Threats to Access to Justice in the Nationality and Borders Bill

Public Law Project and JUSTICE

Report Stage Briefing House of Commons

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. PLP and JUSTICE are of the strong opinion that as currently drafted, the Bill does not strike the right balance between its competing aims of making the system fairer, to protect those in need of asylum, and facilitating removal. Instead, it risks creating a system where 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. This briefing focuses on amendments proposed to the Nationality and Borders Bill ('the Bill') ahead of their consideration at Report stage on 7th December 2021. JUSTICE and PLP's wider concerns about the impact of this Bill on the rule of law and access to justice can be found in our earlier briefings here.

Amendment 12 – leave out Clause 9: Notice of decision to deprive a person of citizenship

5. Amendment 12 seeks to remove Clause 9 of the Bill, which was introduced at Committee Stage. Clause 9 introduces exceptions to the requirement to give a person notice if they are going to be deprived of their citizenship. It inserts a new subsection 5A into section 40 of the British Nationality Act 1981, and provides that no notice is required 'if it appears to the Secretary of State that
    a. the Secretary of State does not have the information needed to be able to give notice under that subsection,
    b. it would for any other reason not be reasonably practicable to give notice under that subsection, or
    c. notice should not be given
        i. in the interests of national security,
        ii. in the interests of the relationship between the United Kingdom and another country, or
        iii. otherwise in the public interest.'

6. **The problem with this clause:** Clause 9 was introduced to the Committee at a very late stage, leaving no adequate time for its consideration. It follows a High Court judgment this year[1] which quashed regulations governing notice in deprivation of citizenship cases. That case considered the existing regulations which applied when the person's whereabouts were unknown and there is no address or past address known, or the address is defective, and no representative address is known either. In those circumstances the regulations permitted notice to be deemed given if the Secretary of State noted the above circumstances on the file. The High Court found this was not lawful, observing 'you do not "give" someone "notice" of something by putting the notice in your desk drawer and locking it.'[2]

7. Whilst there is a clear need to consider how someone can be given notice or notice that is *deemed* to be given in the above circumstances, JUSTICE and PLP are concerned with how broadly this exception to notice has been drafted. It is important to remember that notice of a decision is not a mere technicality, particularly when decisions are as serious and have such fundamental consequences as deprivation of citizenship, notice is matter of natural justice. 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.'[3] 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): you cannot challenge a decision you are not notified about.[4]

8. However, Clause 9 is drafted very broadly. 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 online describe the test for dispensing with notice to be 'exceptional circumstances', which is not the case. The factsheet features unfinished sentences on this area of policy, perhaps as a result of late introduction of this amendment.[5]

9. Any provision which abridges or exempts notice, for example when someone's address is unknown, needs to be drawn restrictively, in order to balance restrictions carefully against

[1] See *D4 v SSHD [2021] EWHC 2179 (Admin)*
[2] Ibid, para 49
[3] R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36, para [26]
[4] 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. Available at https://committees.parliament.uk/publications/8021/documents/82695/default/
[5] See the Deprivation of Citizenship Factsheet published on 3 December 2021, which states "The Bill allows for the Home Office to deprive someone of their citizenship without delivering physical notification to them but only in exceptional circumstances, as above. Process and safeguards already in place " the sentence ends without completion or a full stop. Available at: https://www.gov.uk/government/publications/nationality-and-borders-bill-deprivation-of-citizenship-factsheet

the preservation of the right to notice and access to justice. PLP and JUSTICE do not consider that the above clause strikes the right balance. Such provisions should not be drawn broadly and rushed through Parliament, but rather require careful scrutiny, especially when they concern such an important decision as deprivation of citizenship.

We therefore support amendment 12 to leave out clause 9.

Amendments 32-38 to Clause 21: Late compliance with priority removal notice: damage to credibility

10. As previously drafted and considered in Committee, Clause 21 sought to standardise how information or evidence was considered by the Secretary of State or other competent authority in certain human rights, protection, modern slavery or human trafficking decisions when that information came after the cut-off date of a Priority Removal Notice, i.e. it was 'late'.

