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House of Commons
Joint Committee on Human
Rights

Legislative Scrutiny: Immigration Bill (second Report)

Twelfth Report of Session 2013–14

Report, together with formal minutes

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Joint Committee on Human Rights

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The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Summary

The Immigration Bill was introduced in the House of Commons on 10 October 2013 and had its Second Reading on 22 October 2013. We published our first Report on the Bill on 18 December 2013, before Remaining stages in the Commons. The Bill then passed to the House of Lords where it had its Second Reading on 10 February. Its Committee stage is due to start on 3 March.

This Report focuses on the new Government clause added to the Bill at Report stage in the Commons concerning the deprivation of UK citizenship, as this is a significant new matter in the Bill which engages substantively with a number of human rights and which was not dealt with in our first Report. We also return to some of the issues set out in our first Report.

Deprivation of UK Citizenship

Exercises of the power to deprive

We are surprised by the Government's refusal to inform Parliament of the number of cases in which the power to deprive of citizenship has been exercised while abroad, or of the number of cases in which the Secretary of State's decision was taken wholly or partly in reliance on information which in the Secretary of State's view should not be made public. Parliament is entitled to this information in order to assist it to reach a view as to how the new power is likely to be exercised in practice. We ask the Government to make this information available to Parliament, or to provide a more detailed explanation as to why this is information which should not be made available to Parliament.

Urgency

We note that the possibility of introducing a power such as this was being publicly floated by the Home Secretary in media interviews, and by Charles Farr, the Head of the Office of Security and Counter-Terrorism in the Home Office, in evidence to the Home Affairs Committee, as long ago as November last year. Notwithstanding the need to give serious consideration within Government to the implications of the Al-Jedda judgment, we consider that there was time to hold a public consultation which would have made for better informed parliamentary scrutiny of the Government's proposal.

Compatibility with the UK's international obligations on statelessness

We accept the Government's argument that, in strict legal terms, enacting the power in clause 60 to deprive a naturalised citizen of their citizenship even if it renders them stateless does not involve any breach by the UK of its obligations under the UN Conventions on Statelessness. The new power will lead to an increase in statelessness, which represents a significant change of position in the human rights policy of the UK, which has historically been a champion of global efforts to reduce statelessness. It does not per se, however, put the UK in breach of any of its international obligations in relation to statelessness.

Intended scope of the power

We are surprised by the Government's statements about the intended scope of the power to deprive, which is significantly wider than was indicated by the Home Secretary to the House of Commons. We would be very concerned if the Government's main or sole purpose in taking this power is to exercise it in relation to naturalised British citizens while they are abroad, as it appears that this carries a very great risk of breaching the UK's international obligations to the State who admitted the British citizen to its territory. We recommend that the Bill be amended to make it a precondition of the making of an order by the Secretary of State that, in the circumstances of the particular case, the deprivation is compatible with the UK's obligations under international law.

Applicability of the ECHR

We do not accept the Government's argument that, generally speaking and in the absence of exceptional circumstances, a decision to deprive a naturalised citizen of their citizenship while they are physically in the territory of another State does not engage the individual's Convention rights under Articles 2, 3 and 8 ECHR because they are outside the UK's jurisdiction for ECHR purposes. In our view, a deprivation decision must be compatible with those Articles whether the citizen concerned is abroad or in the UK at the time of the deprivation decision.

Impact on children and dependants

We welcome the Government's acceptance that a deprivation order should not be made without taking full account of the impact on the whole family unit, and with regard to the best interests of any child affected. To ensure that the best interests of the child are treated as a primary consideration, as required by Article 3 UNCRC, we recommend an amendment to the Bill which requires the Secretary of State to take into account the best interests of any child affected when deciding whether to make a deprivation order under the new power.

Adequacy of safeguards against arbitrariness

We welcome the Government's indication that it would adopt a proportionality approach to deciding whether or not to exercise the new power in clause 60 to deprive of citizenship. However, we note that the Government does not want to rule out the possibility that deprivation of citizenship leaving a person stateless is necessary in the interests of the economic well-being of the country. It is hard to imagine the circumstances in which such a serious measure could ever be necessary and proportionate for such a purpose. We recommend that the Bill be amended to make it a precondition of an order that the deprivation of citizenship is a necessary and proportionate response to the conduct in question.

Retrospectivity

Changing the law with retrospective effect is recognised to be an exceptional step which requires weighty justification; and all the more so when the effect of such retrospectivity is to enable particular individuals to be deprived of the benefit of court judgments in their favour. These considerations are even weightier where the provision which is being given

retrospective effect is a sanction in respect of previous conduct. We are not persuaded that there are sufficiently weighty reasons to justify the new power being made retrospective, and we recommend that the Bill be amended so as to prevent it having retrospective effect.

