Liberty’s Report Stage Briefing on Clause 64 of the Immigration Bill in the House of Lords

April 2014
About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at

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“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 – the 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.”

The late Lord Kingsland, Conservative Shadow Lord Chancellor

October 2002

The Government amendment, now incorporated at Clause 64 of the Immigration Bill, was published on 29th January around 24 hours before House of Commons Report Stage consideration of the Bill. It attracted around 40 minutes of scrutiny as part of Report Stage consideration of the Bill in the House of Commons. The clause provides for the Secretary of State to render a person stateless by depriving him of nationality, where citizenship has been gained through naturalisation and where the Home Secretary is satisfied that deprivation is ‘conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom.’

Liberty believes that this clause is a gravely retrograde step which ignores the emerging international consensus on the reduction of statelessness without offering any prospect of greater security. In fact, we consider clause 64 would compromise our safety and frustrate international efforts to effectively fight terror.

The legal background

Deprivation of citizenship was first enshrined in statute in 1914 with the outbreak of War. It provided for revocation where fraud in obtaining citizenship was demonstrated, where disaffection or disloyalty to the King was established, or where an individual assisted the enemy during wartime amongst other grounds. The British Nationality Act 1948 made

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1 Lords Hansard, 9 October 2002: Column 278.
2 Proposed new subsection 40(4A) to the British Nationality Act 1981.
3 Under the British Nationality and Status of Aliens Act 1914, by section 7(1) revocation was on the grounds that the Secretary of State was satisfied (i) that the certificate was obtained through false representations or fraud; or (ii) the subject of the certificate has shown himself to be disaffected or disloyal to His Majesty. By section 7(2), citizenship was to be revoked where the continuance of a certificate was not conducive to the public good and one of the following scenarios applies: (a) the subject of the certificate has engaged unlawfully or traded or communicated with the enemy or otherwise assisted the enemy; (b) the subject of the certificate has within five years of naturalisation been sentenced to imprisonment for 12 months or more, to a term of penal servitude or to a fine of £100 or more; (c) the subject of the certificate was not of good character as the time citizenship was
similar provision but left the Secretary of State with a discretion to deprive an individual of citizenship on one of a number of enumerated grounds.4

Following UK ratification of the Convention on the Status of Stateless Persons 1954 and to facilitate our ratification of the 1961 Convention on the Reduction of Statelessness, the British Nationality (No 1) Act 1964 and the British Nationality (No 2) Act 1964 were enacted. The latter narrowed the grounds upon which an individual could be deprived of citizenship removing the ground of continuous long-residence abroad. The British Nationality (No.2) Act further provided that where the Secretary of State sought to remove nationality on the grounds that a person had been sentenced to a year or more of imprisonment within the first 5 years of naturalisation, he could not do so if it appeared to him that this would render the person stateless.

The next legislative intervention came with the section 40 of the British Nationality Act 1981 which provided for removal of citizenship on four grounds: (i) fraud in obtaining nationality, (ii) disloyalty or disaffection towards Her Majesty, (iii) assisting the enemy during wartime, and (iv) receipt of a custodial sentence of at least 12 months in the first 5 years of naturalisation. All four grounds were dependent upon the Secretary of State also establishing that the person's ongoing citizenship was not conducive to the public good and the fourth ground could not be used in circumstances where deprivation would lead to statelessness.

