Public Law Project and JUSTICE
House of Lords Report Stage briefing: 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 at Report Stage in the House of Lords. Clause 9 proposes to give the State the power to deprive citizens of their citizenship without notifying them. Furthermore, it proposes such power be available in extremely broad circumstances with no safeguards for the individual.

2. 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. We are unpersuaded that this power is necessary, and we are concerned by how broadly and subjectively the power is drafted. When contemplating such an onerous power, such drafting is unjustifiable.

3. PLP and JUSTICE support Amendment No.20 tabled by Baroness D'Souza that Clause 9 not stand part of the Bill. In summary[1], we do so because:

    a. Notice is not a technicality; it is a fundamental principle of the right of access to justice.[2] If there is no notice, there is no appeal, and therefore no possibility to scrutinise the Secretary of State's decision making. Appeal is critical given the scope of the power. Accessing that appeal cannot be theoretical and illusory. It must be practical and effective.

    b. The power is drafted with a subjective test: notice can be withheld "if it appears to the Secretary of State" that one of the grounds apply. This fails to require the power to be exercised responsibly and when objectively necessary. Again, considering the consequences to the individual, this is unjustifiable.

    c. The circumstances in which the power can be exercised are so broadly drafted that they provide almost no protection to the individual nor restrictions on the State at all, particularly the catch-all "otherwise in the public interest" limb.

[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] 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].

d. There are no mechanisms of judicial or political oversight of the power, as there are in Australian and New Zealand, despite those jurisdictions having much stricter law on deprivation of citizenship.[3]

e. Clause 9 follows a 2021 High Court judgment,[4] 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 found that putting a notice in a desk drawer was *not* notice and was unlawful.[5] This has since been upheld by the Court of Appeal.[6] The Clause attempts not only to provide a future power to withhold notice, but to retrospectively legitimise and legalise all such past practice before the new power comes into law. In principle, this is bad law-making. In practice, for any individuals affected, they will remain unnotified, but in addition there will be no obligation on the Government to consider if its failure to notify is legal under the new law.

Secondary position

Clause 9 has been drafted broadly and rushed through Parliament, rather than being the subject of careful scrutiny. For reasons set out above, PLP and JUSTICE continue to oppose that clause 9 stand part of the Bill.

4. However, should the leave out amendment not succeed, we would support the following amendments tabled by Lord Anderson and Baroness D'Souza, as a secondary position. Given the importance of what is at stake for individuals, these amendments provide some safeguards where none currently exist.

Amendment No.15 tabled by Lord Anderson of Ipswich

5. This amendment 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.

Amendment No.16 tabled by Lord Anderson of Ipswich

6. Two of the current "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"). We support this restriction, since circumstances in which no notice is given should be narrowly defined. Furthermore, a test of objective necessity is

[3] 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/)
[4] See *D4 v SSHD [2021] EWHC 2179 (Admin)*
[5] Ibid.
[6] *R(D4) v Secretary of State for the Home Department* [2022] EWCA Civ 33, 26 January 2022

introduced, which is an improvement on the subjective test: the Secretary of State must reasonably consider it necessary not to give notice.

Amendment No.17 tabled by Lord Anderson of Ipswich

7. This amendment inserts an explicit duty for the Secretary of State to give written notice to any individual who is subject to a no notice deprivation of citizenship order if they make contact with the Home Office. We support clarity in such circumstances, in which it would be indefensible for notice to continue to be withheld.

Amendment No.18 tabled by Lord Anderson of Ipswich

8. This amendment provides that no time will run until notice is given. As we have consistently raised in our briefings, an individual cannot appeal a decision they do not know about, and therefore this protection is necessary to ensure time to appeal does not run out whilst a person is unnotified.

Amendment No.19 and No.15tabled by, Lord Anderson of Ipswich

9. This schedule creates a mandatory judicial oversight mechanism[7] for every "conducive to the public good" deprivation order which is made without notice. We support this mechanism which will ensure that the Secretary of State's power is scrutinised by the independent judiciary. 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.

Amendment tabled Baroness D'Souza deleting subsections (5), (6) and (7)

10. Under clause 9, subsection (5) ensures that prior notices of deprivations which would otherwise be unlawful for failure to give proper notice, will be treated by the court as a lawful 'pre-commencement' deprivation order. This amendment removes subsection (5), meaning historical deprivation orders found to be unlawful for failure to give proper notice, as was recently found in the case of D4, will be upheld. Removing subsections (6) and (7) is consequential to removing subsection (5).

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