CLAUSE 9(5)-(7) OF NATIONALITY AND BORDERS BILL – BRIEFING FOR PEERS

UNNECESSARY RETROSPECTIVE LEGISLATION THAT VIOLATES THE RULE OF LAW

Clause 9 of the Nationality and Borders Bill introduces a power to deprive persons of their citizenship without telling them.[1] It amends the longstanding position under the British Nationality Act 1981 that the Home Secretary must notify individuals when depriving them of their citizenship.

A suite of amendments was tabled by Lord Anderson of Ipswich at Report Stage in the House of Lords. The Government then tabled these amendments in the House of Commons, as its own, and they were accepted. These amendments improve Clause 9 in certain respects: the test is no longer subjective and there is now some judicial oversight over the power to deprive a person of their citizenship in secret.[2]

However, Clause 9(5)-(7) remain untouched. This requires remedying for two reasons. First, the subsections pose a profound threat to the rule of law, by retrospectively validating prior invalid and unlawful orders of the Home Secretary to deprive people of their citizenship without notice. Second, they create two tiers of oversight for these orders: orders which are made after the commencement of the safeguards in this Bill, and orders unlawfully made until now. Subsections (5)-(7) allow the latter to evade judicial oversight, and permit deprivation without the benefit of these safeguards.

In the High Court case of *D4*,[3] it was revealed that the Home Secretary frequently did not notify people before taking away their citizenship. This was in violation of the clear statutory duty to provide notice to the affected person. Parliament had never empowered the Government to take away people's citizenship without informing them. In *D4*, the High Court and subsequently the Court of Appeal found the Home Secretary's act of depriving citizenship without notice to be unlawful, and declared the order in question a nullity.[4] This was upheld by the Court of Appeal.[5] It follows that all of the deprivation orders made without notice before the *D4* decision are invalid and unlawful.

Through Clause 9(5), the Government proposes to validate these unlawful deprivations retrospectively, effectively creating a legal fiction that an order has always been valid notwithstanding the failure to comply with the statutory requirement to give notice. These pre-Act deprivation orders will not be subject to the safeguards in Lord Anderson's amendments. No justification has been offered for failing to protect the rights of individuals against whom the Home Secretary has made invalid deprivation orders.

If Clause 9(5), and consequently 9(6) and 9(7), were removed, the consequences would be far from onerous for the Home Office: it would reconsider these decisions and apply the new safeguards in this Bill in remaking any deprivation orders.[6] It was the Government's own view that such safeguards "enable us to protect the rights of the individual while delivering on our security objectives".[7]

Further, remaking the orders would allow the Home Secretary to consider the deprivations in light of fresh evidence, including from the All-Party Parliamentary Group on Trafficked Britons in Syria that many of the British women and children deprived of citizenship "were groomed, coerced or deceived" and may be potential victims of human trafficking.[8] Instead of doing so, the effect of Clause 9(5)-(7) is to leave unchecked any serious legal errors in these cases.

Therefore, Reprieve, Public Law Project, JUSTICE, and the Immigration Law Practitioners' Association respectfully ask Peers to protect the rule of law and support Baroness D'Souza's motion to remove Clause 9(5)-(7) from the Bill.

CLAUSE 9(5)-(7) THREATEN THE RULE OF LAW

The British Nationality Act 1981 requires the Government to provide notice to people when depriving them of their citizenship.[9] The Government has been failing to comply with this obligation by depriving people of citizenship without notifying them. In the *D4* case, the Court of Appeal was informed that the Home Secretary knew of 63 cases where notice was "served to the file", i.e. ordered in secret.[10]

Both the High Court and the Court of Appeal found this approach to be unlawful, because the Home Secretary acted outside her statutory powers.[11] In the High Court, Mr Justice Chamberlain observed: "as a matter of ordinary language, you do not 'give' someone 'notice' of something by putting the notice in your desk drawer and locking it. No-one who understands English would regard that purely private act as a way of 'giving notice'."[12]

To undo these legal errors, Clause 9(5)-(7) would validate orders which were invalid when they were made, through their retroactive application.[13] Where a citizenship deprivation order breached the requirements laid down by Parliament, and part of the Government's secondary legislation was struck down by the courts for that reason, Clause 9(5) will make that deprivation order valid after the fact. This sends the message that the Government need not comply with the law, and that Ministers may act outside the powers granted to them by Parliament.

The House of Lords Constitution Committee highlighted the "unacceptability of retrospective legislation other than in very exceptional circumstances" and that "no justification has been offered in this case."[14] As Lord Kerr explained in *Walker v Innospec Limited* [2017] 4 All ER 1004 (at §22):

> The general rule, applicable in most modern legal systems, is that legislative changes apply prospectively. Under English law, for example, unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective effect. The logic behind this principle is explained in *Bennion on Statutory Interpretation*, 6th ed (2013), Comment on Code section 97: "If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it".