The Nationality, Immigration and Asylum Act 2002 amended the 1981 Act to provide that citizenship could be removed on just two grounds: from those who have gained it through fraud or where the Secretary of State is satisfied that the person has done something seriously prejudicial to the vital interests of the UK, provided that revocation of citizenship would not render him stateless. This law was passed at a time when the atrocities of 9/11 were fresh in the minds of British politicians. It prohibited deprivation of citizenship on public good grounds where such deprivation would make a person stateless. Even at the height of the war on terror, the last Government appeared to recognise that making an individual

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4 The 1948 Act provided that those who have gained their citizenship through registration or naturalisation may be deprived of it if the Secretary of State is satisfied that it was gained through fraud, false representation or concealment. The Secretary of State further was to have the power to revoke citizenship if the individual had shown himself to be disaffected or disloyal to His Majesty; had assisted the enemy during wartime; been imprisoned for at least a year during the first 5 years of naturalisation; been ordinarily resident elsewhere for a continuous period of 7 years. Any removal of citizenship under the 1948 Act could not occur unless the Secretary of State was satisfied that continuing citizenship was not conducive to the public good.
stateless does not make him a lesser threat. In 2006, the Immigration, Nationality and Asylum Act 2006 broadened out the grounds upon which citizenship could be removed in pursuit of the public good, but notwithstanding a domestic terrorist atrocity, the Government retained the prohibition on rendering an individual stateless in pursuit of the public good.

The Al-Jedda litigation

The impetus to create new powers to strip individuals of all national ties comes not from the urgent necessity of fighting terrorism, but rather is a result of the Home Secretary losing a legal battle. The Government has explicitly framed clause 64 as a response to the decision of the Supreme Court in Al-Jedda. Al-Jedda was born in Iraq, but granted British nationality with his family in 2000, thereby automatically losing Iraqi citizenship. In 2004 he travelled to Iraq and was detained by the British authorities, without charge, for three years on suspicion of membership of a terrorist organisation. Unsurprisingly his prolonged, arbitrary detention was ruled unlawful in 2011. Following his release from internment, the British Government sought to deprive Al-Jedda, now in Turkey, of citizenship. The Secretary of State certified that her decision was made on the basis of information which could not be put in the public domain. The question which it fell to the Supreme Court ultimately to consider, following protracted domestic litigation, was whether the prohibition on rendering an individual stateless covered situations in which he could regain a former nationality. The Court robustly rejected the Home Secretary’s claim, reaffirming that statelessness was a matter to be determined at the point at which an individual is deprived of citizenship and pointing out that domestic law prevented her from ordering this punishment.

In the wake of this decision, the Secretary of State now seeks a broad discretionary power to make individuals stateless.

International trend away from statelessness

Britain was amongst the first to engage with the scourge of statelessness by ratifying, in 1930, the Convention on Certain Questions Relating to the Conflict of Nationality, which

7 Whilst the Court expressed extreme scepticism about the Government’s claim that Al-Jeddah would be able to regain his Iraqi nationality on being stripped of British citizenship, they proceeded on that basis to determine the wider issue.
8 Id. Para 34.
9 179 LNTS 89, in force 1 July 1937, ratification for Great Britain and Northern Ireland and all parts of the British Empire.
included a Protocol Relating to Certain Cases of Statelessness.\textsuperscript{10} War highlighted the international dimensions of problems presented by unprecedented volumes of displaced persons including those rendered effectively stateless. The link between human rights violations and the absence of national protection became impossible to ignore in the aftermath of the Second World War. The Universal Declaration of Human Rights was adopted by the UN General Assembly, with UK support, in 1948. It provides, at Article 15, that: “everyone has the right to a nationality…no one shall be arbitrarily deprived of his nationality.”

Provisions designed to prevent or reduce statelessness made their way into many subsequent international instruments including the International Covenant on Civil and Political Rights,\textsuperscript{11} the Convention on the Rights of the Child,\textsuperscript{12} the Convention on the Elimination of all Forms of Discrimination against Women,\textsuperscript{13} the Convention on the Nationality of Married Women,\textsuperscript{14} the Convention Relating to the Status of Stateless Persons\textsuperscript{15} and the Convention on the Reduction of Statelessness.\textsuperscript{16} The last of these, adopted in 1961 and ratified by the UK in 1966, is the instrument which has as its focus the reduction of statelessness. The UK was one of the first to ratify and implement the 1961 Convention which was a result of years of strenuous negotiation in which the UK was a vocal participant. UK delegates to Plenary Meetings which led to the agreement of the Convention were keen to point out that deprivation of nationality was a cause of statelessness which deserved the attention of assembled international representatives.\textsuperscript{17} The UK delegation also pointed out the concern that existed around the creation of distinctions between the deprivation of nationality in relation to those who were born British nationals and those who gained the

