

# **CITIZENSHIP REMOVAL RESULTING IN STATELESSNESS**

**FIRST REPORT OF THE INDEPENDENT REVIEWER ON  
THE OPERATION OF THE POWER TO REMOVE CITIZENSHIP  
OBTAINED BY NATURALISATION FROM  
PERSONS WHO HAVE NO OTHER CITIZENSHIP**

by

**DAVID ANDERSON Q.C.**

**Independent Reviewer of Terrorism Legislation**

APRIL 2016



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## 1. INTRODUCTION

### The power under review

- 1.1. By the Immigration Act 2014 **[IA 2014]**, Parliament conferred upon the Secretary of State the power under review: that is, a power to deprive a person of British citizenship resulting from naturalisation, in circumstances where the consequence of that order is to render the person stateless.<sup>1</sup>
- 1.2. The power under review may be exercised only if:
- (a) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, when a British citizen, “*has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom*” or associated territories; and
  - (b) the Secretary of State has “*reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such country or territory*”.<sup>2</sup>
- 1.3. Outside the scope of this review are the powers that enable:
- (a) *dual nationals* to be deprived of their British citizenship (however acquired), if the Secretary of State is satisfied that deprivation is conducive to the public good;<sup>3</sup> and
  - (b) single or dual nationals to be deprived of citizenship resulting from registration or naturalisation when the Secretary of State is satisfied that it was obtained by means of *fraud, false representation or concealment of a material fact*.<sup>4</sup>
- 1.4. So the uniqueness of the power under review arises:
- (a) neither from the mere fact that deprivation of citizenship is exercisable on “*conducive to the public good*” grounds,
  - (b) nor from the mere fact that its exercise makes people stateless.

Rather, the distinctive nature of the power lies in its combination of those factors.

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<sup>1</sup> IA 2014 s66, inserting a new s40(4A) into the British Nationality Act 1981 **[BNA 1981]**.

<sup>2</sup> This condition was inserted during the parliamentary passage of the Bill: the original intention was to confer a power to make persons stateless, regardless of their prospects of acquiring citizenship elsewhere. See 2.21(c) below.

<sup>3</sup> BNA 1981 s40(2), as substituted by Immigration Asylum and Nationality Act 2006 ss 56(1), 62. Prior to that date, higher or additional thresholds had to be surmounted: 2.5 and 2.10 below.

<sup>4</sup> BNA 1981 s40(3).

## **This review**

- 1.5. The power under review is comparable to one that existed in the UK prior to April 2003 (2.4-2.8 below), but has relatively few international parallels (3.9 below). Its parliamentary passage was sufficiently controversial that provision was made for the regular review of its operation.
- 1.6. Reviews are to take place as follows:
  - (a) The first review is to be completed as soon as practicable after the end of the first year in which the power was in force, and its outcome communicated to the Home Secretary in a report which she is obliged to lay before each House of Parliament.<sup>5</sup>
  - (b) Subsequent reviews are to be conducted, and reports produced, at three-year intervals.<sup>6</sup>
- 1.7. I am a barrister (Queen’s Counsel) in independent practice, serving on a part-time basis as Independent Reviewer of Terrorism Legislation.<sup>7</sup> James Brokenshire MP, Minister of State for Immigration, invited me to conduct the first statutory review in July 2015. There is no statutory requirement that this or any subsequent review be conducted by the Independent Reviewer of Terrorism Legislation, though it is certainly necessary that any reviewer should have full security clearance.
- 1.8. This report is the outcome of the first statutory review. It covers the period 30 July 2014 to 29 July 2015.

## **Operation of the power**

- 1.9. The power under review was not exercised during the period under review, and indeed had still not been exercised as of April 2016, when this report went to print. There is therefore no concrete action to review.
- 1.10. It may however be useful for the evolution of the power under review to be summarised, and for some of the likely legal and practical issues concerning its operation to be identified in outline. That is done in chapters 2 and 3, before some short conclusory comments in chapter 4.

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<sup>5</sup> Immigration Act 2014 s66(3), inserting a new s40(4B) into the British Nationality Act 1981.

<sup>6</sup> British Nationality Act 1981 s40(4B)(1)(b).

