightly[13].*

The "reverting to the pre 2002 position" argument

The Minister chose his words with care when he said "many respects, we are seeking to bring the law back more closely to the pre-existing [pre-2002] position". There is a very profound difference between the laws before 2002 and now. The law on deprivation of citizenship was changed fundamentally in 2004. We set out in our briefing for Lords' Committee stage[14] full details of that, and Baroness Kennedy deprived in their application in the Madhi Hashi case. In summary, the law changed so that the deprivation took effect prior to any appeal, rather than only when all appeals had taken place and been determined against the appellant. Prior to 2004, an appellant had a British passport on which to return to the UK to exercise his/her in country right of appeal. After 2004, the person did not. This is subsequent to the UK's giving up the power to make persons stateless. The power proposed in this Bill to strand a stateless person outside the UK, to deny a stateless person an in-country right of appeal, is novel.

Between 1949 and 1973, a total of ten citizens of the UK and Colonies were deprived of their British nationality. We do not have figures for how many were left stateless. From 1973 until the coming into force of the Nationality, Immigration and Asylum Act 2002, which prohibited deprivation on character grounds where this would leave a person stateless, no one was deprived of their British nationality, whether to be left stateless or not[15]. Any suggestion that deprivation of citizenship leaving persons stateless was the norm until 2002 is thus inaccurate

Our fear, as explained in our briefings, is that persons will be deprived of their citizenship while outside the UK, in States such as Syria or Somalia, as has been the case with those deprived of their citizenship in the past. They may be unaware of their deprivation ; they may be unaware of any right of appeal. If they are aware of a right of appeal they may have the most grave difficulty in lodging such an appeal and in presenting their case. Sir Richard Shepherd silenced the rowdy House of Commons with his chilling speech:

> ***Sir Richard Shepherd:*** *… my concern is not the difficulty for Governments; my concern is for the British common law system. This is not about the European Court of Justice—its rulings or anything else. The issue of concern to me is: what is our process?*
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> *I believe, and this was fundamental to our legal system, that a person should know the reasons why they are to be aggrieved, but that is not possible under the Bill. He or she will not know the reasons why they are being deprived of citizenship, so they can make no case that can be held to be valid, because they do not know what they are challenging—or they will claim they do not know what they are being challenged with. We do not know and the public do not know, so this violates one of the first principles of our legal system—our common law system. I want the House always to remember that our common law system*

[12] HL Report 19 March 2014 col 213.
[13] HC Report 30 January 2014 col 1038.
[14] Available at http://www.ilpa.org.uk/resources.php/25900/ilpa-briefings-for-immigration-bill-house-of-lords-committee-stage-3-march-2014
[15] HL Deb 8 July 2002 col 66W.

in England has been absolutely essential to our liberties, freedoms, standing and our sense of who we are.

I understand the difficulties that Governments face, as there are a lot of wicked, evil people out there, but the answer has always been to prosecute. We are told, "Oh we can't prosecute because in a prosecution we may have to reveal our sources." This is the nightmare situation that the world in which we now live is facing: we are not to know, we cannot know and we cannot challenge. The Special Immigration Appeals Commission is one of the most monstrous extrusions on the national scene, as not even the solicitor representing the accused or the person who loses their citizenship knows the reasons why their client is there. Gisting? Well, all those rules that have been put in place essentially deny open justice using the argument of national security.

I have been a Member of Parliament for 36 years, and I look back over the decline of our sense of who we are, what our system is, and our freedoms and liberties, which are concentrated in the concept of the common law … We, as citizens of this country, have a right to know why people are charged. That is why we have an open court system, so that we can judge whether the measures are competent, reasonable or truthful to the purpose of our nation. That is why I cannot support the very notion that so much power should be concentrated in one individual—a Home Secretary—whether good or bad, that they may make decisions of this nature without our being able to challenge whether they are valid, true or right. I want the House to stand up for who we are and what our system of justice is—and it is not secret justice[16].