\textsuperscript{10} 179 LNTS 15, in force 1 July 1937, ratification for the UK deposited January 14th, 1932.
status, describing the distinction as “not a happy one”.\textsuperscript{18} Prior to ratifying the Convention the UK introduced new domestic law reducing the grounds on which individuals could be deprived of nationality to bring our law into line with the provisions of the Convention.

\textbf{The US experience}

The experience of the United States is instructive. During the latter half of the 20th century, it has retreated from broad denaturalization powers, and the U.S. Supreme Court has rejected the idea that government can revoke a person’s citizenship against his or her will (unless it was obtained unlawfully). As long ago as 1958, in the case of \textit{Trop v. Dulles}, the Court famously concluded ruled:

“We believe that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.”\textsuperscript{19}

These strong words have reverberated down the decades. In 1967 in \textit{Afroyim v. Rusk}, the U.S. Supreme Court found forced denaturalisation to be a violation of the Fourteenth Amendment which addresses citizenship rights and equality before the law. In the wake of the Civil War, Justice Black writing for the Court concluded:

“We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”\textsuperscript{20}

These principles came to the fore in 2010, when the U.S. Congress considered legislation to involuntarily revoke the citizenship of a person determined to have provided “material support” to a group designated as a terrorist organization. Legal experts argued that such a move would very likely be unconstitutional—not only because it would fly in the face of the

\textsuperscript{18} 23\textsuperscript{rd} August 1961, 20\textsuperscript{th} Plenary Meeting UN doc. A/CONF.9/SR.20, 11 October 1961, 2-3.
\textsuperscript{19} \textit{Trop v. Dulles}, 356 U.S. 86.
\textsuperscript{20} \textit{Afroyim v. Rusk}, 387 U.S. 253.
Supreme Court’s strong statement that a person’s constitutional right to citizenship cannot be revoked against his or her will, but also because it would allow for denaturalization without conviction in a court (but rather based on a determination by the Secretary of State). This extreme proposal was firmly rejected, and the United States has continued to rely on the idea that citizenship must be voluntarily and intentionally renounced.

**International law**

Much mention has been made, in the debate around what is now clause 64, to a reservation entered into by the UK at the time the Convention came into force. It is correct that the reservation permitted by Article 8(3)(a)(ii), and entered into by the UK at the time of ratification, prevents clause 64 from bringing us into direct conflict with this aspect of our international obligations. An analysis of this sweeping new power, however, should not end with this distinct provision. The argument has been made by a number of prominent international lawyers that the provisions of clause 64 would contravene other of our international obligations. As Baroness Kennedy of the Shaws pointed out during the Committee debate on the Bill:

> “Deprivation of citizenship is potentially inconsistent with obligations accepted by the United Kingdom under many different treaties, in particular, the obligations of investigation and prosecution in the fulfilment of which every other state party has a legal interest.”

Professor Guy Goodwin-Gill, a leading authority in this area, has made plain his view that we risk violating our international legal obligations if we seek to remove the nationality of those present in another country:

> “If the UK were to refuse readmission, and if no other country had expressed its willingness to receive that person, the UK would be in breach of its obligations towards the receiving state.”

This was an issue of great concern to the JCHR which expressed, in its recent report on the Bill, its grave misgivings about the Government’s apparent intention to use clause 64 in relation to naturalised British citizens while they are abroad. It concluded “it appears that this

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21 Commons Hansard, 17 Mar 2014: Column 46.
22 JCHR, Legislative Scrutiny: Immigration Bill (second Report), paragraph 37.
carries a very great risk of breaching the UK’s international obligations to the State who admitted the British citizen to its territory.\textsuperscript{23}

Liberty further believes that the spirit and trajectory of international law on statelessness militates firmly against a move to breathe new life into a decades old reservation, which would undermine the progress of recent decades so often driven forward by the United Kingdom.