11. **The problem with these additional amendments:** Amendments 32, 33, 34, 36, 37 and 38 mean that the duty to take into account, as damaging to a person's credibility, material provided late in response to a priority removal notice will apply not only to the Secretary of State but also to any material before immigration officers, the Tribunals and Special Immigration Appeals Commission (SIAC). Amendment 35 further requires judges to make an explicit statement about how it has done so when it makes a decision.

12. The problems with these amendments are that 1) they are attempting to impose further unnecessary restrictions on judicial decision-making, and 2) those restrictions risk undermining fair decision-making.

13. We do not consider such a requirement to make certain deductions about credibility based on lateness is required or indeed desirable. The judiciary are already required to take account of behaviour, as damaging to credibility, which is designed or likely to mislead, conceal information or obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.[6] Therefore there already exists a more nuanced basis on which the judiciary will consider credibility – not based on complying with a deadline, but on the behaviour of the appellant. The effect therefore of the amendments is not to give the judiciary further tools with which to assess credibility; it already has such tools. The effect is to constrain the assessment of credibility and restrict the proper and independent exercise of judicial scrutiny of all circumstances - a process which is of utmost importance given the high proportion of first instance decisions that are overturned by the First-tier Tribunal on appeal.[7]

14. We consider this will make unfair outcomes more likely, rather than less. There are numerous legitimate reasons why late claims are made, including difficulties in accessing legal advice; lack of understanding of the scheme; the emergence of new evidence; changes in the law; shame and fear of disclosure; and the impact of trauma on disclosure.

---

[6] Under s.8 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

[7] Around 50% of appeals to the First-tier Tribunal against the Home Office's decisions are successful: Tribunal Statistics Quarterly: January to March 2021 (published 10 June 2021), table FIA.3, available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2021

15. There is a possibility of the clause not applying if such circumstances are deemed a 'good reason' by the deciding authority. However, someone who is experiencing difficulty in accessing appropriate support to bring their claim, causing lateness in any claim made, may for those exact same reasons experience significant difficulties proving their good reasons. Furthermore, even if there is no good reason for lateness, for example a simple mistake, even negligence on behalf of the appellant, this does not mean that the judicial scrutiny of their appeal should be restricted.

    PLP and JUSTICE do not consider legislation to restrict the judicial interpretation of evidence on the basis of its timing is necessary or desirable. We therefore urge Members of Parliament to vote against Amendments 32-38 to Clause 21.

Amendment 119 to Clause 25: Late provision of evidence in asylum or human rights claim: weight

16. Clause 25 also stipulates that the judiciary shall have regard to the principle that that minimal weight should be given to evidence which is late without good reason in any asylum or human rights claim. Amendment 119 seeks to leave out Clause 25. Whilst PLP and JUSTICE do not think Clause 25 is necessary for the same reasons as above in relation to Clause 21, it provides for some appropriate judicial discretion, for example, having *regard* to the principle that minimal weight should be given is not the same as stipulating minimal weight shall be given.

    We therefore support amendment 119 to leave out Clause 25. However, priority should be given to the scrutiny and opposition to the Government's amendments 32-38 to Clause 21.

Amendments 39 & 40 to Clause 22 Priority removal notices: expedited appeals; Amendments 42 & 43 to Clause 23 Expedited appeals: joining of related appeals; and Amendments 46 & 47 to Clause 26 Accelerated detained appeals

17. PLP and JUSTICE have already briefed on why expediting appeals is of concern. The severely curtailed expedited appeal process in Clause 22 applies to a protection or human rights appeal if the claim is made after the cut-off date of a Priority Removal Notice. The restrictions include removing the appeal to the First-tier Tribunal and removing onward appeal to the Court of Appeal, essentially giving 'one shot at justice in the Upper Tribunal.

18. No appeal is immune from judicial error, that is the very reason why multiple levels of judicial scrutiny exist across the justice system. This is true regardless of whether the claim being appealed is deemed late by the Secretary of State. Therefore, such provisions are particularly draconian.