The Bureau of Investigative Journalism has documented[17] what has happened to those deprived of their British citizenship in the past in cases where their fate is known. These are not persons left stateless, but persons deprived of their citizenship. Death and rendition feature on the list, as do unsuccessful appeals. The Government continues to decline to tell parliament how many of those deprived of their citizenship were out of the UK at the time. It is correct that a number have appealed. Lawyers in these cases have done astonishing work. But not everyone has a lawyer and often, despite lawyers' best efforts, appeals in these circumstances have failed.

The *"we are seeking to address the specific issue highlighted by the Supreme Court in the al-Jedda case"* [18]argument

When one looks at what the Supreme Court said in *Al Jedda*[19] in context it is plain that it is not highlighting a specific issue at all but addressing, with reluctance and no little exasperation, an argument put before it by the Secretary of State with which it is wholly unimpressed.

23.The Secretary of State invites the court to determine the appeal on a premise. It is that on 14 December 2007 the respondent could have applied to the Iraqi authorities for restoration of his Iraqi nationality; that under Iraqi law he then had a right to have it restored to him; and that its restoration would have been effected immediately. Pressed by the court to explain whether her argument extended to a person's right to obtain a nationality never previously held – such as, perhaps, a Jewish person's right to obtain Israeli nationality or a wife's right to obtain the nationality of her husband – Mr Swift QC, on behalf of the Secretary of State, explained that the argument did not extend beyond the restoration of a former nationality. Pressed further to explain whether the argument extended to a person who, prior to her order, had had a right to secure the restoration of his former nationality but who, by the date of the order, had lost that right, Mr Swift explained that the focus was upon what the person could achieve in response to the order and thus that the argument did not extend that far. …

[16] HC Report 7 May 2014 : Column 205-6.
[17] http://www.thebureauinvestigates.com/2013/02/26/medieval-exile-the-21-britons-stripped-of-their-citizenship/.
[18] James Brokenshire MP HC Report 7 May 2014 col 192.
[19] SSHD v Al -Jedda [2013] UKSC 62 (9 October 2013) http://www.bailii.org/uk/cases/UKSC/2013/62.html

25. An appellate court has no need to address argument founded on a premise which it considers unrealistic and, in the absence of any other ground for the appeal, can dismiss it without doing more than to explain why it considers the premise to be unrealistic. In my view, at least on the findings made below, the present appeal comes close to deserving that unusual treatment. …

26. … there was an element of indulgence on the part of the Court of Appeal towards the Secretary of State in its accession to her invitation to proceed on the suggested premise; and that, were it to proceed likewise, this court would be extending an analogous indulgence. On balance, however, and in the light of the time, effort and expense which has now been devoted to the substantive argument, I consider that this court should adopt the suggested premise and proceed to determine the clean point, namely whether an order for deprivation made against a person who, at its date, can immediately, by means only of formal application, regain his other, former, nationality is invalid under section 40(4) of the Act.

…

30.The Secretary of State places great weight on the word "satisfied" …"if [she] is satisfied that the order would make a person stateless". … Irrespective, however, of whether the word "satisfied" in subsection (4) can sensibly be afforded any significance at all, I am clear that it cannot bear the weight which Mr Swift seeks to ascribe to it. He contends that it confers latitude upon the Secretary of State – and, in the event of an appeal, upon the Tribunal or the Commission – to look beyond the ostensible effect of the order to the active cause of any statelessness and, in particular, to the facility of the person to secure restoration of his previous nationality. But a requirement that I should be satisfied of a fact does not enlarge or otherwise alter the nature of the fact of which I should be satisfied. …

32. …But a facility for the Secretary of State to make an alternative assertion that, albeit not holding another nationality at the date of the order, the person could, with whatever degree of ease and speed, re-acquire another nationality would mire the application of the subsection in deeper complexity. In order to make his argument less unpalatable to its audience, Mr Swift, as already noted, limited it to the re-acquisition of a former nationality, as opposed to the acquisition of a fresh nationality. But, with respect, the limitation is illogical; if valid, his argument would need to extend to the acquisition of a fresh nationality. Yet a person might have good reason for not wishing to acquire a nationality available to him (or possibly even to re-acquire a nationality previously held by him).

