

IMMIGRATION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Immigration Bill in the House of Commons on 10 October 2013. This supplementary memorandum addresses the issues arising from Government amendments tabled on 28 January 2014 for Commons Report Stage.

DEPRIVATION OF CITIZENSHIP: CONDUCT SERIOUSLY PREJUDICIAL TO THE VITAL INTERESTS OF THE UNITED KINGDOM

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to New Clause *Deprivation of citizenship: conduct seriously prejudicial to the vital interests of the United Kingdom* (“the new clause”), which has been drafted for inclusion in the Immigration Bill. It has been prepared by the Home Office. It concludes that this new clause is compatible with the Convention rights, as defined in section 1 of the Human Rights Act 1998 (“the 1998 Act”).

Purpose of the new clause

2. The new clause is intended to permit the Secretary of State to deprive naturalised British citizens of their citizenship even if doing so would render the individuals stateless, but only if she is satisfied that those individuals have conducted themselves in a manner which is seriously prejudicial to the vital interests of the United Kingdom. It does this by amending section 40 of the British Nationality Act 1981 (“the 1981 Act”) so that the prohibition on causing people to be stateless in section 40(4) does not apply when the relevant test is made out. The new clause applies to citizens of the British Overseas Territories as well as to citizens of the United Kingdom, which in the 1981 Act includes the Crown Dependencies.

Background

3. The Court of Appeal and the Supreme Court in a recent deprivation case both noted that domestic legislation prohibiting deprivation on conducive grounds if it renders someone stateless goes further than is necessary in international law (see *Al Jedda v SSHD* [2012] EWCA Civ 358 at paragraphs 127/8 and 130, and [2013] UKSC 62 at paragraph 22). This is because of the UK’s position in respect of the 1961 Convention on the Reduction of Statelessness (“the Convention”), which the UK ratified in 1966.
4. Article 8(1) of the Convention provides that ‘a Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless’. Article 8(3) provides, so far as material:

... a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

- (a) that, inconsistently with his duty of loyalty to the Contracting State, the person
 - (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
 - (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State.

Article 8(4) of the Convention provides:

A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

5. The UK signed the Convention on 30 August 1961 and ratified it on 29 March 1966. On the date of ratification it made the following declaration:

[The Government of the United Kingdom declares that], in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person

- (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
- (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.

6. The British Nationality Act 1948 (“the 1948 Act”) and the 1981 Act as enacted both permitted deprivation which would render someone stateless. Section 4(1) of the Nationality, Immigration and Asylum Act 2002 amended section 40 of the 1981 Act to introduce the prohibition on rendering someone stateless on grounds relating to their behaviour after acquiring citizenship. The amendment came into force on 1 April 2003. It reflected the terms of article 7(1)(d) of the European Convention on Nationality 1997, which the Government was at that stage considering signing. In the event, the Government did not sign that Convention, and has not done so to date.
7. Under both the 1948 Act and the 1981 Act, as enacted and as amended, it was and is possible to deprive someone of their British citizenship and render them stateless if they acquired their citizenship through fraud or misrepresentation. This approach is compatible with Article 8(2)(b) of the Convention.
8. The new clause would therefore amend domestic legislation to revert it to the position prior to 1 April 2003 in accordance with the position which the UK set out in its declaration in respect of the Convention in 1966.

ECHR implications of the new clause

9. The new clause is capable of engaging the ECHR. The Home Office notes, however, that the new clause creates a power to render someone stateless in certain circumstances, but not a duty to do so. It would be unlawful under section 6 of the 1998 Act to exercise the power set out in the new clause incompatibly with an individual's Convention rights; nor could the new clause ever require such an exercise of the power.
10. The Home Office is satisfied that there may be circumstances in which the power could in fact be exercised compatibly with the ECHR. The ECHR does not contain a substantive right to citizenship. However, decisions as to citizenship are capable of engaging Article 8. In *Genovese v Malta* (Application no. 53124/09, 11 November 2011), the ECtHR noted:

