Public Law Project and JUSTICE
Briefing on Clause 9 of the Nationality and Borders Bill

1. This briefing focuses on Clause 9 of the Nationality and Borders Bill ('the Bill') ahead of its consideration by the House of Commons on 22nd March 2022, after Clause 9 was removed from the Bill during the House of Lords report stage (Lords Amendment No. 4). Clause 9 proposes to give the State the power to deprive citizens of their citizenship without notifying them.

2. As originally drafted, Clause 9 provided for such a power to be available to the State with no safeguards for the individual. During the Bill's consideration in the other place, Lord Anderson of Ipswich (Crossbench peer and UK's Independent Reviewer of Terrorism Legislation, 2011-2017) drafted a range of safeguards to be added to the Bill. The Government has accepted those safeguards and tabled them before the Commons (Amendments (a)-(f)).

3. Public Law Project ('PLP') and JUSTICE have previously briefed on our serious concerns with Clause 9, which we consider undermines access to justice and the rule of law.[1] Whilst the safeguards substantially improve the Clause – as Baroness Warsi commented, they "make a bad law slightly less bad"[2] – we continue to be unpersuaded that this power is necessary, as well as having concerns about the breadth and accessibility of the safeguard provisions for individuals affected.

   As such, PLP and JUSTICE urge Members of Parliament to agree with the Lords in their Amendment No. 4 and oppose the Government's Amendments in lieu. We list our key reasons below.

Notice and Access to Justice

4. Notice is not a technicality; it is a fundamental principle of the right of access to justice.[3] If there is no notice, there can be no timely consideration by the individual if they want to

[1] For more detailed consideration, please see our Second Reading and Committee Stage briefings for the House of Lords which contain consideration of clause 9.
[2] HL Deb (28 February 2022). Vol. 819. Col. 590
[3] As Lord Steyn stated in R (Anufrijeva) v Secretary of State for the Home Department: '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. [2003] UKHL 36, para [26].

appeal and scrutinise the Secretary of State's decision making. Appeal is critical given the scope of the power and the onerous nature of the decision:

> *citizenship is a critically important and fundamental right. It is, as Hannah Arendt famously said, and as both the US Supreme Court in Trop v Dulles 356 U.S. 86 (1958) and our Court of Appeal in EB (Ethiopia) [2007] EWCA Civ 809 have recognised, "the right to have rights.*[4]

Accessing that appeal cannot be theoretical and illusory. It must be practical and effective.

5. The safeguards being introduced provide that a person must be notified *once they make contact with the Home Office* (Amendment (c)) and that until notice is given, time for appeal does not run (Amendment (d)). Whilst these safeguards protect those who find out another way, they fail to address the problem of the unnotified individual being ignorant of a decision made against them, and therefore unable to appeal, for a potentially unlimited amount of time.

6. Non-notification could have profound real-world consequences. For example, someone might get pregnant on the understanding that her child would be a British citizen by descent, only to find that their citizenship had been taken away without them knowing it.

The Government has not successfully made the case for the need for the power

7. The Clause is in response to the High Court case of *D4*,[5] in which a regulatory provision allowing notice of deprivation to be "given" by putting a notice in a desk drawer was found to be unlawful. This has since been upheld by the Court of Appeal.[6] On the need for the ability to withhold notice, the Government conceded in the Lords that, prior to the case of *D4, "there had been no cases where the notification requirement had prevented deprivation action from taking place."*[7] Given that the regulation allowing for the desk drawer option was only added in 2018,[8] this is a revealing admission which undermines the Government's purported need for the Clause, since prior to 2018 it was clearly able to give notice to everyone from whom it wished to deprive citizenship.