33…as an addition to the person who will "have" another nationality on the date of registration, Parliament, reflecting the terms of the 1961 Convention, there refers to the person who will "acquire" another nationality. Parliament would have been capable of making an analogous addition to section 40(4). After the words "would make a person stateless", it could have added the words "in circumstances in which he has no right immediately to acquire the nationality of another state". But it did not do so; and the Secretary of State therefore invites the court to place a gloss, as substantial as it is unwarranted, upon the words of the subsection.

The Secretary of State in *Al Jedda* asked the court, against its better judgment as to whether it should be examining such a hopeless point at all, to address the effect on her powers of deprivation of a person's being entitled, with no intervening discretion, to reacquire a nationality s/he had previously held as of right and without delay. The Court said no effect whatsoever.

The Secretary of State does not now seek an amendment in the terms of the premise she put forward in *Al Jedda* but seeks a very much broader power. This was explored in the Commons' debates.

In *Al Jedda* the Secretary of State limited her argument and hence the court's consideration, to reacquisition of a nationality previously held. Fiona Mactaggart MP said:

> *All the examples that the Minister has used relate to cases in which he expects people to reacquire a nationality that they gave up to avoid having their British nationality taken away. If that is his intention, would it not have been better to table a much narrower amendment in which that was the circumstance in which the Home Secretary could consider withdrawing a person's citizenship? That might have been more broadly welcomed in the House than amendment (*a).[20]

The Minister did answer her specific point but simply said that the amendment was carefully framed. He also made reference to the Supreme Court in *Al Jedda*.

In *Al Jedda* the Secretary of State was limited her argument to a nationality that could be required immediately. Sarah Teather MP asked the Minister to comment on

> *"…the time frame in which he thinks it is reasonable to expect somebody to obtain another citizenship? … would somebody be stateless for two years, five years or 10 years?*
>
> ***James Brokenshire:*** *That is largely in the hands of the individual. When the power is exercised, it will be open to the individual to seek the citizenship of the other country. We are unable to compel them to act in that way. That goes to the heart of the problem that we have identified. It is open to the individual to seek the citizenship of the other country, so it depends on what action they take* [21].

That fails to address the question of cases where it is not the fault of the individual but where a State fails to recognise the person and **the Minister in the House of Lords should be asked to address the point.**

In *Al Jedda* the Secretary of State limited her argument and hence the Court's consideration, to the reacquisition of a nationality as a matter of right. Mr Brokenshire MP said:

> *..the Home Secretary will consider the relevant nationality laws of a person's country and that person's circumstances, and she will make a decision based on whether, under those laws, the person is able to acquire another nationality. The test is whether there is a route under the law, but she will have regard to other considerations—for example, about practical or logistical arrangements*[22].

and

> *…the primary consideration is for the Home Secretary to research various materials and determine whether the individual could reacquire their former nationality, because that is what we are largely talking about in the circumstances of considering such laws. I am sure that she would also have to consider practical issues and the other surrounding circumstances. It is difficult to be specific, as individual facts and cases will no doubt be relevant to the provision. She will, therefore, wish to consider those other practical or logistical arrangements as part of her determination about whether there are reasonable grounds for the individual to secure citizenship from another state*[23].

There are echoes of the Secretary of State's efforts to place weight of notion of her being "satisfied" described in the extract from *Al Jedda* above. As Sir Richard Shepherd made clear, it will be difficult in practice to know how the Secretary of State has applied the test. But the comments of the Minister in Committee raise many concerns about how it is intended to apply it.

[20] HC Report, 7 May 2014 col 194.
[21] HC Report 7 may 2014, col 195-6.
[22] HC Report 7 May 2014 col 191.
[23] *Ibid* ,col 193.

Is the Minister distinguishing between what the laws of another State say about whether a person can acquire another nationality, which he describes as the test, and whether the person will in practice be able to acquire that nationality which he seems to suggest that she may, but is not bound to, take into account? **Clarity on this point is needed**.