Fair hearing

In our view it is clear that an appeal to SIAC will not be a fair hearing unless the AF disclosure obligation applies, so that the Secretary of State is legally required to disclose to the individual concerned sufficient information to enable him to give effective instructions to his special advocate. So long as the legal framework does not make such provision, the UK will be in breach of Article 8(4) of the Statelessness Convention. We recommend that the Bill be amended to ensure that the AF disclosure obligation applies in all appeals against orders made by the Secretary of State under the proposed new power.

Access to a practical and effective remedy

We welcome the Government's clarification that appeals to the Special Immigration Appeals Commission against deprivation of citizenship under the new power will not be subject to the proposed residence test for eligibility for legal aid, even where the appeal is brought from outside the UK, and we ask the Government to confirm that the same applies in relation to appeals to the First Tier Tribunal. We also recommend that, in order to ensure that the right of appeal is practical and effective, the legal framework provides that the time for lodging an appeal only begins to run either when the individual has actually received the notification or when the Secretary of State can demonstrate that she has taken all reasonable steps to bring the decision to the individual's attention, whichever is the earlier.

Follow-up to first Report

Removal powers

We recommend amendments to the regulation-making power in clause 1(6)(c) of the Bill to ensure that the Bill reflects the Government's stated intention that family members will always be notified if they are facing removal.

Removal of appeal rights and the right of effective access to court

We have serious concerns about the effect of some of the Government's proposed judicial review reforms on the practical ability to bring meritorious challenges to decisions, including in the immigration and asylum context. We recommend that the removal of appeal rights for which the Bill provides should not be brought into force until Parliament is satisfied that the quality of first instance decision-making has improved sufficiently to remove the risk that meritorious appeals will be prevented from being brought.

Limits on the Tribunal's powers to consider "new matters"

The Government's objective to prevent the Upper Tribunal from becoming the primary decision-maker by considering matters not previously considered by the Secretary of State can be achieved in a way which does not make the scope of the Tribunal's jurisdiction dependent on the consent of the respondent to the appeal. We recommend that the Bill be amended by removing the condition of the Secretary of State's consent and leaving it to the

Tribunal to decide the legal question of the scope of its own jurisdiction.

Out of country human rights appeals

In the absence of legal aid, we do not consider that an out of country appeal against deportation on the grounds that it is in breach of the right to respect for private and family life is a practical and effective remedy for the purposes of Article 8 ECHR and Article 13 in conjunction with Article 8. We recommend that legal aid be available for such out of country human rights appeals, or alternatively that new s. 94B of the Nationality, Immigration and Asylum Act 2002, inserted by clause 12(3), be deleted from the Bill.

Best interests of children a primary consideration

We recommend that the Bill be amended to remove any scope for doubt about the effect of the Bill on the s. 55 children duty, by requiring the best interests of the child to be taken into account as a primary consideration.

Prescribing the weight to be given to certain considerations

We remain concerned by the provisions in the Bill which seek to influence the amount of weight given to the right to a private or family life in particular types of case. We recommend an amendment which would give effect to the recommendation in our first Report that the Bill be amended in a way which retains this as a relevant consideration to be weighed in the balance, but does not seek to prescribe the weight to be given to the right in that balancing exercise.

Access to services

We welcome the Government's indication that the Secretary of State, when exercising her residual discretion to grant permission to occupy premises under a residential tenancy agreement, will take into account the best interests of any child involved, in accordance with the duty in s. 55 of the Borders, Citizenship and Immigration Act 2009. We recommend that the Secretary of State issue new guidance specifically on the s. 55 duty, explaining clearly to front-line decision-makers exactly how that statutory duty applies in relation to functions conferred by or by virtue of this Bill.

To meet the concern about the impact of extended charging for health services on children's health, we recommend that new guidance be issued specifically on the s. 11 Children Act duty, explaining to front-line decision-makers in the health sector exactly how that duty applies in the context of extended charging for NHS services.

1 Introduction

Background

1. This is our second Report on the Immigration Bill,¹ which had its Second Reading in the House of Lords on 10 February 2014 and is due to begin its Committee stage on 3 March 2014. In our first Report on the Bill, published on 18 December, we made a number of recommendations.²

2. The Government responded to our Report in a letter dated 29 January 2014 from the then Minister for Immigration, Mark Harper MP.³ We are grateful for the Government's response to our conclusions and recommendations.

