ILPA briefing to Government New Clause 18 *Deprivation of citizenship: conduct seriously prejudicial to vital interests of the UK*

> *"Prejudicial" merely means that the Secretary of State thinks that it is not in the interests of the United Kingdom. There are some who think that Euroscepticism, which is rife in this House and in Parliament generally, is prejudicial to the interests of the United Kingdom because we ought to join the single European currency. Are all Eurosceptics with another citizenship to have their United Kingdom citizenship removed? On the face of it, the idea is absurd. An absurdity of this degree is also a manifest and intolerable injustice.* Lord Rees Mogg, Debates on the Nationality Immigration and Asylum Bill HL Report 9 October 2002, col 278

Briefing

In 2013 the UK Government lost the case of *Al Jedda* [2013] UKSC 62. The Secretary of State sought to deprive Mr Al Jedda of his British citizenship on the basis that he had, or could at once acquire Iraqi nationality and should forfeit his British nationality because this was conducive to the public good for reasons of national security. It was held that Mr Al Jedda did not have Iraqi nationality. It was held that whatever the prospects of his acquiring British nationality, the law did not permit the Secretary of State to make him stateless. It is that law that the Secretary of State seeks to change.

The Secretary of State fought the *Al Jedda* case on the basis that Mr Jedda was not stateless. She then argued that if he were to become so it would be because of his own failure, rapidly and without formality, to reacquire resume his Iraqi nationality. She did not argue that his character, conduct or associations made it permissible to contemplate consigning him to life as stateless person. This clause does contemplate that the actions of the UK could leave a person stateless for an indefinite period or for ever.

We question whether the clause falls within the scope of the Bill, given the comments of the Minister in the Public bill Committee. Dr Julian Huppert had raised questions of citizenship in the context of exceptions to the clauses on bail and was told by Mr Mark Harper MP:

> *My hon. Friend the Member for Cambridge has raised with me before the issue that his amendment deals with, as he says, and he has thought of a very creative way of raising it in the Bill, given that to solve the problem substantively… would actually be outside the scope of the Bill. I am sure that he tested that with the Clerks and came up with a very creative way of raising it. He is right that it is an anomaly that some people do not qualify as British citizens by birth, either because they were born at a time when they could not inherit a mother's British nationality, or because their parents were unmarried and they could not therefore inherit their father's nationality. That does not apply to children born today, but he is right that the previous law change was not retrospective. … As my predecessor, my right hon. Friend the Member for Ashford (Damian Green) said, and as I said in my letter, we support the change that my hon. Friend the Member for Cambridge proposes, but that is not within the scope of the Bill.* [1]

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[1] http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131105/pm/131105s01.htm - c col 178

ILPA resisted the temptation to propose a considerable number of citizenship amendments for the Public Bill Committee on the understanding that they would be rejected as not within the scope of the Bill and would therefore welcome an explanation of the basis for inclusion of the current amendment with a view to proposing them in the House of Lords. It has been suggested to us that New Clause 18 differs from Dr Huppert's amendments in that it is concerned only with persons who naturalised as British. It is, but that is in no way material to the question of whether it is an amendment about citizenship, which it is, rather than about immigration. It is silent on the proposal as to the immigration status, if any, to be afforded a person deprived of their citizenship. As set out in the Annexe, the question of whether a difference should be made between those naturalising as British and those born British has preoccupied the UK since the 1961 UN Convention on the Reduction of Statelessness was negotiated, as has the desire to reduce statelessness.

The amendment appeared on the order paper on 29 January 2014 and on that date we first had sight of the Government European Convention on Human Rights Memorandum pertaining to the clause. We do not attempt to address herein the complex questions of the present day effects of the UK's declaration made at the time of ratification of the 1961 UN Convention on the Reduction of Statelessness and the question of the compatibility of the Government amendment with that declaration, in the light of subsequent developments, questions to which we may return when the Bill reaches the House of Lords. Suffice to say that in 2002 when in the wake of the 11 September 2013 bombings in the United States there was the utmost concern for all matters of national security, the UK considered it proper to make provision in its law to prohibit deprivation of citizenship on the grounds that this was conducive to the public good, where such deprivation would make a person stateless. This is perhaps unsurprising. A person with no ties to any State, for which no State has responsibility is not obviously a lesser threat to national security.