The 1954 UN Convention on the Stateless of Persons uses the much more careful, and internationally recognised, formulation:

> *Article 1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.*

The UNHCR Guidelines on Statelessness No. 1: *The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*[24] say

> ***When is a person "not considered as a national" under a State's law and practice?***
>
> *16. Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status.14 This is a mixed question of fact and law.*
>
> *17. Applying this approach of examining an individual's position in practice may lead to a different conclusion than one derived from a purely objective analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.*

Does the Government intend to distinguish between cases where a person is entitled to another nationality and cases where there is an intervening discretion to afford or withhold nationality? For example, in British nationality law even where a person meets conditions as to age, parentage and residence (all of which can be matters of dispute of fact), the Secretary of State must further determine them to be persons of good character, a discretionary judgment. In the case of David Hicks, the Australian national detained in Guantanamo Bay, he registered because his mother was British. At the time when he registered (the law was subsequently changed) there was no good character test imposed on those registering as British because they had been born to a British mother outside the UK before 1 January 1983, i.e. at a time when women were not citizens enough to pass on their nationality to their children born overseas. Nonetheless, the then Secretary of State sought to argue that she did not have to register him as British because he was not of good character[25]. When told she had no such discretion and after further skirmishes, she opted for registering him as a British citizen and then immediately depriving him of his British citizenship.

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[24] HCR/GS/12/01, 20 February 2012 **see** http://www.unhcr.org/4ffa957b9.html **.**

[25] *R(Hicks) v SSHD* [2005] EWHC 2818 (Admin) (13 December 2005) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2005/2818.html&query=title+(+hicks+)+and+title+(+v+)+and+title+(+secretary+)+and+title+(+of+)+and+title+(+state+)&method=boolean and *SSHD v Hicks* [2006] EWCA Civ 400 (12 April 2006) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/400.html&query=title+(+hicks+)+and+title+(+v+)+and+title+(+secretary+)+and+title+(+of+)+and+title+(+state+)&method=boolean

There are many situations in which a person has rea difficulties in acquiring a nationality to which they are entitled as a matter of law. We prepared (in some haste) a briefing on this subject for Commons Consideration[26]. Peers may also recall examples given in the Open Society Justice Initiative briefing[27] for Lords' report:

> ***Dominican Republic***. *In September 2013, the nation's highest court issued a ruling denationalizing many thousands of Dominicans, leaving them stateless. Those affected were born in the Dominican Republic, of Haitian descent. The decision was justified as a reinterpretation of laws dating back to 1929 and with the false assumption that affected individuals had a claim to Haitian nationality.*
>
> ***Zimbabwe.*** *A 2001 amendment to the nationality law made thousands of Zimbabwean citizens by birth with foreign parents stateless. Zimbabwe did not allow dual nationality at that time, and the new provision required any citizen with a claim to another nationality to renounce it – even if they never had it. Absent proof of renunciation, they lost their Zimbabwean*

Even where a person manages to appeal all the difficulties in determining matters of foreign law will apply. The Minister in the House of Commons did not confirm that all discussion of foreign law would take place in open proceedings in the Special Immigration Appeals Commission. We have seen many examples of Government assertions about other State's laws that were erroneous. Lord Avebury battled for many years to show that the Government's assumptions as to when persons had retained Indian nationality was erroneous and that that this had led to persons being wrongly refused entitlements to British citizenship consequential upon the return of Hong Kong to China[28]. He continues to press for clarity on the position of Malaysian British Overseas Citizens who renounced their Malaysian nationality[29]. Whether a person would in practice be able to obtain a nationality can also be a matter of dispute. The attitude of the Chinese Government to persons obtaining British citizenship was repeatedly pleaded as a reason by British Nationals (Overseas) with no other nationality or cit8izenship could not be included in section 4B of the British Nationality Act 1981 when it was inserted in 2002 to allow those with a form of British nationality giving them no right of abode in any country and no other nationality or citizenship to upgrade to British citizenship. Lord Goldsmith reiterated these concerns in his *Citizenship: our common bond* in 2008[30]. Yet when the Borders Citizenship and Immigration Act 2009 finally added British Nationals (Overseas) to the Act, there was no objection whatsoever. In the Gurkha case[31] it was in the end for the claimants to bring evidence that there was not the hostility on the part of the British government to the Gurkhas' obtaining British citizenship that had previously been suggested.