3. In this Report we follow up on some of the recommendations we made in our first Report, in the light of the Government response, parliamentary debates on the Bill and other relevant developments since our first Report was published. We also report, for the first time, on the significant provision in clause 60 of the Bill, introduced by the Government at Report Stage in the Commons, which would enable the Secretary of State to deprive naturalised UK citizens of their citizenship even if the effect of doing so would be to leave them stateless.

1 HL Bill 84.

2 Eighth Report of Session 2013–14, *Legislative Scrutiny: Immigration Bill*, HL Paper 102/HC 935 (hereafter "First Report on the Bill").

3 Available on our website: http://www.parliament.uk/documents/joint-committees/human-rights/Govt_response_re_Immigration_Bill.pdf (hereafter "Government response")

2 Deprivation of UK citizenship

Background

4. Clause 60 of the Immigration Bill was inserted by Government amendment at Commons Report Stage on 30 January.⁴ The effect of the new clause is to empower the Secretary of State to deprive a naturalised British citizen of their citizenship, even if that renders the individual stateless, if the Secretary of State is satisfied that the deprivation of citizenship is conducive to the public good because the person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the UK.”⁵ The power is retrospective: in deciding whether or not to make a deprivation order, the Secretary of State may take account of conduct before the section came into force.⁶

5. A naturalised British citizen is someone who was not born a British citizen but has become one through the legal process of naturalisation, by which someone with no automatic claim to British citizenship can obtain the same rights and privileges as someone who was born a British citizen. A person can apply for naturalisation as a British citizen if they have lived in the UK for five years or more, or are married to a British citizen and have lived in the UK for three years or more.⁷

6. The new clause was tabled only two days before Report Stage. It was not preceded by any consultation and the Government has not explained the urgency which requires it to be added to the Bill at such a late stage in the Commons. There was a lot of concern expressed during debate in the Commons that the clause had not been properly scrutinised and an expectation that the House of Lords would scrutinise it particularly carefully in light of the lack of opportunity for informed scrutiny in the Commons.

7. The Explanatory Notes to the Bill published before Second Reading in the Lords explain that the purpose of the clause is to qualify the existing provisions on deprivation of citizenship so that in the most serious cases, “such as those involving national security, terrorism, espionage or taking up arms against British or allied forces”, individuals can still be deprived of their citizenship, where this has been acquired by means of naturalisation, without regard to whether or not it will render them stateless.⁸

8. The provision is intended to be consistent with the 1961 UN Convention on the Reduction of Statelessness, which allowed States to declare on ratifying the Convention that they retain the right to deprive a person of citizenship and render them stateless in specific circumstances. When the UK ratified the Convention on Statelessness in 1966, it explicitly declared that it retained the right to deprive of citizenship where the person had “conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.”

4 HC Deb 30 Jan 2014 cols 1038–1106.

5 Clause 60(1) of the Bill, inserting new subsection (4A) into s. 40 of the British Nationality Act 1981.

6 Clause 60(2).

7 <http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/naturalisation/>

8 EN 84 paras 379–382.

9. In accordance with our best practice recommendation that Government amendments with significant human rights implications should be accompanied by a human rights memorandum, the Government provided us with a supplementary ECHR Memorandum addressing the compatibility of the new clause with the ECHR, which we were grateful to receive.⁹ The supplementary memorandum explains the background to the introduction of the clause. In the recent case of *Secretary of State for the Home Department v Al-Jedda* (9 October 2013), the Supreme Court held that the Secretary of State did not have the power to deprive a naturalised British citizen of his British citizenship on the ground that it would be conducive to the public good if the order would make him or her stateless, even if at the date of the Secretary of State's order it were open to the individual to apply for citizenship of another State.¹⁰ In the Supreme Court's view, the terms of the statutory prohibition on making a person stateless were clear: the question is whether the person already holds another nationality at the date of the order, not whether they were entitled to one or might acquire one.

10. In the course of its judgment, the Supreme Court noted that by enacting the prohibition on deprivation of citizenship on "public good" grounds if it renders someone stateless, "Parliament went further than was necessary in order to honour the UK's existing international obligations."¹¹ This is because of the UK's declaration at the time it ratified the 1961 Statelessness Convention, retaining the right to deprive a naturalised person of their citizenship if they conducted themselves in a manner seriously prejudicial to the vital interests of the UK, even if it left them stateless. In 2002 Parliament tightened the prohibition on rendering someone stateless, to enable the UK to sign and ratify the European Convention on Nationality. In fact, it never signed that Convention, and the new clause now seeks to change the position back to what it was at the time the UK made its declaration on ratifying the 1961 Convention.