Retrospective legislation is dangerous: it sets a precedent that the Government can fail to abide by primary legislation enacted by Parliament and then retrospectively validate, legitimise, and legalise its conduct. The Government has conceded that the type of decisions it wants to retrospectively legitimise should properly, in the future, be subject to more safeguards and scrutiny than previously. It is therefore deeply concerning for Government to ask Parliament to retrospectively validate and deny minimal safeguards to cases in which it unlawfully failed to comply with the limits on its powers in the past.

CLAUSE 9(5)-(7) CREATE TWO TIERS OF SECRET DEPRIVATIONS

As a result of the amendments first tabled by Lord Anderson of Ipswich, the new regime would create a two-tiered system of oversight for secret deprivations, distinguishing between pre- and post-commencement deprivations.

Lord Anderson's regime creates a statutory obligation for the Home Secretary to give written notice as soon as is reasonably practicable to a person deprived of citizenship without notice upon their contacting the Home Office,[15] introduces judicial oversight of secret deprivations made on the grounds they are conducive to the public good,[16] and places an obligation on the Home Secretary to periodically review the circumstances of a person in respect of whom a deprivation order was made and decide whether to give late notice of the order.[17]

However, these safeguards are only available for those deprived of their citizenship after commencement. They will not apply to past invalid deprivations without notice, which Clause 9(5)-(7) seek to retroactively validate.

The Government has conceded that Lord Anderson's amendments were necessary to strike the right balance between rights and security; in the Minister's words, they "enable us to protect the rights of the individual while delivering our security objectives".[18] If the safeguards are necessary for post-commencement secret deprivations, they must also be necessary for pre-commencement deprivations. Carving a distinction between the two is arbitrary, risks creating confusion, and is likely to lead to injustice.

CLAUSE 9(5)-(7) ARE UNNECESSARY

Removing Clause 9(5), and consequentially removing 9(6) and 9(7), would not pose an undue burden on the Government. The Home Secretary can simply remake the deprivation orders which were unlawfully made without notice. As the House of Lords Select Committee on the Constitution put it, "no justification has been offered" for the Clause's retrospective application.[19]

Further, remaking the orders would allow the Home Secretary to consider the deprivations in light of fresh evidence, including from the APPG on Trafficked Britons in Syria that many of the British women and children deprived of citizenship "were groomed, coerced or deceived" and may be potential victims of human trafficking.[20]

Instead of taking this simple step of remaking the orders, the Government seeks to retrospectively validate invalid orders. This tramples on the rule of law. Ministers only have the powers Parliament bestows. This provision is contrary to that principle and risks covering up grave errors made in depriving British nationals of citizenship.

RECOMMENDATION

Reprieve, Public Law Project, JUSTICE, and the Immigration Law Practitioners' Association respectfully ask Peers to support Baroness D'Souza's motion to remove Clause 9(5)-(7) from the Bill.

If you have any questions, please feel free to contact jack.steele@reprieve.org.uk.

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[1] Nationality and Borders Bill, Clause 9, available at https://bills.parliament.uk/publications/44307/documents/1132.
[2] HL Deb (28 February 2022). Vol. 819. Col. 581.
[3] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179.
[4] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179.
[5] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179; *R (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department* [2022] EWCA Civ 33.
[6] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179, Chamberlain J at para 66.
[7] HC Deb (22 March 2022). Vol. 711. Col. 183.
[8] Report of the APPG on Trafficked Britons in Syria, 10 February 2022, para 3.3.3. https://appgtraffickedbritons.org/inquiry-into-trafficked-people-to-isis/.
[9] British Nationality Act 1981, s.40(5).
[10] *R (on the application of D4) v Secretary of State for the Home Department* [2022] EWCA Civ 33, Whipple LJ at para 36.
[11] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179; *R (on the application of D4) v Secretary of State for the Home Department* [2022] EWCA Civ 33.
[12] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179, para. 49.
[13] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179.
[14] House of Lords, Select Committee on the Constitution, 11th Report of Session 2021–22, HL Paper 149 Nationality and Borders Bill, para. 22, https://committees.parliament.uk/publications/8606/documents/86994/default/.
[15] Nationality and Borders Bill (Motions relating to Lords Amendments), 22 March 2022, Amendment in Lieu (c), Subsection (5D).
[16] Nationality and Borders Bill (Motions relating to Lords Amendments), 22 March 2022, Amendment in Lieu (f), Schedule 4A, paragraph 1(2).
[17] Nationality and Borders Bill (Motions relating to Lords Amendments), 22 March 2022, Amendment in Lieu (f), Schedule 4A, paragraph 2(2).
[18] Letter from Tom Pursglove MP to all MPs, *Nationality And Borders Bill: Commons Consideration Of Lords Amendments,* 18 March 2022, p. 3; HC Deb (22 March 2022) Vol. 711. Col. 183.

[19] House of Lords, Select Committee on the Constitution, 11th Report of Session 2021–22, HL Paper 149 Nationality and Borders Bill, para. 22, https://committees.parliament.uk/publications/8606/documents/86994/default/.
[20] Report of the APPG on Trafficked Britons in Syria, 10 February 2022, para 3.3.3. https://appgtraffickedbritons.org/inquiry-into-trafficked-people-to-isis/.