**Rogue states and statelessness**

History is littered with examples of rogue states and autocratic governments using statelessness as a form of punishment and a means of facilitating other, yet more appalling ill-treatment. Prior to the mass murder of two thirds of the Jewish population of Europe during World War II, in 1935 Germany introduced the Nuremberg Laws which divided German citizens into full citizens and citizens without political rights, creating millions of stateless persons. In more recent history, former Iraqi President Saddam Hussein stripped the Faili Kurds of their Iraqi nationality by decree on one day in 1980. Many were expelled from their homes, marched across the Iranian border into decades of exile and statelessness. Between 1986 and 1989 Saddam Hussein conducted operation Anfal, a genocidal campaign against the Kurdish people in which up to 100,000 civilians lost their lives and 90\% of Kurdish villages in targeted areas were demolished.\textsuperscript{24} It is not hard to find further examples:

- During the 1998-2000 Ethiopian-Eritrean border war, Ethiopia denationalised nearly all Ethiopian citizens of Eritrean origin (possibly as many as 500,000 people) and then expelled in the region of 75,000 to Eritrea claiming they were a security risk or had renounced their citizenship by voting in the 1993 referendum on Eritrean independence;
- In the Democratic Republic of Congo in 1981 a 1972 decree signed by President Mobutu granting Zairian citizenship to all Rwandan and Burundians who had settled in Zaire (as DRC was then called) prior to 1950 was retroactively invalidated by the Parliament rendering people of Rwandese origin stateless;
- In Myanmar under the 1982 Citizenship Law, Rohingya were declared ‘non-national’ or ‘foreign residents’. More than 700,000 are in northern Rakhine today and are effectively stateless;

\textsuperscript{23} JCHR, *Legislative Scrutiny: Immigration Bill (second Record)*, paragraph 38.
• Over 100,000 individuals of Nepali origin were stripped of their citizenship and forcibly expelled from Bhutan in the early 1990s;

• In Cote d’Ivoire, former migrants from West Africa who had settled and been naturalised as ‘Ivorian’ were later denaturalised during a programme of ethnic homogenisation and intense xenophobia;

• In parts of Central and East Africa, long standing minority populations have been denied citizenship because they have been identified with colonial powers or historic ‘enemy’ groups, most notably the Nubian population in Kenya.

In Al-Jedda, the UK Supreme Court highlighted that “worldwide legal disabilities with terrible consequences still flow from lack of nationality.” Stripping a person of his nationhood and forcing him into the obvious cracks in protection created by a state based system of law and international relations is a barbaric and unprincipled response to concerns about our security. In the words of former Director of Public Prosecutions, Lord Macdonald of River Glaven, this proposal “associates the United Kingdom with a policy beloved of the world’s worst regimes during the 20th century.” In the words of former Supreme Court Justice, Lord Brown of Eaton-under-Heywood “[i]t is a shocking example to other states, which ordinarily are readier than we are to make such a radical departure from the consensus as to proper international human rights conduct.”

Failures in transparency

A Bureau of Investigative Journalism investigation published in February last year revealed that between 2010 and February 2013, the Home Secretary revoked the passport of 16 British nationals under current section 40 of the British Nationality Act 1981 on public good grounds. At least 5 of those people had been born in the UK and one had been resident for almost 50 years. The Minister for Immigration and Security has since indicated that there have been 27 deprivations on ‘conducive to the public good’ grounds since 2006. In its recent Report on the Bill, the JCHR remarked that use of these powers “has increased significantly in recent months” and that they “appear to be increasingly used in relation to