19. It has been of considerable concern to PLP and JUSTICE that the reach of these provisions has been altered to be even more onerous during Committee stage. As amended, they now also apply to related appeals even if those appeals relate to claims made in time (Clause 23). Clause 20(4) has also been inserted, which preserves the expedited appeal process for a late claim even if the PRN recipient stops being liable for deportation or removal. PLP and JUSTICE consider this to be directly contrary to the stated purpose of the expedited appeal process, which was stated as being 'to reduce the extent

to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action' (Explanatory Notes, para 220). You cannot frustrate a removal for which you are no longer liable.

20. We have also briefed on why the accelerated detained appeals in Clause 26 poses a threat to access to justice. Clause 26 is requiring a process to be recreated which has existed before – the Detained Fast Track process. The Detained Fast Track rules were found by the Court of Appeal 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]

21. **The problem with these additional amendments:** All the above appeals processes, for expedited appeals (clause 22), related appeals (clause 23) and for accelerated detained appeals (clause 26) all contain a 'safety valve' provision, i.e., a way for an appeal to exit the expedited or accelerated process. The test for when that may happen is currently when the Tribunal 'is satisfied that it Is in the interests of justice.' However, for all three clauses, that safety valve now is proposed to be narrowed by changing the test. Amendments 39 & 40 for Clause 22; Amendments 42 & 43 for Clause 23; and Amendments 46 & 47 for Clause 26 all seek to replace the test, from when it is "in the interests of justice" to when it is 'the only way to secure that justice is done'.

22. The 'interests of justice' test was the backdrop to the Committee stage consideration of these provisions. It is concerning that it is only after the introduction of Clause 23, widening the application of the expedited process, that the safety valve to the process is being narrowed, rather than all the changes being considered together.

23. Furthermore, it is unclear what the desired impact of the change is. Does the Secretary of State anticipate that there will be cases in which it is in the interests of justice for them to leave the expedited /accelerated process, but which will fail the new test? There is no evidence of why this change is being made at this stage nor why it is needed, but on the face of the amendments they are clear further restrictions to fair process and access to justice.

24. **We consider that the onerous restrictions on appeal in Clauses 22, 23 and 26 require a robust safety valve at a minimum so that the risk they pose to access to justice can be sufficiently responded to on an individual basis. We therefore do not support the narrowing of the test in any of the clauses and urge Members of Parliament to vote against amendments 39, 40, 42, 43, 46 and 47.**

<u>Amendment 106 to Clause 45 notice for removal</u>

25. Committee stage introduced further circumstances in which the 5-day statutory minimum period of removal would not apply within the inserted sections 10A-10E of the Immigration and Asylum Act 1999. PLP and JUSTICE have previously briefed on these provisions: whilst the statutory minimum notice period is to be welcomed, the exceptions risk 'no notice' removals and the fundamental barrier to access to justice a no notice removal entails. Case studies of no notice removals can be found in our previous briefing on Clause 45 (then clause 43) here.

[8] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840

We agree with the conclusions of the Joint Committee 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.[9]

[9] "175. Overall, the Committee welcomes clause 45 as it provides a statutory guarantee of at least 5 working days' notice before a person is removed, an increase on the 72hrs currently guaranteed in policy guidance and does not permit the use of 'removal windows'. These changes provide greater protection for the right of access to justice and against unjustified removals to face human rights abuses taking place without legal challenge. It is important to recognise, however, that the Bill provides for a minimum period of notice, and that if more notice is required to ensure the recipient's right to access justice is respected then more must be provided.
176. It is also important that the power to remove a person who has been issued a priority removal notice without providing a notice period is not used in cases where the right to access justice requires notice to be given. 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. 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. It should also be emphasised in the policy guidance that accompanies the power to detain that detention should not be maintained for 21 days in advance of a removal date where that detention is not necessary and proportionate in the individual case." Footnote 4 above.