<sup>7</sup> Previous reports, and other publications explaining the role of the Independent Reviewer, are freely available from the website <https://terrorismlegislationreviewer.independent.gov.uk>. The Independent Reviewer may also be followed on twitter @terrorwatchdog.

## 2. EVOLUTION OF THE POWER

### International treaties

- 2.1. Two principal international Conventions seek to avoid incidents of statelessness. They are:
- (a) The 1961 UN Convention on the Reduction of Statelessness [**the 1961 Convention**]; and
  - (b) The Council of Europe's 1997 European Convention on Nationality [**the 1997 Convention**].
- 2.2. In the view of the Government, neither of those Conventions prevents the United Kingdom from using the power under review to render a person stateless. That is, in summary, because:
- (a) Though the United Kingdom ratified the 1961 Convention, it was entitled according to the terms of that Convention to retain a pre-existing domestic law power to deprive a person of their nationality if the person had "*conducted himself in a manner seriously prejudicial to the vital interests of the state*".<sup>8</sup> Such a power is said to have existed at the time under the British Nationality Act 1948 [**BNA 1948**].<sup>9</sup>
  - (b) Though the 1997 Convention absolutely prohibited deprivation resulting in statelessness, save where nationality had been obtained by misrepresentation or fraud,<sup>10</sup> it was never ratified by the United Kingdom.<sup>11</sup>
- 2.3. Further background is set out in a recent judgment of the UK Supreme Court<sup>12</sup> and in a useful House of Commons Library Note, the contents of which are not elaborated here.<sup>13</sup>

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<sup>8</sup> 1961 Convention, Article 8(3)(a)(ii). The UK ratified the Convention in March 1966 with a reservation to Article 8.

<sup>9</sup> BNA 1948, s20.

<sup>10</sup> 1997 Convention, Article 7(3).

<sup>11</sup> Though the Government intended to ratify it in 2002, when UK law was changed to bring it into line with the 1997 Convention: 2.11 below.

<sup>12</sup> *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62, paras 15-22.

<sup>13</sup> House of Commons Library (Melanie Gower), "Deprivation of British citizenship and withdrawal of passport facilities", Standard Note SN/HA/6820, 30 January 2015.

## UK law and practice 1983-2003

- 2.4. The current basis of nationality law in the UK is the British Nationality Act 1981 **[BNA 1981]**, in force since 1 January 1983.
- 2.5. For 20 years after that, BNA 1981 stated that the Secretary of State could by order deprive of citizenship a person who had acquired British citizenship<sup>14</sup> by registration or naturalisation, if satisfied that:
- (a) registration or naturalisation had been obtained by fraud, false representation or concealment of material fact: s40(1);
  - (b) the person had shown disloyalty of disaffection towards Her Majesty by act or speech: s40(3)(a);
  - (c) the person had unlawfully traded or communicated with an enemy during any war in which Her Majesty was engaged or been engaged in or associated with any business carried out to assist an enemy in that war: s40(3)(b); or
  - (d) the person had been sentenced in any country to twelve months or more imprisonment within five years of the date of naturalisation or registration and the person would not become stateless: s40(3)(c), s40(5)(b).
- In each case, the Secretary of State could deprive a person of their British citizenship only if satisfied that it was not conducive to the public good that that person should continue to be a British citizen.
- 2.6. These powers reflected those previously in place under the British Nationality Act 1948 **[BNA 1948]**.
- 2.7. There was no statutory exclusion, save as stated at 2.5(d) above, for cases in which the deprivation of British citizenship would render a person stateless. UK law prior to April 2003 therefore permitted the removal of citizenship from naturalised British citizens on the basis of specified conduct deemed not conducive to the public good, even if they had no other citizenship and no prospect of obtaining such citizenship.
- 2.8. The Home Office has stated that between 1949 and 1973 there were 10 cases in which persons who had become citizens by application were rendered stateless

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<sup>14</sup> Six types of citizenship status could (and may still) be the subject of deprivation: they are listed in BNA 1981 section 40(1).

by the deprivation of British Citizenship.<sup>15</sup> But the power then fell into disuse. As of 1 February 2002, the citizenship deprivation powers in BNA 1948 and BNA 1981 had not been used since 1973.<sup>16</sup>