26 House of Lords Committee Stage Debate on the Immigration Bill, Hansard, 17 March 2014, per Lord MacDonald of River Glaven at Column 53.  
28 We understand that before 2002, an individual had not been deprived British nationality since 1973. In between 2002 and 2010, 5 attempts were made to remove nationality.  
29 House of Commons Westminster Hall debate on Deprivation of UK Citizenship, Hansard, 11 February 2014, per James Brokenshire MP at column 259WH.
individuals going abroad, to Syria, for example.” The Bureau of Investigative Journalism was told on 18th December 2013 that 20 individuals had been deprived of their British citizenship since the start of 2013: “more than every previous year of the Coalition government combined.” Eight of those on conducive to public good grounds. When asked during Report Stage consideration of the Bill what has happened to those deprived of citizenship in recent years, the Home Secretary did not provide any specific information.

The JCHR also probed the Government for basic information about those stripped of nationality, but were refused for reasons of “national security and operational effectiveness.” Liberty does not accept that these factors bar greater transparency, particularly given that the details requested were made available in 2010 in response to a Freedom of Information request made by ILPA. The JCHR, too, expressed considerable surprise at the Government’s decision to withhold basic information from Parliament, concluding:

“Parliament is entitled to be told in how many cases in recent years the current power to deprive of citizenship has been exercised while the individual is abroad.”

Liberty fears that Government obstruction here has less to do with operational concerns and more to do with a desire to obscure the plight of those subject to current powers to remove citizenship. The information gleaned through the efforts of the Bureau of Investigative Journalism provides disturbing details about some of those deprived of British nationality under the existing law.

Bilal al-Berjawi, a British-Lebanese citizen came to the UK as a baby and grew up in London. He left the country for Somalia in 2009 with British-born Mohamed Sakr, a dual British-Egyptian national. Since they were stripped of their British nationality in 2010, al-Berjawi was hit in US drone strikes on two separate occasions. He was reportedly killed by a US drone hours after calling his wife in the UK to congratulate her on the birth of their first son. Sakr was killed by a US drone strike in February 2012. It is hard to avoid the reaching the same conclusion as former Special Advocate Ian Macdonald QC, that removal of citizenship “means that the British government can completely wash their hands if the

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30 JCHR, Legislative Scrutiny: Immigration Bill (second Report); Paragraph 17.
32 Commons Hansard, 30 Jan 2014: Column 1047-1048 in response to a question by Rehman Chishti MP.
33 Ibid. paragraph 19.
35 Ibid. paragraph 21.
The recent refusal by Government to provide information about those it has stripped of citizenship does little to assuage fears that, by stripping itself of any consular responsibility for individuals, the Government knowingly facilitates extra-judicial killings and kidnap by its intelligence partners.

Compromising our security

Clause 64 would not only fail to keep us safe, it would pose its considerable security risks of its own. The question put by Baroness Smith of Basildon during Committee looms large and unanswered:

36 Bureau of Investigative Journalism, Former British citizens killed by drone strikes after passports revoked, Chris Woods and Alice K.Ross, 27th February 2013.
37 In a recent legal advice Jemima Stratford QC considered that, if this is the case: -“the transfer of data to facilitate a drone strike is likely to be unlawful for the purposes of English law because the drone strike itself would not be a lawful act, if carried out by the UK government…GCHQ employees providing locational intelligence, that they knew would be used for the purpose of drone strikes are at risk of prosecution as secondary parties to murder.” Paragraph 84.
38 Bureau of Investigative Journalism, Former British citizens killed by drone strikes after passports revoked, Chris Woods and Alice K.Ross, 27th February 2013.
39 Commons Hansard, 30 Jan 2014: Column 1048.
“What are the implications for national and international security of allowing terror suspects to be loose and undocumented in whatever country they happen to be in when their citizenship is revoked?”  

This point was further developed by Lord Pannick who made clear his view that:

"the clause will make it more difficult to remove dangerous people, and make it more likely that dangerous people who are temporarily abroad will be sent back to this country because they no longer have a British passport."  

