Public Law Project and JUSTICE joint briefing on the Nationality and Borders Bill for the House of Lords Committee

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About Public Law Project

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

About JUSTICE

2. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Executive Summary

3. This briefing focuses on provisions of the Nationality and Borders Bill ('the Bill') which we consider undermine the rule of law and threaten access to justice. Contrary to the Home Secretary's stated intention of 'ensuring access to justice and upholding the rule of law',[1] PLP and JUSTICE believe that, as currently drafted, the Bill does not strike the right balance between its competing aims of making the system fairer, protecting those in need of asylum, and facilitating removal. Instead, it risks creating a system in which people with a legitimate basis to stay in the UK – and genuine grounds to fear removal - can be removed without effective access to justice.

4. We also consider that attempts to streamline appeals are focusing on the wrong end of the system. There is no reference in the Bill or its explanatory notes to the fact that around 50% of the appeals to the First-tier Tribunal against the Home Office's decisions are successful,[2] or that, on the Government's own evidence to the Independent Review of Administrative Law ('IRAL'), about one third of judicial reviews lodged against it were either settled or decided in the claimant's favour.[3]

5. Indeed, nothing in the Bill addresses the really urgent issue: how to improve the fairness, quality and efficiency of Home Office decision making processes so that more people receive the right decision first time and in a timely manner. The clauses addressed below will increase the risk of injustice for those subject to the immigration system and their families; at the same time, they will not achieve the Home Office's aims of a more efficient immigration system, particularly if the need for access to proper legal advice, better first-instance decision making, and a properly funded courts and tribunals system are not urgently addressed.[4]

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[1] Explanatory Notes, para 30.
[2] Tribunal Statistics Quarterly: July to September 2021, Table FIA_3 *First-tier Tribunal (Immigration and Asylum Chamber) Number of appeals determined at hearing or on paper*, available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021.
[3] The Government told the IRAL that 2/3 of judicial reviews lodged against it in 2019/20 were successfully defended. See Summary of Government Submissions to the Independent Review of Administrative Law, §47. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf
[4] The need for investment in the courts and tribunals system was recognised by the outgoing Lord Chancellor, Robert Buckland QC MP, in his letter of resignation to the Prime Minister: https://twitter.com/RobertBuckland/status/1438185693386354688/photo/1

6. We include below suggested amendments and analysis of the following provisions:
    a. Priority Removal Notices:
        i. Scope of PRN (Clause 20)
        ii. PRN presumptions (Clauses 21 and 25)
        iii. PRN expedited appeals (Clauses 22 and 23)
    b. Accelerated Detained Appeals (Clause 26)
    c. Removal of right of appeal for claims certified as clearly unfounded (Clause 27)
    d. Notices of deprivation of citizenship (Clause 9)
    e. Notices of removal (Clause 45)

Clause analysis

Priority Removal Notices: Overview (Clauses 19-25)

7. The key facts about Priority Removal Notices are as follows:
    a. The Bill introduces Priority Removal Notices (PRNs) for those who are liable to removal or deportation (Clause 19(1)).
    b. The recipient is given a period of time (unspecified in the Bill or the Explanatory Notes) to access up to 7 hours of legal advice (Clause 24) and then inform the Home Office of any grounds or evidence they want to provide in support of an asylum or human rights claim to remain in the UK.
    c. After the 'cut-off date', you must be able to prove you have a good reason for being late. If you cannot:
        i. Credibility in a new claim will be presumed to be damaged (Clause 21)
        ii. Evidence submitted will be presumed to have minimal weight (Clause 25)
        iii. Appeals which follow will be expedited and curtailed (Clauses 22 and 23).
    d. All of this is stated to be in order 'to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action' (Explanatory Notes para 220).

8. Our key concerns are as follows:
    a. The policy confuses efficiency with speed. Efficiency is not just speed; it is speed plus accuracy.
    b. Instead, the regime creates speed plus *inaccuracy* by:
        i. Increasing the use of presumptions, about credibility and weight, rather than deciding cases on their facts; then
        ii. Requiring the Tribunal to deal with the case at an expedited pace, with no consideration of whether doing that would cause unfairness; then finally
        iii. Removing the safety net of a second appeal.
    c. Making decisions based on presumption, and restricting access to robust appeal, is dangerous. It may make the process of removing people from the country faster. But that process will be one littered with more errors than we have now.
    d. An increase in inaccuracy is troubling, given that the number of successful challenges to Home Office decisions indicates that there is an unacceptably high rate of poor decision-making. Of the cases appealed to the First Tier Tribunal, around 50% are successful every year. When such high rates of error are combined with a reduction in due process in the courts and tribunals, it becomes extremely concerning.

e. Inaccuracy and lack of due process means vulnerable people will be removed wrongly and suffer grave abuses of their human rights.
f. This will not be "efficient" – it will be fast and unfair.