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[26] Available at http://www.ilpa.org.uk/resources.php/26328/ilpa-briefing-immigration-bill-commons-consideration-of-lords-amendments-further-briefing-continued-

[27] http://www.ilpa.org.uk/resources.php/26116/ilpa-briefing-for-the-immigration-bill-house-of-lords-report-7-april-2014-deprivation-of-citizenship

[28] See the 6 February 2006 letter of Tony McNulty MP to Lord Avebury at http://www.publications.parliament.uk/pa/ld200506/ldlwa/060228wa1.pdf

[29] See e.g. Damian Green MP to Lord Avebury of 6 February 2012, Lord Avebury to Damian Green of 11 February 2012 (two letters), 18 October 2012 Mark Harper MP to Lord Avebury, 23 October 2012 lord Avebury to Mark Harper. There is very much more.

[30] See http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf

[31] *Limbu & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2008] EWHC 2261 (Admin) (30 September 2008) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/2261.html&query=title+(+limbu+)&method=boolean

Dr Julian Huppert and Alok Sharma MP asked what would happen if the Secretary of State deprived someone of their citizenship and when they applied for citizenship of another country they were turned down. The Minister replied that if the individual were in the UK "there is precedent for giving limited restricted leave to remain"[32]. **The Minister in the House of Lords should be pressed on what will happen if the person is outside the UK. First in cases where the Secretary of State had not held a reasonable belief (and had thus acted unlawfully) but secondly in cases where her belief had been reasonable, but erroneous.** Assessment of the letter of foreign citizenship laws and of their operation in practice is a minefield full of opportunities for different views. We add, so that it is clear that the Secretary of State has no power to naturalise a person if she does not consider them to be of good character and also no power at large to naturalise an adult, so she is not in a position to restore a person's British citizenship.

Reasonableness of acquisition of another nationality

As the extract above makes clear, this point was not explored in *Al Jedda* because, pressed by the Court, the Secretary of State elected instead to confine her argument to reacquisition of nationality previously held and she lost on this point.

The Government amendment does not envisage a situation in which it is not reasonable for a person to acquire another nationality. For example they might be a refugee from that country, including as a result of having been part of a stateless minority discriminated against in that country. The country might be, for example, Syria, in the grip of a desperate civil war, or a country where persons of their gender/ religion/sexual orientation/political persuasion or history says that they will face torture. There is no reference in the clause to its being reasonable to expect the person to acquire another nationality or citizenship. Is it intended to be the case for example that any Jewish person could be deprived of their citizenship on the basis that they could obtain Israeli nationality?

We are not, we repeat at the risk of being tedious, talking about persons in the UK and well-placed to stand upon rights not to be removed from the UK under Article 3, the prohibition on torture, inhuman and degrading treatment or punishment under European Convention on Human Rights. We are talking of persons who may in the country at which they are at risk, or who will face *refoulement* to that country and no protection. We recall that in the immigration, not nationality, case of *MK (Tunisia)*[33] the UK had extradited MK to Italy recognising that he would risk torture in Tunisia but satisfied that Italy would not send him there. When Italy made moves to do just that, the UK stripped MK of his leave. The provisions under which he returned to UK (successfully) to appeal were reversed in the Crime and Courts Act 2013.

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[32] Ibid. Col 197.

[33] *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333 (25 March 2011), available at http://www.bailii.org/ew/cases/EWCA/Civ/2011/333.html . Discussed in *Arbitrary Deprivation of Nationality, ILPA comments for the Office of the High Commissioner for Human Rights*, 15 February 2013, available at http://www.ilpa.org.uk/resource/17273/arbitrary-deprivation-of-nationality-ilpa-comments-for-the-office-of-the-high-commissioner-for-human

The Review

Sir Richard Shepherd said in the House of Commons:

> *Panicked by the Lords defeat, the Government have introduced their own amendments, which would provide a review once the measure had been implemented. That is closing the stable door after the horse has left without its passport, having been deprived of its citizenship. It is too late to do anything then. We have to take a look at how the measure would impact on what we are trying to achieve and secure before we effect any legislation rather than afterwards*[34].