#### UK law and practice 2003-2014

- 2.9. The Nationality Immigration and Asylum Act 2002 [**NIAA 2002**] entered into force on 1 April 2003. As regards the deprivation of citizenship, NIAA 2002 amended BNA 1981 in three significant respects.
- 2.10. **First**, the specific grounds summarised at 2.5(b)-(d) above were replaced by a general power in the Secretary of State to deprive a person of citizenship status if satisfied that the person had done anything “*seriously prejudicial to the vital interests of the UK or a British overseas territory*” (s40(2))<sup>17</sup> – a formulation which echoed both the 1961 Convention and the 1997 Convention.
- 2.11. **Secondly**, that “*seriously prejudicial*” power was not to be used if the Secretary of State was satisfied that to do so would make a person stateless (s40(4)). That change brought UK law into line with the 1997 Convention, which the Government at the time intended to sign and ratify.<sup>18</sup>
- 2.12. **Thirdly**, the power was extended to citizenship acquired by birth (though because of the new bar on making people stateless, it could not have been used on such citizens unless they had already acquired the citizenship of another country).
- 2.13. As NIAA 2002 passed through Parliament, Ministers responded to concerns about how the powers would be used. In particular:
- (a) Lord Filkin explained that the term “*vital interests*” “*includes national security, but it also covers economic matters, as well as the political and military infrastructure of our society*”.<sup>19</sup>

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<sup>15</sup> Letter of James Brokenshire MP to the JCHR, 20 February 2014 Q20. That letter, together with the JCHR’s letter to which it responds and other correspondence and memoranda received by the JCHR in connection with the Immigration Bill, can be found at the following link: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/immigration-bill/>

<sup>16</sup> Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387, February 2002, p.35.

<sup>17</sup> The power to deprive a person of citizenship because registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact (2.2(a) above) remained in place: BNA 1981 s 40(3)(6).

<sup>18</sup> HC Committee on the Nationality Immigration and Asylum Bill, 30 April 2002, cols 61-62 (Angela Eagle MP).

<sup>19</sup> Hansard HL Deb 8 July 2002 cols 505-506.

(b) He also gave a “*categorical assurance*” that the powers would not be used as an alternative to prosecution (such as under anti-terrorism legislation) if the Director of Prosecution thought there was evidence to prosecute.<sup>20</sup>

2.14. With effect from 16 June 2006, in the wake of the previous year’s 7/7 London bombings, the “*seriously prejudicial*” requirement cited at 2.10 above was replaced by a more easily-satisfied condition: the Secretary of State now had to be satisfied only that “*deprivation is conducive to the public good*”.<sup>21</sup> But it remained the case that (as had been the case since April 2003) the power could not be used when the effect would be to make a person stateless.

2.15. As recorded by the Joint Committee of Human Rights [JCHR] in February 2014, 27 people had been deprived of their citizenship since 2006 on the ground that it was conducive to the public good to do so.<sup>22</sup>

2.16. The Government has refused to make public the number of persons who were abroad at the time they were deprived, or the number of deprivations that were based in whole or in part on closed material. However:

(a) It did admit that “*at least six*” of those 27 individuals had children.<sup>23</sup>

(b) It has made available to me, pursuant to a commitment given in Parliament,<sup>24</sup> figures as to the numbers of individuals who were abroad when deprived of their citizenship between 2011 and 2015 – while continuing to maintain that the public disclosure of those figures would be contrary to national security.

### **The al-Jedda case**

2.17. The power under review, introduced by IA 2014 s64, had its origins in the failed attempt by the Home Secretary to deprive Hilal al-Jedda, a naturalised British citizen, of his citizenship.

2.18. Mr al-Jedda was originally an Iraqi citizen. He came to the UK as an asylum-seeker in 1992, and acquired British citizenship in 2000, when his Iraqi citizenship automatically lapsed. He travelled to Iraq in 2004, where he was arrested by US forces and transferred into British custody. Shortly before his release in 2007, he was notified that the then Home Secretary was considering depriving him of his British citizenship on the basis that this would be conducive to the public good.

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<sup>20</sup> Hansard HL Deb 9 October 2002, cols 282-3.