11. During the debate on the Government amendment at Commons Report Stage, a number of concerns were expressed about the clause and questions were asked on a range of matters, including the intended scope of the power, the different consequences of exercising it where the person is in the UK and where they are abroad, the difficulty of removing a stateless person, the adequacy of the safeguards provided and the practical effectiveness of the legal remedies available. The Government's ECHR memorandum, while very welcome, also gave rise to a number of questions. We therefore wrote to the Home Secretary on 12 February asking a number of detailed questions to help us with our scrutiny of the Bill.¹² In view of the imminence of the Bill's committee stage in the Lords we requested a response by 20 February and the Government provided its response on that date.¹³ We are grateful to the Government for its prompt reply to our detailed questions, which has enabled us to report in time to inform the Bill's committee stage.

9 Supplementary ECHR Memorandum, 29 January 2014, available on our website https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf

10 [2013] UKSC 62.

11 *Al-Jedda*, above, at para. 22.

12 Letter dated 12 February 2014 from the Chair to the Home Secretary: http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Theresa_May_MP_120214.pdf

13 Letter dated 20 February 2014 from James Brokenshire MP, Immigration and Security Minister, to the Chair, available on our website: http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_James_Brokenshire_MP_200214.pdf

12. We have been sent and considered parliamentary briefing material on the clause by Liberty and the Immigration Law Practitioners Association. We have also received and taken into account a helpful memorandum from Professor Guy Goodwin-Gill, Professor of International Refugee Law at the University of Oxford and Senior Research Fellow at All Souls College Oxford, who was one of Mr Al-Jedda's legal representatives before the Supreme Court.¹⁴

The rights at stake

13. As the Home Secretary acknowledges, depriving people of their citizenship is a serious matter, and becoming stateless has serious consequences for individuals. In the memorable words of Hannah Arendt, it deprives people of “the right to have rights.” The Supreme Court in *Al-Jedda* referred to the growing international awareness of “the evil of statelessness”, following particularly egregious examples during the twentieth century such as the Reich Citizenship Law of 1935 stripping all Jewish people of their citizenship of the German Reich.¹⁵

14. The Universal Declaration of Human Rights (1948) provides in Article 15:

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality [...]

15. The European Convention on Human Rights (1950) does not include an express right to a nationality, but it is well established in Convention case-law that the arbitrary denial of citizenship may violate the right to respect for private life under Article 8 ECHR.

16. Two significant UN Conventions on Statelessness were agreed in 1954 and 1961: the Convention relating to the Status of Stateless Persons 1954 and the Convention on the Reduction of Statelessness 1961. As Professor Goodwin-Gill's brief historical account shows, the UK has taken a very active part in promoting the reduction and elimination of statelessness globally, including in the lead up to the 1961 Convention.

17. The number of naturalised British citizens who have been deprived of their citizenship by the Home Secretary under existing powers (i.e., not rendering them stateless) has increased significantly in recent months; these powers appear to be increasingly used in relation to individuals going abroad, to Syria, for example. The deprivation of citizenship removes the State's responsibility for the protection of the individuals concerned and exposes them to actions which lack due process. Two former UK citizens who have been deprived of their citizenship have subsequently been killed by US drone strikes, and others are reported to have been exposed to irregular treatment including rendition.

Exercises of the power to deprive

18. We asked the Government how many times the previous power of deprivation had been exercised in a way which rendered stateless the person deprived of citizenship

14 Information paper from Professor Guy Goodwin-Gill, *Mr Al-Jedda, Deprivation of Citizenship and International Law* <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>

15 *Al-Jedda*, para. 12.

between the UK's ratification of the UN Convention on the Reduction of Statelessness and the restriction of the Home Secretary's power to leave a person stateless in 2003. The Government does not hold comprehensive records on past deprivations, but "archived briefings" suggest that there were 10 cases between 1949 and 1973 involving naturalised citizens.

19. We also asked the Government for more details of the cases of the 27 people who have been deprived of their citizenship since 2006 on the ground that it is conducive to the public good to do so. The Government assesses that at least six of the individuals concerned had children, but "for reasons of national security and operational effectiveness" is unable in an open letter to provide details of the number of individuals who were abroad at the time they were deprived of their citizenship or the number of deprivations that were based in whole or in part on closed material.

20. We are surprised by the Government's refusal to inform Parliament of the number of cases in which the power to deprive of citizenship has been exercised while abroad, or of the number of cases in which the Secretary of State's decision was taken wholly or partly in reliance on information which in the Secretary of State's view should not be made public.