We agree. There is no guarantee that the person producing the report would be independent. The Secretary of State can withhold parts of the report from parliament not only on the grounds that she is of the opinion (a subjective test) that it would be "prejudicial to national security" to withhold them but also on the grounds that she is of the opinion that it would be "contrary to the public interest" for do so. After the first year, the report is to be laid only once every three years. Whatever parliament thinks of the report will have no effect upon whether the provisions continue in force. This would appear to be no more than the amendment the Minister laid but did not move at Lords' report, with the concession that parliament can see some parts of the report. The House of Lords has no more reason to be impressed with this provision than it was then.

In the House of Commons, the Minister said

> *We have not yet decided who will conduct those reviews. It may be appropriate, for example, to appoint the independent reviewer of terrorism legislation—currently David Anderson—to take on that additional task, but we are mindful that if the review of the deprivation power is added to the demands on him, that must not be to the detriment of his capacity to meet his existing important statutory reviews*[35].

Were it considered appropriate to appoint a Home Office official that would be equally permissible under the terms of the Commons' amendment.

John Mcdonnell MP said in the House of Commons:

> *"… the amendment makes no reference to independence.*
>
> *In addition, the Secretary of State will have a veto over what is reported to the House and that applies not just to national security but, as the amendment says, to public interest. Public interest has been used in this House by successive Governments to avoid embarrassments and to avoid providing the House with information on which we can make considered judgments.*"[36]

He received no reassurance on either point from the Minister in reply.

[34] 7 May 2014 col 207.
[35] HC Report 7 May 2014 co1 11 99

[36] HC Report 7 May 2014 col 212

Other matters

In response to a question from Lord Avebury, Lord Taylor of Holbeach indicated that he would be happy to put a paper dealing in detail with Professor Goodwin Gill's paper in the library[37]. That paper has not yet appeared in the depositary and the Minister should be pressed on when it will appear. It is unclear why, if the Government is confident that the powers and their legal basis need no further scrutiny, it has not been produced already.

In our preliminary briefing for Third Reading we addressed the matters raised in Lord Taylor's letter of 17 April 2014[38] to Baroness Smith of Basildon following Lord's Report. In the event deprivation of citizenship was not debated at Lords' Third Reading and therefore we reproduce those comments here. The debates in the Commons and the Minister's letter are evidence, if evidence is needed, that the Committee proposed by the House of Lords will have much to consider.

Text from ILPA preliminary briefing for Third Reading.

The Minister's letter is a disappointing document. Its opening

> *"the Government is currently considering how to protect the security of its citizens following the vote on the deprivation of citizenship provisions in the Immigration Bill, on Monday 7 April"*

is pompous and does scant justice to the concern for national security expressed by those who participated in the debate or to the carefully reasoned arguments they put forward for considering that the clause would not contribute to national security.

The majority did not accept that deprivation of citizenship resulting in statelessness would make the citizens of the UK, or indeed of other countries, safer. It conceived of security not as a national, but as a global, affair. A person who threatens security is the responsibility of all States, in the spirit of, as Lord Macdonald of River Glaven put it, "the comity of nations" and "solidarity between free countries in the face of terrorism." He said

> *"… statelessness deprives people of the "right to have rights". It brings about a bleak, hopeless status, or rather a complete lack of status, that the British Government should have no role in encouraging, first, because of the positively terminal impact that the imposition of statelessness is bound to have on the ability of the rightless to function in a way that is even remotely human in the modern world and, secondly, because it is clear that such an imposition as a policy measure can have no sensible part in a co-ordinated international effort to combat security threats. …"* (17 March 2014, col 53)

The Lord Brown of Eaton-under-Heywood, having indicated that he was in any event unimpressed by the national security arguments, said firmly *"…it is very unlikely that any advantage to national security could begin to compensate for the indisputable reputational damage that such a measure would occasion"* ((17 March 2014, col 54).

Baroness Kennedy of the Shaws asked

> **…** *Where is the rule of law of which we are so proud? …Deprivation of citizenship is potentially inconsistent with obligations accepted by the United Kingdom under many different treaties dealing with*

[37] 7 April 2014 col 1192

[38] Available at http://data.parliament.uk/DepositedPapers/Files/DEP2014-0641/170414_-_Baroness_Smith_-_Deprivation_-_Letter_from_Lord_Taylor.pdf

> *terrorist acts, in particular, the obligations of investigation and prosecution in the fulfilment of which every other state party has a legal interest.*" (10 February 2014, col 484).