<sup>21</sup> Immigration Asylum and Nationality Act 2006, s56, amending BNA 1981 s40(2).

<sup>22</sup> Letter of JCHR to James Brokenshire MP, 12 February 2014, Q21 (fn 15 above).

<sup>23</sup> Letter of James Brokenshire MP to JCHR, 20 February 2014, Q21 (fn 15 above).

<sup>24</sup> Lord Taylor of Holbeach, Hansard HL 7 April 2014 col 1191.

- 2.19. As the law had stood since April 2003, there could be no deprivation of citizenship when the Secretary of State was satisfied that this would render a person stateless (2.11 above). The Secretary of State argued that this prohibition did not apply, either because Mr al-Jedda's Iraqi citizenship had revived or because it was his own failure to apply for Iraqi citizenship, rather than the deprivation order, that threatened to render him stateless. Those arguments were rejected by the Court of Appeal and Supreme Court,<sup>25</sup> with the result that Mr al-Jedda retained his British citizenship.<sup>26</sup>

### Passage of the power under review

- 2.20. Encouraged by the unanimous view of the Supreme Court that when it enacted NIAA 2002 s40(4) (2.11 above)

“Parliament went further than was necessary in order to honour the UK's existing international obligations”,<sup>27</sup>

The Home Secretary tabled an amendment to the Immigration Bill then approaching its Report stage in the Commons. The Government contended that there was no time to hold a public consultation on the matter.<sup>28</sup> The new provision (clause 18, later clause 60) allowed naturalised British citizens to be deprived of their citizenship if the Secretary of State was satisfied that deprivation was conducive to the public good, because the person had conducted himself in a manner which is seriously prejudicial to the vital interests of the United Kingdom.

- 2.21. The most significant developments in debates on the new clause were:
- (a) the rejection by the House of Commons of an Opposition (Labour) amendment that would have required the Home Secretary to obtain the **permission of a court** before depriving a person of their British citizenship;
  - (b) the rejection by the Commons of a Lords amendment that would have provided for the establishment of a **Joint Parliamentary Committee** to consider and report on the proposal; and

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<sup>25</sup> *Secretary of State for Home Department v Al-Jedda* [2013] UKSC 62, 9 October 2013.

<sup>26</sup> Mr al-Jedda's story had a twist in the tail. During the Supreme Court hearing, the Home Office was refused permission to introduce evidence that his Iraqi passport had been used to travel, and that the Iraqi Government regarded him as a citizen. Accordingly, the Home Office issued another deprivation order on 1 November 2013. SIAC decided as a preliminary issue that this second deprivation order did not render Mr Al-Jedda stateless contrary to BNA 1981 s40(4) (SC/66/2008, 18 July 2014), and the issue is now before the Court of Appeal.

<sup>27</sup> *Secretary of State for Home Department v Al-Jedda* [2013] UKSC 62, 9 October 2013, para 22.

<sup>28</sup> Government Response to JCHR report, para 5.

(c) the Government's concessions, in response to concerns that persons could be left permanently stateless, that:

- the power should be subject to **regular review** (1.5-1.6 above); and that
- the Home Secretary should be able to exercise the power under review only if she had reasonable grounds for believing that the person was **able to become a national of another country or territory**.

2.22. The latter concession introduced a hurdle that did not apply to the analogous pre-2003 power (2.4-2.8 above), though that power was not used after 1973.

2.23. Reports and commentaries dealing with the power under review were produced by the JCHR,<sup>29</sup> by the House of Lords Constitution Committee<sup>30</sup> and by a number of academics and NGOs. Along with the relevant ministerial statements and parliamentary debates, they are ably summarised and referenced in a House of Commons Library Standard Note.<sup>31</sup>

2.24. The power under review, introduced by IA 2014 s66, became BNA 1981 s40(4A) and entered into force on 30 July 2014.

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<sup>29</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (Second Report)*, 3 March 2014, HC 1120, paras 4-81.

<sup>30</sup> House of Lords Select Committee on the Constitution, *Immigration Bill*, 7 March 2014, HL Paper 148, paras 19-26.

<sup>31</sup> House of Commons Library (Melanie Gower), "*Deprivation of British citizenship and withdrawal of passport facilities*", Standard Note SN/JA/6820, 30 January 2015, Appendix 2, pp. 17-23.