9. We primarily consider that Clauses 19 – 25 should be left out of the Bill. However, we provide alternative amendments below which we consider will beneficially probe the regime or create minimum standard improvements.

Scope of the PRN: Clause 20 (Priority removal notices: supplementary)

Suggested Amendment

Clause 20, page 24, line 39, leave out subsection (4) Explanatory Statement: This amendment ensures that individuals who are no longer liable to removal will not be subject to the consequences of Priority Removal Notices, including vastly curtailed appeal access.

10. Clause 20(4) was added with very little scrutiny in the Commons, and provides that 'A priority removal notice remains in force until the end of the period mentioned in subsection (1) [at least 12 months] *even if the PRN recipient ceases to be liable to removal or deportation from the United Kingdom during that period'* (our emphasis).

The problems with this clause

11. The PRN regime is for those who are to be removed or deported. The stated purpose is to remove individuals faster. However Clause 20(4) will subject people to the PRN regime even if they are no longer liable for removal. This broadening of scope is illogical; there can be no justification for the PRN regime to apply to those who cannot be removed or deported. Our above amendment corrects this.

Late compliance with priority removal notice: damage to credibility (Clause 21) and Late provision of evidence in asylum or human rights claim (Clause 25)

Suggested Amendments

Clause 21, page 25, line 31, at the end insert – (4A) A deciding authority shall not take into account the late provision of the material as damaging the PRN recipient's credibility where to do so would be unfair in all the circumstances. Explanatory Statement: This amendment requires the deciding authority to consider whether the presumption of damage to credibility is fair, rather than solely whether there are good reasons for delay.

Clause 25, page 30, line 26, at end insert –

(2A) A deciding authority shall not take into account the late provision of evidence in considering the weight to be given to it where to do so would be unfair in all the circumstances.
Explanatory Statement: This amendment requires the deciding authority to consider the presumption of minimal weight is fair, rather than solely whether there are good reasons for delay.

12. Clauses 21 and 25 are an attempt to short-cut decision-making in the Secretary of State's favour: rather than a decision being made on the facts of the case, the Clauses allow presumptions about credibility and weight to be made on the basis of delay only, with the possibility of disapplying the presumptions if you can show "good reasons" for being late.

Problems with these clauses

13. There are numerous perfectly legitimate reasons why late claims are made. These include but are certainly not limited to:
    a. difficulties in accessing legal advice;
    b. lack of understanding of the scheme;
    c. changes in the law;
    d. shame and fear of disclosure; and
    e. the impact of trauma on disclosure for survivors.

14. The Government's own equality impact assessment identified that:

> "Vulnerable people [...] might find it more difficult than others: to disclose what has happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements. There may also be trauma-related considerations, in terms of how any vulnerable groups adduce evidence."[5]

15. Furthermore, cases with no good reason for delay may still be made by those with a legitimate basis to stay in the UK and with genuine grounds to fear removal.

16. An example of the type of claimant who may risk injustice as a result of the provisions is as follows:

> A traumatised woman has been a victim of rape and sexual abuse. She is terrified of discussing her experiences with a male Home Office interviewer. Her initial claim, which does not include disclosure of her experiences as a result, is rejected. She is then served with a priority removal notice. She has problems responding to the notice due to multiple factors: her lack of access to an interpreter, no access to a computer, her remote location, and the ongoing fear of disclosing her experiences to a stranger. She only is able, with the support of a friend who speaks her language, to receive some legal advice after the cut off date, and thereafter submits a late claim.

[5] *The Nationality and Borders Bill: equality impact assessment (accessible version),* 16 September 2021, para 19. Available at: https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment/the-nationality-and-borders-bill-equality-impact-assessment-accessible-version

17. Whilst there are already amendments tabled to probe what will constitute "good reasons" for delay - and we support such important discussions - we are concerned that the Clauses maintain a focus on proving you have good reasons for being late, with no requirement on the decision-maker to consider whether the presumptions being made are fair.