We recall the words of the late Lord Kingsland when the Nationality Immigration and Asylum Act 2002 was debated:

> *"Clause 4(2) says: The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of—*
>
> 1. *(a) the United Kingdom, or*
> 2. *(b) a British overseas territory*".
>
> *Subsection (4) qualifies that by adding that citizenship cannot be so deprived if it would render the citizen stateless.*
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> *Our amendment would add to that qualification, or if the seriously prejudicial conduct in question constitutes an offence under the Terrorism Act 2000 (c.11), the Anti-terrorism, Crime and Security Act 2001 (c.24) or general criminal law*". *We have tabled the amendment because, under the clause, the Secretary of State can override any single stipulation of criminal law in the land by this massive discretionary power, which depends solely on his subjective judgment. …*
>
> *Why should such a person not be prosecuted in the normal way in our criminal courts instead? Why on earth should the Secretary of State be given this discretion to pick somebody out of the normal judicial process and deal with him by his own subjective judgment.*
>
> *Again in another place, Miss Eagle referred to war criminals as a category of person whom we would wish to deprive of citizenship—if they had it—using these new powers. Does that mean that the Government will, in future, consider deprivation of citizenship under Clause 4 as an alternative to prosecuting war criminals by due process?*

The noble Lord, Lord Filkin, made an intriguing comment in Committee on 8th July. He said: We do not consider that deprivation of citizenship should in future be applied as a penalty for acts of a general criminal nature".—[Official Report, 8/7/02; col. 503.] What then do the Government envisage as a response to acts of the most serious criminal nature against the state, such as those that I have already outlined?

Later in that debate I asked the noble Lord to outline the circumstances in which he foresaw the discretion of the Secretary of State being exercised. He replied: One circumstance would be where a British citizen, either by himself or in concert with others, had taken actions against the interests of the British state and its citizens in ways that were clear and blatant while not resident in the United Kingdom. In that situation, I cannot see that the British criminal law could be used against them if their acts were committed abroad, even if their acts were against the interests of the British state from abroad".—[Official Report, 8/7/02; col. 511.] Surely, however, the Government are at perfect liberty in such a case to apply for the extradition of that person with a view to prosecuting him or her in our own courts in the United Kingdom.

I hope that the Minister will at least be able to reassure noble Lords—indeed, to undertake—that the proposals in this clause will not be used so as to evade the obligation to prosecute terrorists and others who commit serious crimes against the United Kingdom under any of our criminal laws.

I conclude with this point. Clause 4 must be against the rules of comity in international law. If we identify someone as a person proposing to commit a serious terrorist offence, for example, surely the obligation is on us to deal with that person. If we simply deport him, we shall be handing on—in my submission, irresponsibly—this terrorist problem to another state which may not have the same capability of dealing with it as we do. It cannot be a proper response to the terrorist threat to refuse to deal with it ourselves if the act involved occurs in our jurisdiction or in another jurisdiction from which we can gain extradition. That would be irresponsible of us. HL Report 9 October 2002, cols 277-278

His speech was followed by that of the Lord Rees Mogg, quoted at the top of this paper. Instead of addressing those questions at this stage, in this briefing we concentrate on why passing this amendment risks forfeiting the UK's powerful position in challenging the global problem of statelessness.

Most stateless people are not stateless as a result of a deprivation of nationality on the grounds of character, instead they are the victims of discrimination and oppression, deprived, in the memorable words of Hannah Arendt, of the right to have rights. They need the UK's protection. In the words of UNHCR:

> *To be stateless is to be without nationality or citizenship. There is no legal bond of nationality between the state and the individual. Stateless people face numerous difficulties in their daily lives: they can lack access to health care, education, property rights and the ability to move freely. They are also vulnerable to arbitrary treatment and crimes like trafficking. Their marginalization can create tensions in society and lead to instability at an international level, including, in extreme cases, conflict and displacement*[2].

In his preface to the UNHCR *Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011*[3], UN High Commissioner for Refugees (UNHCR), the UN High Commissioner for Refugees, António Gutierres, said

> *I am especially heartened by the real breakthrough – what I would describe as a 'quantum leap forward' – in relation to the protection of stateless people. Statelessness was one of the most*

[2] http://www.unhcr.org/pages/49c3646c158.html
[3] October 2012, available at: http://www.refworld.org/docid/50aca6112.html [accessed 30 January 2014]

> *neglected areas of the global human rights agenda. … awareness of the problem of statelessness has expanded significantly in all regions, and substantive progress has been made in addressing it… Over sixty States made statelessness-related pledges. …The pledges set out in this document constitute a profound expression of solidarity and commitment. They signal a watershed in the reinforcement of the international protection regime and, once implemented, will lead to tangible improvements in the lives of men, women, boys and girls affected by displacement and statelessness in the decade ahead.*

In 2013, following its pledge made at the conference celebrating the 50th anniversary of the 1961 UN Convention on the Reduction of Stateless, the Home Office created a statelessness determination procedure and provision for stateless persons to be given leave to remain in the UK. The Home Office's May 2013 guidance on applications for leave as a stateless person reads as follows:

> *Statelessness has been estimated to affect up to 12 million people worldwide. Possession of nationality is essential for full participation in society and a prerequisite for the enjoyment of the full range of human rights. ..*
>
> *Given the seriousness of the problem, the United Nations in 1954 adopted the Convention Relating to the Status of Stateless Persons. The Office of the United Nations High Commissioner for Refugees (UNHCR) has a mandate to work with governments to prevent and reduce statelessness and to identify and protect stateless persons. …*
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> *In January 2012 the Home Secretary agreed to develop a new procedure by which stateless persons who have no other right to remain in the UK but cannot be removed, can be formally determined as stateless and granted leave to remain. This would address a potential gap in the UK"s protection response, ensure visible compliance with international treaties and help deal positively with cases which might otherwise be incapable of satisfactory resolution[4].*

The UK risks losing a proud position, a position of solidarity, a potential position of leadership. We urge the House of Commons to reject this amendment.
We set out in the Annexe the history and development of the relationship between the deprivation of citizenship and the prohibition on statelessness in UK law.