### 3. ISSUES RELATING TO THE POWER

#### Citizenship deprivation on conducive grounds

3.1. Powers to strip people of their citizenship on grounds conducive to the public good respond to what my Special Adviser, Professor Clive Walker Q.C., has referred to as

“the growing importance attached to loyalty within core values (such as ‘Britishness’) as the citizen’s reciprocal duty towards the state which grants the prize of citizenship.”<sup>32</sup>

They tap into the feeling, which may well be widespread in the population, that a person who has betrayed the interests of his or her state of citizenship should no longer be entitled to benefit from that citizenship.<sup>33</sup>

3.2. In concrete terms, and in keeping with ancient notions of banishment, such powers are seen as a means of enabling wrongdoers with foreign links (notably terrorists) to be expelled from or denied re-entry to the territory which they have made their home. More specifically, they are one way of recognising the notion that those who have travelled abroad to fight for terrorist organisations inimical to the UK should **forfeit the right to return**.<sup>34</sup>

3.3. The power to deprive dual-nationals of their citizenship exists in the law of a number of states. A 2010 study of 33 European countries found that 14 of them had provisions for deprivation based on behaviour contrary to the interests of the state (restricted in eight cases to naturalised citizens), and noted that while these provisions tend to be rarely invoked, “*a new trend is emerging towards broader provisions for loss on the grounds of actions deemed contrary to the public good*”.<sup>35</sup>

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<sup>32</sup> Private communication to the author. I am indebted to Professor Walker for his assistance with research materials in relation to this report, and for his guidance.

<sup>33</sup> The growing demand for allegiance as a condition of citizenship was recently considered by B. Herzog, *Expatriation in America from the Colonial Era to the War on Terror* (NYU Press, 2015).

<sup>34</sup> Compare the Prime Minister’s announcement on 1 September 2014, after a raising of the threat level three days earlier, of a range of measures to “*stop people travelling overseas to fight for terrorist organisations or engage in terrorism-related activity and subsequently returning to the UK*”: Explanatory Notes to the Counter-Terrorism and Security Act 2015, para 4.

<sup>35</sup> European University Institute, EUDO CITIZENSHIP Policy Brief No. 3, “Deprivation of Citizenship”: [http://eudo-citizenship.eu/docs/policy\\_brief\\_loss.pdf](http://eudo-citizenship.eu/docs/policy_brief_loss.pdf). See further the summary of 22 national laws by the European Commission’s European Migration Network, “Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes”, 25 September 2014.

- 3.4. There have been recent moves to enlarge citizenship-stripping powers in Australia<sup>36</sup> and in France,<sup>37</sup> though a new Canadian law seems set to be reversed.<sup>38</sup> In the USA it has been noted that “*high-profile efforts to legislate the termination of citizenship in the context of terrorist activities have fallen flat*” and that “[e]xpatriation of terrorists is unlikely to ever comprise a component of the US counter-terror response”.<sup>39</sup>
- 3.5. Citizenship deprivation powers have been controversial in a number of countries, even when (because limited in their application to dual nationals) they do not result in statelessness. Such powers are said to **make law-abiding immigrants feel unwelcome** because they encourage the notion that naturalised citizens who have retained their citizenship of origin do not enjoy the same security as those who have always been citizens.
- 3.6. More specifically, a citizenship deprivation power has been characterised as an **ineffective and counter-productive** weapon against terrorism, in that:
- (a) It amounts to “*a policy of catch and release, setting up today’s convicts as tomorrow’s foreign fighters*” and exporting them to places where they can do more damage because (unlike at home) they cannot be monitored.
  - (b) The power encourages “*the dangerous delusion that terrorism is (or can be made into) a foreign threat and problem*”, diminishing the incentive to deal with it domestically.
  - (c) Exercise of the power may result in complex and costly legal battles about whether human rights concerns (in particular, the prohibition against delivering people to torture abroad) prevent deportation to the remaining country of citizenship.

Reflecting on the proposed repeal of a recent Canadian law which has allowed since June 2015 for the deprivation of the citizenship of dual nationals with terrorist convictions, two distinguished terrorism experts summarised these and

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<sup>36</sup> Under the Australian Citizenship Amendment (Allegiance to Australia) Act 2015, citizenship loss for dual nationals is automatic on engaging in conduct defined by reference to terrorism offences, or fighting for, or being in the service of, a specified terrorism organisation.