18. The drafted amendments above provide this safeguard of fairness within the application of the provision. The intended improvements are that:

    a. vulnerable people who may experience difficulty in harnessing evidence of delay, particularly when delay is due to a number of factors and not one event, should not be subject to presumptions if it would be unfair to so do, for example due to the type of claim they are making;
    b. late but probative and robust evidence is not unfairly dismissed just because it is late without good reason;
    c. a late claim or late evidence which is clearly unmeritorious would be unaffected by the amendments, since it could be considered fair to give them minimal credibility or weight.

Clauses 22 and 23 – Priority removal notices: expedited appeals; and Expedited appeals: joining of related appeals

Suggested amendments in order of preference

A: Oppose the Question that Clauses 22 and 23 stand part of the Bill.

B: Oppose the Question that Clause 23 stand part of the Bill.

C: (In alternative to A, and further or in the alternative to B):
Clause 22, page 26, leave out lines 39 to 43 and insert –
(2) The Secretary of State may certify P's right of appeal under this section, only if satisfied that:
(a) there were no good reasons for P making the claim on or after the PRN cut-off date;
(b) an expedited appeal would not be unfair in all the circumstances.

D: (In the alternative to C, at a minimum):
Clause 22, page 26, line 41 leave out "may" and insert "must".

19. Clauses 22 and 23 prescribe further automatic consequences when a 'late' protection or human rights claim is made after a PRN cut-off date. Clause 22 creates a new procedure whereby the Secretary of State can certify a late claim if she is not satisfied there are good reasons for the claim being late. In so doing, she can severely circumscribe access to appeal in three ways.

    a. Firstly, appeals must be brought and decided on an expedited basis.
    b. Secondly, there is no onward appeal: appeals go straight to the Upper Tribunal, and if it dismisses the appeal, there will be no further right of appeal to the Court of Appeal.

c. Thirdly, Clause 23 was introduced at Committee Stage, and provides that certain other appeals pending for that person are also dragged into the expedited procedure. This is the case even if they predated the PRN and were made on time. These include protection and human rights appeals, EU and EEA appeals, and also appeals against deprivation of citizenship.

The problems with these clauses

20. **They will not tackle abusive, repetitious or unmeritorious claims:** The stated justification of the PRN regime is 'to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action'. However, these provisions do not target unmeritorious claims, instead they target claims which have a right of appeal and have *not* been certified as unfounded.[6] Therefore, this provision will severely circumscribe the right of appeal in cases which the Home Secretary accepts have at least a real prospect of success.

21. **The importance of appeal:** As has been mentioned already within the House and at the beginning of this briefing, but bears repeating: Home Office decision-making is overturned in half of appeals at first instance.[7] This appeal process is therefore a critical and much-needed safety net to concerningly high levels of Home Office mistakes. These mistakes risk injustice being done to thousands of individuals with legitimate claims.

22. **Expedition of appeal:** The mere fact that a claim is made late, even without good reason, does not mean it can be decided fairly if the appeal process is expedited. There is no current requirement in the Bill for the cases to be capable of being fairly decided on an expedited basis. The only gateway requirement, again, is lateness.

23. **There is no onward appeal to the Court of Appeal:** Onward appeal from a first judicial appeal is important to correct errors of law and set binding precedent for such errors of interpretation.

24. **Clause 23 means other appeals are included, even if they were on time:** Even if there were merit in punishing 'late' appeals, the addition of related appeals by Clause 23 is impossible to justify. This will expedite appeals which are on time and could never, on their own, be expedited through Clause 22. We have two concerns:

    a. It is very common that people, particularly with limited access to quality legal advice, make a claim or appeal then they may subsequently realise and find that they have further claims or appeals which are valid and legitimate. Clause 23 could have a chilling effect on meritorious claims after a PRN cut-off date, because to make that claim would put their previous claims or appeals in a worse position.
    b. The other appeals include European Union citizens' rights appeals, appeals against European Economic Area decisions, and appeals against deprivation of citizenship. This expands the risk of injustice of the scheme. The inclusion of a deprivation of citizenship appeal is of particular concern. Combined with new Clause 9, this creates an additional

[6] The provisions target claims which have a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002. This right of appeal is *only* available for human rights or protection claims which are either (a) first claims or (b) fresh claims which the Home Secretary accepts have a realistic prospect of success. If she does not accept the latter, she can certify the claim as clearly unfounded, and it will come outside of the s.82 appeal rights scheme anyway.
[7] The figure has been consistently around 48-50%. See Tribunal Statistics Quarterly: July to September 2021, Table FIA_3 *First-tier Tribunal (Immigration and Asylum Chamber) Number of appeals determined at hearing or on paper*, available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021

barrier to effectively challenging the State's unilateral decision to deprive a citizen of their citizenship. Whilst Clause 9 will inevitably mean more people are not informed of the decision, Clause 23 puts their access to appeal in jeopardy if they are also a recipient of a PRN.