8. Concerningly, as soon as the Government was given the ability by the (unlawful) regulations to put the notice in the desk drawer, the number of individuals who were given actual notice plummeted. The Home Office admitted in evidence in the *D4* case that of the 45 conducive to the public good decisions taken in 2019-2021, some 29 were served to the file, in all cases because the whereabouts of the subject was unknown. In D4, her lawyers told the court that her whereabouts in a Syrian camp were known to the

[4] Joint Opinion on Clause 9 by Raza Husain QC and Eleanor Mitchell of Matrix Chambers and Jason Pobjoy of Blackstone Chambers, instructed by Leigh Day and the Good Law Project. Available here.
[5] See *R(D4) v SSHD [2021] EWHC 2179 (Admin)*
[6] *R(D4) v Secretary of State for the Home Department* [2022] EWCA Civ 33, 26 January 2022
[7] HL Deb (27 January 2022). Vol. 818. Col. 511
[8] The British Nationality (General) (Amendment) Regulations 2018 (SI 2018/851), amending the British Nationality (General) Regulations 2003 (SI 2003/548)

Government at the time of deprivation—government agencies had been there to talk to her daughter—and that her family continued to live at her previous address in England.

9. Rather than making a case for the necessity of the power, it has instead become apparent that the Home Office managed satisfactorily without it for years. However, since (unlawfully) having a power not to give notice, the Home Office has ended up using that power for the majority of its decisions. We are therefore concerned that notice has become a matter of preference, not necessity, despite it being a matter of fundamental importance to natural justice and rule of law.

The Safeguards

10. Several aspects of the newly tabled safeguards are clear improvements:

    a. Amendment (a) removes the subjective element of the test "if it appears to the Secretary of State". We have briefed consistently against such a subjective test: subjective opinion is an inadequate basis for exercising such onerous powers which, if they are to exist, need to be accountable to a rigorous objective test.
    b. Amendment (b) has to some extent narrowed the circumstances of withholding notice (however, see concerns below) as two of the previous "catch-all" grounds for withholding notice are removed by this amendment (if notice is "for any other reasons not reasonably practicable"; and "otherwise in the public interest"). Furthermore, a test of objective necessity is introduced, which we support as an improvement on the subjective test: the Secretary of State must reasonably consider it necessary not to give notice.
    c. Amendment (f) introduces a mandatory judicial oversight mechanism[9] for every "conducive to the public good" deprivation order which is made without notice. If the decision not to give notice is found to be "obviously flawed", the Secretary of State must either give notice, revoke the deprivation order, or make a fresh application (if circumstances have changed and/or there is further evidence). The amendment also creates an obligation for the Secretary of State to review no notice deprivation orders, with a further judicial check if no notice has been given after 2 years.

11. However, we have the following concerns:

    a. The circumstances in which the power can be exercised are **still drafted extremely broadly**. The Home Office has repeatedly stated on social media that the power will be used only in "exceptional circumstances" and yet this threshold fails to make its way into the Bill. Instead, wide and permissive categories remain, even after the removal of the "otherwise in the public interest" catch-all. Of particular concern is the new supposedly narrower category of "the investigation or prosecution of organised **or** serious crime". We consider this to be unnecessarily

[9] Inspired by the judicial oversight mechanism in the Terrorism Prevention and Investigation Measures Act 2011.

broad: it would mean the existence of an investigation or prosecution into organised but *non-serious crime* would relieve the Secretary of State of her obligation to give notice. We too note the justification of "the relationship between the United Kingdom and another country" remains, which we consider to be extremely broadly drafted.

b. Judicial oversight in the Special Immigration Appeals Commission will of course be *prior* to notice taking place, meaning the individual will not be present nor have the opportunity to make representations. Therefore, whilst some judicial oversight is better than no oversight at all, it must not be mistaken as a suitable alternative to notice.

c. The new Schedule 4A creates judicial oversight only for those who are deprived of their citizenship in the future. For those in the past, who have been subject to without notice deprivation decisions prior to *D4,* Subsections (5) to (7) of Clause 9 will retrospectively legitimise and legalise their deprivation decisions despite the unlawful notice, before the new power comes into law. **This will in effect create a "two tier" system of oversight**: whilst the Government has now conceded the need for judicial oversight, and such oversight will be afforded to all cases henceforth, it will not be available to those who were deprived of notice before 2021. Instead, it seeks to ringfence a number of previous unlawful decisions and prevent scrutiny of them. We cannot see any justification for such a two-tier system, and we consider it could lead to serious injustice.

For these reasons, PLP and JUSTICE urge Members of Parliament to agree with the Lords in their Amendment No. 4 and oppose the Government's Amendments in lieu.