A*ut dedere aut judicare* is to be preferred to offshoring[39] those who threaten the vital interests of the UK.

The letter in many respects appears lazy, rehashing arguments that were demonstrated to be fallacious at earlier stages. Thus, the letter advances argument that deprivation of citizenship allows the Government to stop people travelling although it has all the powers it could want or need to deprive citizens a passport on national security grounds as was pointed out by Lord Pannick in the debate[40] with reference to the Minister's statement of 25 March 2013.

Another example, the letter again makes reference to the possibility of the immigration rules (Part 14, paragraph 400ff[41]) being used to give a person remaining in the UK after having been deprived of their citizenship on the grounds that they had done something seriously prejudicial to the vital interests of the UK, being given leave under the UK's statelessness determination procedure. Baroness Hamwee raised the rules on who can be given leave under that procedure in the debates[42] . As she alluded to and as we set out in full in our preliminary briefing for Third Reading, anyone who could be deprived of their citizenship under the proposed powers would be excluded from the stateless determination procedure on the grounds of character or conduct. The Minister acknowledges in his letter that there are exclusion provisions. So why mention the stateless determination procedure at all, when it is irrelevant?

The letter is silent on the question posed by the Joint Committee on Human Rights and in the debates of how many of the 25 persons deprived of their British citizenship since 2006 had been outside the UK at the time.

The letter says

> *"…we would expect any individual…to seek to resolve their nationality issues at the earliest opportunity"*

Quite how a person such as Madhi Hashi, rendered to the United States and there imprisoned, is supposed to set about "resolving his nationality issues" is wholly unclear. The letter goes on to say

> *"In cases where this is not possible, the individual would be able to avail themselves of whatever protection that country provides"*

The seemingly casual use of "whatever" says it all. Madhi Hashi sought to avail himself of "whatever" protection Djibouti could provide.

We have yet to see the full response to Professor Goodwin Gill's paper and in parliament his exegesis of the international law obliging states to readmit their nationals. We can only state that we have yet to find an international lawyer who does not find Professor Goodwin Gill's arguments on the point persuasive. Given the poor quality of the arguments in the Minister's letters, we are not holding our breath for the full response to Professor Goodwin Gill.

By the amendment made to the Bill the House asks for further and better argument before it takes a step, the gravity of which and the consequences of which for the persons concerned and the UK's international reputation, it took extremely seriously:

The Lord Avebury invited the House to consider "**…** the appalling example we are setting…the rest of the world. Britain was in the forefront in promoting the 1961 UN Convention on the Reduction of

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[39] See *Offshoring,* John Urry, Polity Press, April 2014.
[40] 7 Apr 2014: Column 1169.
[41] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279697/Immigration_Rules_-_Part_14.pdf
[42] 7 Apr 2014: Column 1177.

Statelessness, and has since worked to reduce the pockets of statelessness that still exist all over the world, such as the Bidoon in the Gulf states, the Rohingya and the Palestinians. How can we now pretend to a share in the leadership of the UNHCR's continuing effort to eliminate statelessness when, at the same time, we are enacting domestic legislation to create more stateless people?" (19 March 2014, col 212). The Lord Roberts of Llandudno reminded the House "Let us not forget the judgment of Chief Justice Warren ruling in the United States Supreme Court case of *Trop v Dulles* in 1958. He said that, "use of denationalization as a punishment", means, "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture." (17 Mar 2014 : Column 53**)** The Lord Deben said "… the exemplars are not ones that are easily taken to the heart of the broad mass of the British people. That means that those people should be particularly able to call upon this House… We live in a world in which statelessness is one of the most terrible things that can befall anyone." (19 March 2014 col 213) The Lord Brown of Eaton-under-Heywood recalled that "…Lord Wilson, in giving the Al-Jedda judgment, referred in paragraph 12 to "The evil of statelessness" and spoke of the "terrible practical consequences" that flow from it" (17 March 2014, col 54).