Our Amendments (clause 22 and 23)

25. Our primary suggested amendment is to remove the clauses. However, if both or only Clause 22 remains, then we consider there is a need to make the test for when the Secretary of State can certify more robust.

26. As such, Amendment C above would only allow the appeal to be certified for an expedited process if there are no good reasons for the lateness *and* that the expedited appeal would not lead to unfairness. If there were medical evidence for example which was going to take more time to obtain, this would help protect the unfair expedition of such cases.

27. At a minimum, we have observed that the current drafting makes certification mandatory "must certify", whilst the caveat of "good reasons" for lateness is discretionary'(P's right of appeal may not be certified if the Secretary of State is satisfied that there were good reasons)'. We consider that, if there are good reasons for lateness, this should stop the claim from being expedited, and cannot see any justifiable reason for the Secretary of State still being able to certify appeals which have good reasons. Therefore amendment D corrects this to '(P's right of appeal ~~may~~ must not be certified if the Secretary of State is satisfied that there were good reasons)'.

Clause 26- Accelerated detained appeals

Suggested amendment

Oppose the Question that Clause 26 stand part of the Bill. Explanatory Statement: Clause 26 recreates the detained fast track scheme, which was found to be unlawful by the Court of Appeal in 2015. The amendment ensures that detainees are not subject to a structurally unfair appeal process.

28. Clause 26 seeks to recreate, through primary legislation, a Detained Fast Track process. A Detained Fast Track for appeals previously existed in the First-tier Tribunal Procedure Rules. Those Rules were found to be unlawful in 2015 because they created an unfair system in which asylum and human rights appeals were disposed of too quickly to be fair.[8] The Court of Appeal described the timetable for such appeals as 'so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases'.[9] It held that the policy did not sufficiently appreciate 'the problems faced by legal representatives of obtaining instructions from individuals who are in detention'[10] nor did it 'adequately take into account

[8] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.
[9] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 para [38].
[10] Ibid.

of the complexity and difficulty of many asylum appeals [and] the gravity of the issues that are raised by them'.[11]

29. Since the Detained Fast Track procedure was overturned the Home Office has twice sought to persuade the Tribunal Procedures Committee to recreate it in Tribunal Procedure Rules. After consultation, The Tribunal Procedures Committee refused, stating: 'a set of specific rules would not lead to the results sought by the Government. If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired.'[12]

30. The Committee was not satisfied that a Detained Fast Track procedure could be created in a way that was compatible with the fair hearing of asylum and human rights appeals. It was found to be also unnecessary because the Tribunal already had ample case management powers to deal with appeals on an expedited basis if necessary.

31. During Committee and Report Stage, Clause 26 has been further amended. Accelerated detained appeals can now include European Union citizens' rights appeals, appeals against European Economic Area decisions, as well as the protection and human rights appeals, and appeals against deprivation of citizenship. Furthermore, the Tribunal's ability to order a case is not dealt with within the accelerated procedure has been further limited, from when it is in 'the interests of justice' to when it is 'the only way to secure justice is done'.

The problems with this clause

32. Clause 26 seeks to force the Tribunal Procedure Committee's hand by *requiring* it to make provision for a new Detained Fast Track. There is nothing in the Bill nor the Explanatory Notes that makes the process different to the Detained Fast Track Scheme which was found to be unfair.

33. The Tribunal can only to transfer cases out of the Detained Fast Track if it is 'the only way to secure justice is done'. This is not enough to make the system fair. In fact, the Detained Fast Track scheme contained a more generous version of this 'safety valve' clause, which provided the Tribunal with the ability to transfer cases out if it was 'in the interests of justice'. However, the Court of Appeal found even this wider test did not provide a sufficient safeguard against the structural unfairness of the Scheme.[13] The more restrictive test only compounds this unfairness.