This point is one reinforced by the opinion of leading international lawyer, Professor Guy Goodwin-Gill, who tells us that:

"Any state which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom."  

In so far as the Government envisages removal of citizenship while an individual remains in the UK, the security case simply does not exist. In the words of Lord Pannick “[o]ther states are less likely to accept entry by a person who is stateless than one who enjoys British citizenship."  

The Home Secretary accepted during the course of the Report Stage debate, that “[i]t might not always be possible to [remove the individual from the United Kingdom], especially when the individual is stateless.” During the Westminster Hall debate secured by Diane Abbott MP on 11th February, the Minister with responsibility for both immigration and security confirmed that the clause:

"can be applicable to those who cannot acquire another nationality. In that event, it is open to them to make an application to stay in the UK as a stateless person."  

The reality is that with no travel documents and no alternative nationality, individuals will remain in this country, their ability to do us harm – if that is their objective – entirely undiminished, but with resources and attention diverted away from criminal prosecution. In

40 Lords Hansard, 17 Mar 2014, Column 41.  
42 Lords Hansard, 17 Mar 2014: Column 44.  
44 Commons Hansard, 30 Jan 2014: Column 1044.  
45 Commons Hansard, 11 Feb 2014 : Column 261WH.
the case of those rendered stateless abroad, Liberty does not accept that this will pose an obstacle to those who intend to do us harm. Those who threaten our security do not respect national borders and violent crimes can be plotted, terrorist training gained, the aims of terrorist organisations furthered by an individual regardless of whether they have a valid British passport.

We now have a plethora of terrorism related offences on our statute books, from training with terrorist organisations abroad to the dissemination of terrorist publications.\(^\text{46}\) The Government’s most recent criminal justice Bill, the Criminal Justice and Courts Bill, would increase the maximum sentences for a number of terrorism-related offences to life imprisonment. The Bill would further extend a special and restrictive parole regime to offences of this nature. Liberty does not believe the Government can seriously argue that it is short of the means to deal with those who pose a threat through our criminal justice system.

Borrowing again from the words of the late Lord Kingsland:

“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 judgement.”\(^\text{47}\)

Astonishingly, the Government’s answer to pressing concerns about the dangers this scheme poses for our security is to call for trust in the decision making of this Home Secretary.\(^\text{48}\) Liberty does not seek to question the Home Secretary’s genuine concern to protect the security of this country, but as a modern developed democracy, we cannot legislate on the basis of our confidence in the motives of one individual. The virtue of our laws must speak for itself and in the words of former Director of Public Prosecutions, Lord Macdonald of River Glaven, this policy:

“can have no sensible part in a co-ordinated international effort to combat security threats. In fact it appears to be the antithesis of such an effort...it threatens illegal and procedural quagmire hardly compatible with the comity of nations, still less with solidarity between free countries in the face of terrorism.”\(^\text{49}\)

\(^{46}\) See e.g. section 54 of the Terrorism Act 2000 and Section 2 of the Terrorism Act 2006.

\(^{47}\) Lords Hansard, 9 October 2002, Column 277.

\(^{48}\) Lords Hansard, 17 Mar 2014, Column 61.

\(^{49}\) Lords Hansard, 17 Mar 2014, Column 53.
Clause 64 is not only barbaric and unprincipled, it threatens our security and our standing in the international community. The Government has failed to make the case for this disturbing new power and provided the minimum possible opportunity for scrutiny by our elected representatives. Liberty urges Peers to support amendment 56, due to be debated on Monday 7th April, in the names of Lord Pannick, Baroness Smith of Basildon, Lord Macdonald of River Glaven and Lord Brown of Eaton-Under-Heywood. This amendment would provide for a Joint Parliamentary Committee to consider the power proposed at clause 64 prior to the introduction of primary legislation, addressing a shocking democratic deficit.