<sup>37</sup> In early 2016, the French legislature debated a Constitutional Law to Protect the Nation, which would have allowed the legislator to add to existing citizenship deprivation powers. President Hollande announced the withdrawal of the citizenship stripping proposal in late March.

<sup>38</sup> The Strengthening Canadian Citizenship Act 2014, in force from June 2015, permits citizenship to be revoked based on criminal convictions relating to security matters. But the law was controversial, and the new Liberal Government has indicated its intention to repeal it.

<sup>39</sup> Peter J. Spiro, “Expatriating terrorists” (2014) 82 Fordham Law Review 2169-2187, 2170. However, following *Hamdi v Rumsfeld* 542 US 507 (2004), Hamdi was released from detention on condition that he renounce his US citizenship and accept travel prohibitions which prevented his return from Saudi Arabia.

other points by characterising the law as “*anti-terror theatre*” in which “*a careful audit of security benefits took a back seat to the political urge for tough-on-terror optics*”.<sup>40</sup>

- 3.7. Additional concerns arise in the case of **out-of-country deprivation** of citizenship. The position of the UK Government is that individuals’ rights under the European Convention on Human Rights [ECHR] are not engaged in those circumstances.<sup>41</sup> If that is correct, and perhaps even if it is not, the Government may be incentivised to remove the citizenship of undesirable dual nationals at a time when they have chosen to travel abroad.
- 3.8. Out-of-country deprivation is alleged to have been the prelude to rendition to the US and even to US drone strikes.<sup>42</sup> The Home Secretary has confirmed that the power under review “*would apply to somebody who was abroad*”,<sup>43</sup> and the JCHR has voiced its suspicion that “*the main or sole purpose of the new power would be to use it in cases of naturalised persons while they are abroad*”.<sup>44</sup>

### Single-national citizenship deprivation

- 3.9. Most of the above criticisms apply also to that internationally rarer statutory creature,<sup>45</sup> the power to deprive single nationals of their nationality.
- 3.10. The obvious additional concern that applies to single-national deprivation is its **capacity to create statelessness**, contrary to the general objectives of the 1961

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<sup>40</sup> All these quotations are from K. Roach and C. Forcese, “Why stripping citizenship is a weak tool to fight terrorism”, *The Globe and Mail*, 3 March 2016. Similar points have been made in relation to other anti-terrorist measures: in the words of the Privy Counsellor Review Committee (Newton Committee) in its Report of December 2003 on the Anti-Terrorism and Security Act 2001 (HC 100, para 195), “*Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally.*”

<sup>41</sup> Government response to the JCHR, paras 11-12. The Government committed only to “*consider the facts of the case and the advice of other Government departments*” when considering “*what, if any, risk of mistreatment an individual may face as a consequence of deprivation action*”: JCHR letter of 12 February 2014, Q5.

<sup>42</sup> Baroness Kennedy of The Shaws, Hansard HL 7 Apr 2014 cols 1179-1180, citing three instances of persons whose citizenship was removed while in Somalia, one of whom (Mahdi Hashi) was taken to the US and two of whom were killed by drones.

<sup>43</sup> Hansard HC 30 January 2014, col 1046.

<sup>44</sup> Government response to JCHR, paras 8-10.

<sup>45</sup> “*Belgium and Ireland, among others*”, were said, in parliamentary debate on the power under review, to “*provide for the prospect of making a person stateless in circumstances analogous to what we are proposing*”: Lord Taylor of Holbeach, Hansard HL 7 April 2014, col 1192. A research publication from October 2010 indicated that in at least five other European countries (Austria, Estonia, Lithuania, Malta and Switzerland) “*there is no provision to ensure that loss in these cases does not lead to statelessness*”: European University Institute, EUDO CITIZENSHIP Policy brief no. 3, “Loss of Citizenship”.