34. Finally, the old Detained Fast Track did not include the expanded list of appeals in Clause 26(6), including EU citizen, EEA and deprivation of citizenship appeals. Therefore, this provision risks an unfair appeals process for far more appellants than originally drafted. Of particular concern is the effect on deprivation of citizenship when combined with new Clause 9. Whilst Clause 9

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[11] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 para [45].

[12] Tribunal Procedure Committee, *Response to the consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

[13] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at paras 43-45. It held, that practically speaking, it was an unfair application to have to make, since appellants had to try to argue it would not be in the interests of justice to continue since they needed more time at the very hearing at which their appeal would otherwise be determined. This put them in a paradoxical Catch 22 position of having to argue that they needed more time to prepare in order for their appeal to be dealt with fairly, and if that argument failed to then argue that they had enough evidence for their appeal to be decided in their favour. This was found to be 'an invidious position… unfair and unjust'.

will inevitably mean more people are not informed of the decision, Clause 26 could severely restrict their access to a fair appeal process once they do become aware if they are also detained.

Clause 27- Claims certified as clearly unfounded: removal of right of appeal

Suggested Amendment

Oppose the Question that Clause 27 stand part of the Bill. Explanatory Statement: This amendment preserves the out-of-country right of appeal for those who have already been removed. It has no impact on the Secretary of State's ability to effect removals, but the amendment would preserve an important last resort.

35. Clause 27 removes the right of appeal for cases which are certified as 'clearly unfounded'. At present, where the Home Secretary certifies a case as 'clearly unfounded', any appeal may only be brought after removal from the UK.

The problem with this clause

36. In cases concerning protection claims or Article 3 human rights claims such appeals are incapable of providing an effective remedy because the feared harm will have eventuated before the appeal can be heard. As the Explanatory Notes (para 285) acknowledge, the right of appeal is rarely exercised and instead challenges are brought by way of judicial review. However, this right of appeal is an important backstop. It may become even more important should the provisions punishing lateness elsewhere in the Bill become law. For example, late evidence under Clause 25 attracting 'minimal weight' – despite how robust or probative it actually is – could lead to arguable cases more likely to be declared clearly unfounded.[14]

37. This section contributes to a general trend in immigration and asylum law away from rights of appeal to the First-tier Tribunal and towards unappealable decisions which are amenable to judicial review. This is regrettable and will not increase the fairness or efficiency of the system. It is furthermore unclear how this further restriction of appeal rights will contribute to the Home Office's aims of creating a more fair and efficient procedure. It will not facilitate removal of those with no right to be in the UK because certified appeals can only be heard after removal.

Notice requirements: Clauses 9 and 45

38. Clause 9 concerns notice of deprivation of citizenship, whilst Clause 45 concerns notice of removal. Whilst the provisions and our recommended amendments differ, the following is true for both notice provisions: **notice is not a technicality.** As Lord Steyn stated in *R (Anufrijeva) v Secretary of State for the Home Department*:

[14] Clause 25(6) confirms that 'determining a claim' in the section includes when the Home Office is deciding whether a claim should be certified as clearly unfounded and whether to accept or reject evidence as a further submission.

> '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.'[15]

39. This principle underlines the importance of notice to the individual's right to access justice. Any right to access the courts must not, therefore, be practically undermined by inadequate or ineffectual notice. To do so undermines common law access to justice itself.

Suggested amendment

We strongly support the tabled amendment by Lord Anderson, Lord Rosser, Lord Paddick and Baroness Warsi to oppose that Clause 9 stand part of the Bill.

40. Clause 9 introduces exceptions to the requirement to give a person notice if they are going to be deprived of their citizenship if it appears to the Secretary of State that: she does not have the information needed; if it is not otherwise reasonably practicable; or because notice should not be given in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest.

The problem with this clause

41. Clause 9 was introduced to the Committee at a very late stage, leaving no adequate time for its consideration in the House of Commons. It follows a 2021 High Court judgment,[16] in which a regulatory provision, which allowed notice to be deemed given even if it hadn't been, was held to be unlawful. The regulation only applied when the person's whereabouts were unknown and their address and their representative's address were unknown or defective. The High Court observed, in finding this part of the regulations unlawful, 'you do not "give" someone "notice" of something by putting the notice in your desk drawer and locking it.'[17]

42. There is clearly now a need to consider what to do in a situation in which someone's whereabouts are unknown, for example by considering an ongoing duty of the Secretary of State to try to effect notice. PLP and JUSTICE are concerned that, instead of doing this, the Secretary of State has proposed legislation which would go far further than the previous regulations and allow her to dispense with notice extremely easily.