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Annexe History and Development of the UK law

UK took an active part in the negotiations that produced the 1961 UN Convention on the Reduction of Statelessness.

On 16 August 1961 at the Sixteenth Plenary Meeting of the Conference that agreed the Convention, the UK delegate, Mr Ross, said of deprivation of nationality that 'the Conference still had the duty of doing its upmost to eliminate that minor cause of statelessness as well...' The UK's compromise text 'admitted no grounds for deprivation other than those already specified in the current law of the

[4] Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/stateless-guide/stateless-guide.pdf?view=Binary

Contracting States... [I]t attempted to overcome... objections... by restricting the causes for deprivation of nationality to certain well-defined categories': UN doc. A/CONF.9/SR.16, 11 October 1961, 2, 3-4.

At the Twentieth Plenary Meeting on 23 August 1961, the UK delegate, Mr Harvey, said:

> *... There had been considerable discussion as to whether or not separate grounds of deprivation or nationality should be applied to natural-born and to naturalized persons. The feeling of the Group had been that the distinction was not a happy one, and it had concluded that it was unnecessary to grant extended grounds for deprivation in the case of naturalized persons. Hence the grounds mentioned applied to both types of cases. The effect of the article was to "freeze" the grounds of deprivation at the date on which the State acceded to the Convention, and to limit them to certain specified types. Paragraph 4 provided that, while the grounds could not subsequently be extended, certain modifications and improvements could be made...* [5]

Paragraph 4 was deleted from the final version by a vote of 12 to none, with 18 abstentions but on the basis:

> *... that the United Kingdom understood the intention of paragraph 4 as being to make it clear that nothing in paragraph 3 should prevent States from restricting their grounds for deprivation of nationality. However, that could be implied from the terms of the Convention as a whole; paragraph 4 was therefore unnecessary… its deletion…would…make no difference to the meaning of the Convention*[6]

The Supreme Court in *Al Jedda* set out the history of the UK's approach. The UK has had a power to deprive persons of citizenship on the ground that is has been obtained by misrepresentation or fraud since the British Nationality and Status of Aliens Act 1914, regardless of whether such deprivation leaves a person stateless.

The question of deprivation the grounds of character tracked the wars of the 20th century. Section 1 of the British Nationality and Status of Aliens Act 1918 converted the power to deprive into a duty and extended it to grounds of public interest: acts of disloyalty to the Crown and, provided that the Secretary of State was satisfied that the continuance of a person's certificate of naturalisation was not conducive to the public good, to any of five further facts. Following the second World War, section 20 of the British Nationality Act 1948 converted the duty back into a power, to be exercised on broadly the same grounds as before. In 1959 the UK ratified the 1954 UN Convention relating to the Status of Stateless Persons. It recited the "profound concern" of the United Nations for stateless persons and the desirability of regulating and improving their status. It did not address deprivation. In 1966 the UK ratified the 1961 UN Convention on the Reduction of Statelessness. To do so, parliament passed the British Nationality (No 2) Act 1964 abolishing two of the grounds for deprivation under the 1948 Act, which were not permitted by the Convention and in the case of a third, a sentence of imprisonment of over a year within five years of naturalisation, providing that the power to deprive could be exercised only where to do so would not make the person stateless. This was the beginning of the UK's limiting its powers of deprivation to prevent statelessness.

Upon ratification the UK made a declaration under paragraph 8(3)(a) which allowed it to retain its existing power to deprive a person of citizenship on the ground of what the Supreme Court in Al

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[5] UN doc. A/CONF.9/SR.20, 11 October 1961, 2-3.

[6] Twenty-second Plenary Meeting, 24 August 1961: UN doc. A/CONF.9/SR.22, 11 October 1961, 7.

Jedda described as, “in effect, conduct seriously prejudicial to the vital interests of the State”. That term is used and there is also reference to rendering services to the enemy..

Section 40 of the British Nationality Act 1981 maintained the position. In the Nationality, Immigration and Asylum Act 2002 the UK took powers to deprive both those born British and those naturalising British, of their British citizenship on the grounds that they had done something "seriously prejudicial to the vital interests" of the UK. At the time, with a view to future ratification of the 1997 Council of Europe European Convention on Nationality which prohibited deprivation leading to statelessness other than on the grounds of misrepresentation or fraud, the UK provided that deprivation on character grounds could not lead to statelessness. In .the Immigration and Asylum Act 2006, passed in the wake of the 7 July 2006 bombings in London, the UK changed the test to deprivation’s being contrary to the public good. Still the prohibition on deprivation leading to statelessness remained.