§ 30. The Court ... reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity (see *Dadouch v Malta*, no. 38816/07, § 47, ECHR 2010 ...). The provisions of Article 8 do not, however, guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual (see *Karassev v Finland* (dec.), no. 31414/96, ECHR 1999-II, and *Slivenko v Latvia* (dec.) [GC], no. 48321/99, § 77, ECHR 2002-II).
11. In *Genovese*, the ECtHR found Malta to be in breach of Article 14 in conjunction with Article 8 because its nationality law prevented an illegitimate child from acquiring nationality if his father was Maltese whereas legitimate children could inherit nationality through either parent.
12. The Home Office notes, therefore, that deprivation of citizenship is capable of engaging Article 8. This is because nationality is part of a person's identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering someone stateless. The Home Office is satisfied, however, that the new clause can be exercised compatibly with Article 8 (as can existing legislation). Deprivation would be in accordance with the law. It would not be arbitrary. The high threshold for deprivation rendering someone stateless would mean that deprivation was necessary in a democratic society in the interests of national security, public safety or, potentially, the economic well-being of the UK. Article 8 would have to be considered on a case by case basis to ensure that deprivation in any given case was proportionate. Anyone subject to deprivation would have a right of appeal under section 40A of the 1981 Act. Deprivation decisions would therefore be subject to supervision by the courts to ensure that they were necessary and proportionate and not otherwise unlawful.
13. The Home Office notes that, where an individual is not in the UK's jurisdiction for the purposes of the ECHR, that person's Article 8 rights will not be engaged by a deprivation

decision. Nevertheless, a deprivation decision could have an impact on the Article 8 rights of the person's family if the family were in the UK's jurisdiction for the purposes of the ECHR and the decision limited the extent to which family life could continue. It could have this effect if it restricted the individual's ability to reside or communicate with his family (although substantive restrictions would be likely to follow a decision to deport or exclude, rather than deprive, the individual). As with deportation or exclusion decisions, therefore, it would be necessary to consider the Article 8 rights of the whole family unit. The Home Office considers, however, that, for the reasons set out above, deprivation would be capable of being necessary and proportionate in respect of an individual's family as well as in respect of the individual. The high threshold would, again, mean that deprivation was necessary in a democratic society in the interests of national security, public safety or, potentially, the economic well-being of the UK; and deprivation rendering someone stateless could only be undertaken in any given case if it were proportionate.

14. The Home Office has considered whether the fact that the new clause is limited to naturalised citizens means any exercise of the power would potentially be discriminatory for the purposes of Article 14 of the ECHR. It is satisfied, however, that the ECHR permits the new clause to be limited to naturalised citizens. The ECtHR considered the role of Article 14 in relation to Article 8 and nationality in *Genovese*. It stated that 'for the purposes of Article 14 a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background' (§ 43).
15. The Home Office is satisfied that there is an objective and reasonable justification for treating naturalised citizens differently from others. The Home Office notes that the distinction between naturalised citizens and others is recognised in international law. The Refugee Convention itself recognises the distinction, and in some respects makes separate provision for naturalised citizens. In addition, Article 8(3) of the Convention limits the power to render people stateless on grounds relating to their behaviour after becoming citizens to powers existing in the domestic law of a contracting state at the time of signature, ratification or accession. UK law at the date of ratification restricted the power to naturalised citizens. There was and is an objective basis for such a restriction in relation to a measure which is intended to protect the vital interests of the UK. Naturalised citizens have chosen British values and have been granted citizenship on the basis of their good character. It is therefore appropriate to restrict a measure with such serious consequences as becoming stateless to naturalised citizens, and the Home Office is satisfied that there is a reasonable and objective justification for this limitation. The Home Office is therefore satisfied that the new clause is compatible with Article 14.
16. The Home Office acknowledges that a person's citizenship may affect his or her treatment at the hands of others. The new clause could therefore potentially engage Article 2 or 3 if a person were deprived of citizenship and suffered mistreatment as a direct consequence of that deprivation. But the ECHR implications of a deprivation decision differ depending on whether or not the individual is in the UK's jurisdiction for the purposes of the ECHR. It would be unlawful for the UK to breach a person's rights

under Articles 2 or 3 in respect of an individual within its jurisdiction for the purposes of the ECHR. If an individual were not within its jurisdiction for the purposes of the ECHR, then deprivation could not breach the individual's Article 2 or 3 rights because those rights would not be engaged (see paragraphs 21 – 30 of *SI, TI, UI and VI v SSHD*, SIAC judgment 21 December 2012). Nevertheless, the Home Secretary has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of Articles 2 or 3 if they were within the UK's jurisdiction and those articles were engaged.

17. The Home Office is therefore satisfied that the new clause is compatible with the Convention rights.

Home Office
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