43. **Notice is dispensed with on a subjective test:** if it *appears* to the Secretary of State that the exemptions apply, not if they do apply. Furthermore, it provides for much broader circumstances than an unknown address: any other reason making it reasonably unpracticable; national security; the UK's relationships with other countries (a very vague category in and of itself); and otherwise in the public interest. Furthermore, there is lack of clarity as to how they will be interpreted. Factsheets recently made available about the Bill online describe the test

[15] [2003] UKHL 36, para [26]. As recently observed in the Joint Committee on Human Rights report on Part 3 of the Bill, this is the same right of access to justice as is conferred by Article 13 ECHR (the right to an effective remedy), See Joint Committee on Human Rights *Legislative Scrutiny: National and Borders Bill (Part 3) – Immigration offences and enforcement*, Ninth Report of Session 2021–22 (24 November 2021), footnote 161.
[16] See *D4 v SSHD [2021] EWHC 2179 (Admin)*
[17] Ibid, para [49].

for dispensing with notice to be 'exceptional circumstances'. This is incorrect, as the phrase appears nowhere in Clause 9.[18]

44. **It is already established that the notice provision in the Act does not require *prior* notice.** It was held in *Al Jedda*[19] that notice could be given at the same time as a deprivation order irrespective of whether this was required by national security reasons. Therefore, given that notice and an order can be made at the same time, there is no justification for permitting notice not to be given when there are national security reasons for this – there can be no such reasons since the deprivation order takes effect when the notice is given.

45. **The current appeal provision reflects how inextricably linked notice and appeal are:** it is not the decision which entitles an individual to appeal, but notice of that decision.[20] Whilst Clause 9(3) amends that, by giving an appeal to those who have been deprived of their citizenship without having been given notice, this amendment exposes with perfect clarity the practical difficulty of exercising this appeal right: how can you challenge a decision you are not notified about? It therefore becomes a theoretical and illusory right of appeal, rather than a practical and effective one.

46. We note organisations have expressed the fear felt by many citizens at the prospect of their citizenship being revoked without notice, and therefore without any clear practical ability to challenge the decision. It has been described as 'living in fear under a sword of Damocles wondering when they will be deemed stateless without any recourse to the law.'[21]

47. **The clause is broader than anything we have currently, with no evidence of the need for this:** In our view, any provision which attempts to respond to the High Court case would take its observation about notice seriously: you do not 'give' someone 'notice' of something by putting the notice in your desk drawer and locking it. If Parliament did wish to provide in legislation for a situation in which notice is impossible, i.e. someone's address and whereabouts cannot be ascertained, this would need:
    a. to be drawn extremely restrictively, with an objective not subjective test;
    b. to be accompanied with an ongoing duty for the Secretary of State to be continually trying to give notice of the decision, and thereby notice of the right of appeal to the person; and
    c. to contain safeguards to protect recourse to access to appeal, for example suspension of any time limits for appeal until actual notice has been given.

48. We note that power to deprive of citizenship itself is broader here than in Australia and New Zealand. And yet if those Governments want to withhold notice, they are subject to significant procedural safeguards. New Zealand requires an application to a judge, where the decision to deprive and the decision to withhold notice are subject to review. Australia requires regular review of the decision to withhold notice (every 90 days) and written notice to the relevant

[18] See the Deprivation of Citizenship Factsheet published on 3 December 2021. Available at: https://www.gov.uk/government/publications/nationality-and-borders-bill-deprivation-of-citizenship-factsheet
[19] *Al-Jedda v Secretary of State for Home Department*, SC/66/2008 (18th July 2014), para [156] onwards.
[20] Section 40A of the British Nationality Act 1981.
[21] Muslim Council of Britain joint statement, co-signed by Zara Mohammed, Muslim Council of Britain, Kudsia Batool, Trade Unions Congress, Maya Foa, Reprieve, Sabir Zazai, Scottish Refugee Council, Ben Jackson, Refugee Reform Initiative, Dr Edie Friedman ,Jewish Council for Racial Equality, Amritpal Singh Dhesi, Sikh Council UK, Dr Abdul Azim Ahmed, Muslim Council of Wales, Dr Muhammad Adrees, Muslim Council of Scotland, Bishop Paul Hendricks & Shaykh Ibrahim Mogra (Co-chairs), Christian Muslim Forum.

