ILPA Briefing for House of Commons Committee stage of the Counter-Terrorism and Security Bill on 16 December 2014, Part 7 Miscellaneous and General, Clause 37 Review of Certain Naturalisation Decisions by the Special Immigration Appeals Commission: Clause Stand Part

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 committees, including Home Office, and other consultative and advisory groups.

At the time of writing no amendments have been tabled to Clause 37 and this is therefore a briefing for clause stand part. It builds on ILPA's briefing for second reading. For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, Alison.Harvey@ilpa.org.uk

PART 7 MISCELLANEOUS AND GENERAL

Miscellaneous

Clause 37 Review of certain naturalisation decisions by Special Immigration Appeals Commission

Introduction

We start by recalling the words of Sir Richard Shepherd MP on the Special Immigration Appeals Commission during ping pong on the Immigration Bill 2014:

> *…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 they are to be aggrieved… 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 in England has been absolutely essential to our liberties, freedoms, standing and our sense of who we are.*

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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 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. I did not invent it—we did not invent it—it came from the movement of the people of this country over hundreds of years and the development of our legal system. Year after year, in a way that one could never assume would happen, Governments have gone out searching for new measures to conceal the openness of what justice should be. 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.[1]

The effect of clause 37 of the Bill is to extend the provisions of s 2D of the Special Immigration Appeals Act 1997, which concerns challenges to the refusal to naturalise a non-EEA national as a British citizen under s 6 of the British Nationality Act 1981, to refusals to naturalise a non-EEA national as a British Overseas Territories citizen under s 18 of the British Nationality Act 1981.

Section 2D was inserted by s 37 of the Justice and Security Act 2013 with effect from 25 June 2013.[2] There is generally no right of appeal against a decision to refuse to naturalise a person as a British citizen, nor as a British Overseas Territories citizen, therefore any challenge must be brought by way of judicial review. However, closed material procedures cannot be used in judicial reviews. It was therefore deemed necessary to kick into the Special Immigration Appeals Commission (SIAC) the challenges in response to which the Government wished to rely on closed material. This was achieved by creating a limited right of appeal to the Commission.

The circumstances in which cases can be transferred to the Commission so that closed material can be used are broad, much broader than the basis on which, under the Justice and Security Act 2014, closed material procedures can be used in the ordinary courts. The adoption of a closed material procedure in immigration cases is required (not allowed, but *required*) not only "*in the interests of national security*" but also, "*in the interests of the relationship between the United Kingdom and another country.*" In addition the Secretary of

[1] HC deb 7 May 2014 : Columns 205-206

[2] Justice and Security Act 2013 (Commencement, Transitional and Savings Provisions) Order SI 2014/1482 (C.58)

State can certify that the information on which the decision was based should not be made public because this is "*otherwise in the public interest.*" The Constitution Committee considered that these additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents.[3] In proceedings before the Special Immigration Appeals Commission is that there is no requirement for the Secretary of State to consider first making a claim for public interest immunity.

Section 2D provided a right of appeal to the Special Immigration Appeals Commission against the refusal. Before the Commission, closed material procedures can be used. But by section 2D the right of appeal to the Commission is restricted to the principles that apply in a judicial review. That is to say the Commission exercises a supervisory jurisdiction, looking at whether the decision-maker acted reasonably, within his/her powers and without bias etc., rather than at the merits of the substantive decision. Being subject to closed material procedures on the broad basis described above is thus in no way offset by having a full right of appeal on the merits of the decision.

It would be helpful to use this opportunity to learn:

- **How many cases have been heard under s2D since it came into force?**
- **What have been the results of those appeals: in how many has the challenge to refusal to naturalise succeeded?**

How many appeals have been heard under section 2D since it came into effect on
Before the Special Immigration Appeals Commission, the procedure rules (rule 4) include a general duty to ensure

> *…that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.*

Thus the comments of the then Lord Chancellor and Secretary of State for Justice during the passage of the Justice and Security Act 2013 that "*...the only issue where you will go into closed proceedings will be national security*"[4] do not hold good in immigration cases.

The dangers of the broader reasons for using closed material procedures were highlighted by the then Nicholas Blake QC, himself a special advocate at that time, giving evidence to the Joint Committee on Human Rights:

> *"If you have a ton of reasons why there should be disclosure and you have a feather against, the feather beats the ton because the statute says nothing which transgresses the line is permitted and that is the point."* [5]

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[3] See the Constitution Committee, Third Report, 13 June 2012, Justice and Security Bill, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1803.htm

[4] Secret justice bill not perfect, says Ken Clarke', *The Guardian*, 29 May 2012

[5] Oral evidence before the Joint Committee on Human Rights, 11 March 2006, published as part of the Committee's 19th report of session 2006 to 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/7031204.htm See also his evidence

The requirements for naturalisation as a British Overseas Territories citizen are broadly the same as for a British citizen (good character, residence, knowledge of English, intention to reside in the territory. There are shorter residence requirements and no intention requirement for spouses and partners) The British Overseas Territories, formerly known as the British Dependant Territories and before that as part of the Crown's dominions and allegiance are Akrotiri and Dhekelia (Sovereign Base Areas on Cyprus); Anguilla; Ascension Island; Bermuda; British Antarctic Territory (no permanent inhabitants but in theory at least a baby could be born there and thus acquire the citizenship of territory), the British Indian Ocean Territory (the Chagos Islands); the British Virgin Islands ; the Cayman Islands; the Falkland Islands; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oena Islands; St Helena, Ascension and Tristan da Cunha; South Georgia and the Sandwich Islands; Tristan da Cunha and the Turks and Caicos Islands

MPs may recall that during the passage of the Immigration Act 2014 it was stated that protective measures, to allow children born out of wedlock to register as British citizens, could not be extended to British Overseas Territories citizens because it would be necessary first to consult with those territories.[6] **It would therefore be appropriate to ask in this case what consultation has taken place on this provision and what has been the result.**

We sound a particular note of concern with regard to the **Chagos Islands** and **ask how consultation has been carried out in respect of that territory.**

ILPA has long been concerned with the ever widening use of closed material procedures of which this is the latest example. In summary we contend:

- The case for the extension of closed material procedures has not been made out.
- Any use of closed material procedures must be closely circumscribed; more closely than is currently before the case before the Special Immigration Appeals Commission.
- All controls and limitations that apply in the courts should apply equally to cases that come before the Special Immigration Appeals Commission. Those appearing before the Special Immigration Appeals Commission should not be subject to a lower standard of protection than those in other courts.

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to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

[6] HC Deb 6 May 2014: Column 1417 per Lord Taylor of Holbeach.