Convention and the 1997 Convention. The JCHR suggested during the passage of the power under review that there may be an implied international law duty not to increase statelessness, independent from the international conventions referred to at 2.1 above.<sup>46</sup> Whether or not that is so, the immigration status of a person left stateless is problematic. The Government has commented that if such a person is “unable to leave or be removed from the UK for legal or practical reasons ... they could be given limited leave to remain in the UK, so that they were not left in a legal limbo”.<sup>47</sup>

- 3.11. These problems would not be avoided by subjecting a single national to out-of-country deprivation of UK citizenship. In the crisp summary of Professor Guy Goodwin-Gill, one of the world’s foremost authorities on immigration law:

“The United Kingdom has no right and no power to require any other State to accept its outcasts and, as a matter of international law, it will be obliged to readmit them if no other State is prepared to allow them to remain.”<sup>48</sup>

- 3.12. The capacity to create statelessness is reduced, but not removed, by the limitation to the effect that the power under review may only be exercised when the Home Secretary has reasonable grounds to believe that the individual is able to become a national of another country or territory (2.21(c) above).

- 3.13. Both principled and practical objections to the capacity to create statelessness were raised by the former Supreme Court Justice, Lord Brown of Eaton-under-Heywood, in a debate on the power under review:

“Historically, it is the autocrats and dictators who have habitually rendered people stateless, while we have a proud record of resisting such measures and striving to minimise what Lord Wilson called in Al-Jedda ... “*the evil of statelessness*”. [It] is really highly doubtful whether making these individuals stateless would in fact make it easier to control their movements and contribute therefore to national security; rather, it might make it more difficult to remove them.”<sup>49</sup>

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<sup>46</sup> James Brokenshire MP letter of 20 February 2014 to JCHR, Q2 (fn 15 above).

<sup>47</sup> *Ibid.*, Q10. Not all countries are so scrupulous. It was reported in 2016 that the Government of Bahrain had deported five former Bahrainis who had been stripped of their citizenship and rendered stateless, with nine others facing the same fate: “Bahrain: Stop Deportations of Nationals”, Human Rights Watch, 20 March 2016.

<sup>48</sup> Professor Guy Goodwin-Gill, “Mr. Al-Jedda, Deprivation of Citizenship, and International Law”, February 2014, paper submitted to the Joint Committee on Human Rights, p.16: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/immigration-bill/>.

<sup>49</sup> Hansard HL 7 April 2014 col 1175. Notorious cases of citizenship-stripping after 1945 include Aleksandr Solzhenitzyn (USSR, 1974) and Wolf Biermann (GDR, 1976).

- 3.14. There is something of a mismatch between the popular perception that citizenship stripping enables or equates to banishment (3.2 above) and the reality, acknowledged in part by the Government (3.10 above), that legal or practical reasons will tend to prevent the removal (or make it impossible to resist the return) of a single national whose UK citizenship has been taken away.

### **The power under review**

- 3.15. In addition to the points of principle made above, the power under review has been criticised on grounds specific to its own formulation.
- 3.16. A striking feature of the power under review is the ***breadth of the discretion*** afforded to the Secretary of State. Its exercise is not contingent on conviction for a terrorist offence, nor even on the satisfaction of one or more of the criteria that were set out in BNA 1981 (2.5 above), but only on the deprivation being “*conducive to the public good*” because the person, when a British citizen, “*has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom*” (BNA 1981 s40(4A); 2.20 above). The Government defends this formulation as consistent with the requirements both of the UN Convention and of legal certainty.<sup>50</sup> It has also stated that it may in some circumstances be preferable to undertake deprivation action even where it is possible to prosecute.<sup>51</sup>
- 3.17. The Supreme Court has however recently pointed to the dangers of broad discretions in the national security field, stating of the broad prosecutorial discretion under the Terrorism Act 2000 that it “*involves Parliament abdicating a significant part of its legislative function*”, and “*leaves citizens unclear as to whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal*”.<sup>52</sup> Similar criticisms have been made, with equal force, of the power under review.<sup>53</sup>
- 3.18. A second striking feature is the absence of any requirement of ***judicial approval*** before deprivation is ordered. The power under review conforms in this respect with other immigration and nationality decisions but contrasts with the executive orders designed to deal with suspected terrorists (Terrorism Prevention and

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<sup>50</sup> James Brokenshire MP letter of 20 February 2014 to JCHR, Q14 (fn 15 above).