Parliamentary Committee, who can make a mandatory request for a briefing from the Minister.[22]

49. None of the above safeguards are provided for in the Bill. Instead, the clause has been drawn broadly and rushed through Parliament, rather than being the subject of careful scrutiny. We urge members to oppose the clause.

[22] See explanation of the Australian and New Zealand provisions here J. Ogilvie-Harris, 'A Comparative Perspective on the Constitutionality of Clause 9 of the Nationality and Borders Bill', U.K. Const. L. Blog (12th January 2022) (available at https://ukconstitutionallaw.org/)

Clause 45- Removals: Notice Requirements

Suggested Amendment

Clause 45, page 47, line 34, at end insert –
(6B) Nothing in this section, or in sections 10A to 10E, permits a person to be removed from the United Kingdom without notice or without further notice if that removal would violate their common law right to access justice.'

Explanatory Statement: This amendment would give effect to the recommendation of the Joint Committee for Human Rights that the regime in Clause 45, which creates exceptions to the requirement to give notice, remains subject to the common law right to access justice.

50. Clause 45 makes clear in statute the duty on the Home Office to give people a minimum of 5 working days' notice of when they are going to be removed from the UK. The Explanatory Notes to the Bill make clear that the purpose of the notice period is to enable individuals to access justice prior to removal (para 493), and that by legislating for a statutory minimum period, the Bill aims to 'standardise the time to access legal advice' (para 497).

51. However, Clause 45 also contains new sections 10B to 10E[23] which provide exceptions to notice being given.

52. The above amendment was originally tabled by Harriet Harman and others at Report stage in the House of Commons. However, due to the sheer number of Government amendments – over 80, including Clause 9 – it did not get debated at all.

Problems with this clause

53. We are primarily concerned with cases in which notice is given, but removal does not go ahead for legitimate reasons, or does not go ahead and in the meantime there is a change in circumstances. In such cases, the Clause allows the Secretary of State to proceed with a removal within a further 21 days, which could risk serious injustice.

54. **Legitimate reasons:** new section 10B within clause 45 allows for removal to take place at any time for 21 days after a failed removal if there has been "disruption by the person to be removed or others". In our experience, Home Office caseworkers interpret the notion of 'disruption' on an extraordinarily broad basis. We are particularly concerned with cases in which a person's refusal to leave their room in detention because they wished to speak to their lawyer first was labelled as 'disruption'.24 In such a case, the notice period has not ensured proper access to justice since there is a legitimate reason for a further notice period to be given: the obtaining of legal advice. However, within Clause 45, the Home Office could then proceed with removal at any time over the following 3 weeks of the so called "disruption" without any further notice at all.

55. The problem of legal advice being sought but not obtained is not uncommon. A recent investigation by the Parliamentary and Health Service Ombudsman found that Legal Aid

[23] The Immigration and Asylum Act 1999.
[24] See, for example, AT and family – R (AT, FF, BT) v SSHD [2017] EWHC 2714 (Admin).

Agency delays resulted in three vulnerable EU citizens living in the UK being locked out of accessing the justice system to challenge deportation orders.25

56. PLP's research has also shown that the cuts to early advice introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in most areas of legal aid have resulted in the formation of 'advice deserts', which threaten access to justice.26 Analysis of the market, including the closure of advice and not-for-profit organisations, has led to large areas of the country where there are no immigration legal aid providers at all.27 Analysis of the Legal Aid Agency directory of providers and the Office of National Statistics, suggests 63% of the population do not have access to an immigration and asylum legal aid provider, and due to the Home Office's dispersal policy, there can often be a mismatch between supply and demand, with those in need of advice housed in areas without legal aid provision.28 Moreover, even in areas where immigration legal advice is available, there is an overwhelming gap' between need and capacity or supply.29

57. Whilst those in detention are eligible for legally aided advice when served with a notice of removal, there are significant accessibility issues. Although there is a Detained Duty Advice scheme, this only offers an initial 30-minute appointment at which advisors must assess eligibility for legal aid. Dr Jo Wilding notes, 'people detained in prisons are often unable to access any immigration legal advice because there are no advice surgeries and communication with lawyers is difficult', where 'detainees have no meaningful choice of provider and cannot change providers if they are dissatisfied.'30 Research by Dr Anna Lindley, commissioned by the Bar Council, also documents concerns about the Detained Duty Advice scheme, including high levels of demand and delays in securing an appointment.31

58. As such, legitimate reasons for disruption, such as wanting to access legal advice which has been unavailable in the first 5 days of notice, could be insufficient to prevent removal as currently drafted. We consider the above amendment would better protect individuals' common law right to access to justice in such cases.

59. **Change in circumstances:** There are also instances in which the reason removal does not go ahead is because it is being challenged in the courts. When these cases end, no further notice is required in Clause 45.32 Whilst this may not cause injustice in some cases, it could do so if proceedings end weeks, months, or even years after the first notice of removal and during

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[25] Parliamentary and Health Service Ombudsman, 'Barred from justice: vulnerable people locked out of legal aid to challenge unlawful deportation orders' (November 2021) available at: https://www.ombudsman.org.uk/news-and-blog/news/barred-justice-vulnerable-people-locked-out-legal-aid-challenge-unlawful

[26] Mary Evenden, 'Legal aid and access to early advice' (Public Law Project, April, 2018) available at https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/immigration-and-asylum

[27] Dr Jo Wilding, 'Droughts and Deserts' (2019) http://www.jowilding.org/assets/files/Droughts and Deserts final report.pdf on reasons for the market failure in immigration and asylum legal aid and map (p. 9) identifying local authority areas with no immigration and asylum providers.

[28] See the report and an interactive map showing the absence of legal aid providers per local authority here: https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/immigration-and-asylum

[29] Dr Jo Wilding, Maureen Mguni & Travis Van Isacker, 'A Huge Gulf: Demand and Supply for Immigration Legal Advice in London' (June 2021) available at: <https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-for-immigration-legal-advice-in-london/>.

[30] Dr Jo Wilding, 'Droughts and Deserts' (2019) http://www.jowilding.org/assets/files/Droughts and Deserts final report.pdf. [42].

[31] Dr Anna Lindley, 'Injustice in Immigration Detention : Perspectives from legal professionals' (The Bar Council, November 2017) available at: http://www.aviddetention.org.uk/sites/default/files/images/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf

[32] Either judicial reviews (section 10E) or appeals after a Priority Removal Notice (section 10D).

that time, the person's circumstances have changed fundamentally, or important new evidence has come to light.

Example: PLP assisted a Sri Lankan man, MLF, in 2017 whose asylum claim had been dismissed.[33] During his judicial review proceedings, in which he was unrepresented, he had submitted further representations to the Home Office based on new evidence of the killing of 3 male relatives. However, this new evidence could not be considered in the judicial review proceedings because it post-dated the decision being challenged. When judicial review proceedings concluded, MLF was served with a decision which refused to consider his fresh representations (on the incorrect basis that he had not followed the correct procedure for providing further evidence) and he was removed to Sri Lanka on the same day without any notice or opportunity to access the court (under the Home Office's unlawful removal windows policy).[34] PLP assisted MLF, who was in hiding in Sri Lanka, to apply for judicial review of his removal without notice. The Home Office conceded that he had been unlawfully removed and arranged for MLF to return to the UK. He has since been granted refugee status on the basis of evidence which post-dated his original appeal, including that which he had submitted during his judicial review proceedings.

60. Again, we consider that the above amendment would better protect individuals' common law right to access to justice in such cases, in which the current draft does nothing to prevent removal from taking place at the court door on the day of judicial review proceedings finishing, despite there being a change in circumstances.

61. The Joint Committee on Human Rights shared our concerns. It concluded:

> 'the power of the Secretary of State to remove a person without further notice being given where a removal has previously failed must not be used in cases where a removal has failed for legitimate reasons or where the claimant's right to access justice requires him or her to have additional notice. This power must not be relied upon to detain individuals on immigration grounds when detention is not necessary.'[35]

62. We support their recommendation that 'the Bill should be amended to make plain that the right to access justice must be respected in any decision on providing notice to an individual liable to removal.'[36]

[33] R(MLF) v SSHD – CO/4418/2017
[34] *R (FB (Afghanistan) and Medical Justice) v SSHD* [2020] EWCA Civ 1338.
[35] Joint Committee on Human Rights *Legislative Scrutiny: National and Borders Bill (Part 3) – Immigration offences and enforcement*, Ninth Report of Session 2021–22 (24 November 2021), para [176].
[36] Ibid