<sup>51</sup> *Ibid.*, Q9.

<sup>52</sup> *R v Gul* [2013] UKSC 64 para 36, and cf. para 63.

<sup>53</sup> R. Thwaites, “The Security of Citizenship? Finnis in the context of the United Kingdom’s Citizenship Stripping Provisions”, Sydney Law School Legal Studies Research Paper No. 15/16, March 2015: “*The basic objection to the conducive ground of deprivation is the arbitrary power it confers on the Secretary of State.*” But the citizenship deprivation laws of other states have also faced criticism for the opposite vice of excessive automaticity: in the case of Australia, see R. Thwaites, “New laws make loss of citizenship a counter-terrorism tool”, The Conversation website, 11 December 2015.

Investigation Measures; Temporary Exclusion Orders), each of which can (save in urgent cases) enter into force only after a court has certified that it is not “*obviously flawed*”.<sup>54</sup>

3.19. In addition to the above points of principle, a number of specific reservations about the power under review, not already mentioned, have been raised by the JCHR, supported in some respects by the House of Lords Constitution Committee. Those are:

- (a) The Government’s refusal to accept the ***applicability of the ECHR*** to out-of-country deprivations;<sup>55</sup>
- (b) The absence of a specific statutory requirement that the best interests of any ***children*** are treated as a primary consideration;<sup>56</sup>
- (c) The ***differential treatment*** of natural-born and naturalised citizens;<sup>57</sup>
- (d) The absence of a specific statutory requirement that “a ***proportionality approach***” will be adopted by the Secretary of State.<sup>58</sup>
- (e) The “***retrospective nature of the power***”, as the JCHR described it, by which is meant its application to persons who already have British citizenship by naturalisation;
- (f) The absence of a legal requirement that, in challenging the deprivation of citizenship in the Special Immigration Appeals Commission, the individual must be ***shown the gist of the case*** against him, sufficient to enable him to instruct counsel (the so-called *AF* disclosure obligation);<sup>59</sup>
- (g) The application of the ***residence test for legal aid*** to appeals to the First-tier Tribunal, and the calculation of time limits for appeal;<sup>60</sup>

3.20. This is not the place for a detailed appraisal of those objections. Some of them may however be in issue in the event that legal challenges are brought to any future exercise of the power under review.

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<sup>54</sup> James Brokenshire MP letter of 20 February 2014 to JCHR, Q15 (fn 15 above).

<sup>55</sup> Government response to JCHR, paras 11-12.

<sup>56</sup> *Ibid.*, paras 13-14. The power under review cannot be applied directly to children, as they are not able to naturalise as British citizens: James Brokenshire MP letter of 20 February 2014 to JCHR, Q12 (fn 15 above).

<sup>57</sup> Government response to JCHR, paras 15-17.

<sup>58</sup> *Ibid.*, paras 18-19.

<sup>59</sup> *Ibid.*, paras 22-23.

<sup>60</sup> *Ibid.*, paras 24-27.

#### 4. CONCLUSION

- 4.1. The power under review is an unusually strong one in international terms. It extends further than the laws of most comparable countries in Europe, North America or Australasia. Yet it has so far attracted less controversy than the recent introduction of more limited powers in Australia, Canada and France. This is, perhaps, a reflection of underlying attitudes to citizenship – or of the fact that the power under review largely replicates one that was used in the UK prior to 1974 and remained on the statute book until 2002.
- 4.2. Since the power under review was only recently enacted by Parliament and has not yet been used, I make no specific recommendations in this report as regards its operation.
- 4.3. It remains to be seen whether the power will be used in future – or, if used, whether it will be of any practical benefit in the global fight against terrorism. Some possible reasons for scepticism are outlined in chapter 3, above. The successor to this review, covering any uses of the power up to July 2018, will have the opportunity to draw conclusions based on four years of experience.
- 4.4. The author of that report will undoubtedly welcome material from anyone who has helpful experience or ideas to impart. His or her identity is not yet known: but if contacted via email [independentreviewer@brickcourt.co.uk](mailto:independentreviewer@brickcourt.co.uk) or twitter @terrorwatchdog, I will ensure that useful contributions reach the appropriate quarters.





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