21. One of the significant concerns about the power in clause 60 to make individuals stateless is that it is intended to be exercised while the individual is abroad, as a sort of de facto deportation and exclusion. As we explain in this Report, the exercise of the proposed power in such cases raises serious concerns about the UK being in breach of its international obligations to the State to which the naturalised UK citizen has travelled. In those circumstances, **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, in order to assist it to reach a view as to how the new power is likely to be exercised in practice. We call on the Government to make this important information available to Parliament, or to provide a more detailed explanation as to why this is information which should not be made available to Parliament.**

22. We also note that where a deprivation of citizenship decision is taken wholly or partly in reliance on information which in the Secretary of State's opinion should not be made public in the interests of national security, or of the relationship between the UK and another country, or otherwise in the public interest, the Secretary of State is required to issue a certificate to that effect.¹⁶ The effect of the Secretary of State's certificate is to remove the individual's statutory right of appeal to the Asylum and Immigration Tribunal (now the First Tier Tribunal)¹⁷ and to replace it with a separate, modified right of appeal to the Special Immigration Appeals Commission.¹⁸ **In light of the seriousness of the consequences for the individual, in terms of the implications for their opportunity to challenge the deprivation decision before an appellate court, we are surprised that the Secretary of State is not prepared to inform Parliament of the number of cases in which such a certificate has been issued, resulting in only the more limited right of appeal to the Special Immigration Appeal Commission being available. We again call on the**

¹⁶ Under s. 40A(2) British Nationality Act 1981.

¹⁷ Under s. 40A(1).

¹⁸ Under s. 2B of the Special Immigration Appeals Commission Act 1997.

Government to make this important information available to Parliament, or to provide a more detailed explanation as to why this is information which should not be made available to Parliament.

Urgency

23. We asked the Government to explain the urgency behind the introduction of the provision into the Bill which justifies the lack of prior consultation and its insertion at such a late stage in the Bill's passage in the Commons

24. The Government explains that the Supreme Court's decision in *Al-Jedda* was handed down on 9 October 2013, the day before the Immigration Bill was introduced in the House of Commons. The Home Secretary asked officials to explore the implications of the Supreme Court's observation that UK law currently goes further than is necessary to honour the UK's international obligations.¹⁹ The options were then considered within Government, against the background of a recognition that this was a complex and potentially contentious issue. The Bill's Committee Stage concluded on 19 November, by which time the Government was not ready to table amendments, so the earliest opportunity was Report Stage.

25. We do not doubt the need to give serious consideration within Government to the implications of the Al-Jedda judgment. However, we note that the possibility of introducing a power such as this was being publicly floated by the Home Secretary in media interviews, and by Charles Farr, the Head of the Office of Security and Counter-Terrorism in the Home Office, in evidence to the Home Affairs Committee, as long ago as November last year. Even if the Immigration Bill were the only legislative opportunity to bring forward such a measure in the current Session, we consider that there was time to hold a public consultation which would have made for better informed parliamentary scrutiny of the Government's proposal.

Compatibility with the UK's international obligations on statelessness

26. As we have outlined above, the Government says that clause 60 of the Bill is entirely compatible with the UK's obligations under the UN Conventions on Statelessness, because the purpose of the new clause is merely to change UK law back to the position which obtained at the time the UK made its declaration in 1966 when it ratified the 1961 Convention on the Reduction of Statelessness.²⁰ By that declaration the UK retained the right to deprive a naturalised citizen of their nationality on the ground, amongst others, that the individual "has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty". Such a declaration was expressly provided for in Article 8 of the 1961 Convention and therefore reverting to the legal position in force at that time involves no incompatibility with the obligations under that Convention.

27. In view of the emphasis on the reduction and elimination of statelessness in the relevant international instruments, we have considered whether enacting a provision

¹⁹ *Al-Jedda*, para. 22.

²⁰ Supplementary ECHR Memorandum, paras 3-8.

which reverses legislation intended to reduce statelessness, which will lead to an increase in the number of stateless people, involves any breach of the UK's obligations in international law concerning statelessness. There is no duty of progressive realisation in any of the conventions. Article 13 of the 1961 Convention, however, provides that "This Convention shall not be construed as affecting any provisions more conducive to the reduction of statelessness which may be contained in the law of any Contracting State now or hereafter in force."

28. Since the Government is essentially relying on the terms of Article 8(3) of the 1961 Convention to justify repealing a subsequent provision which is more conducive to the reduction of statelessness, we asked the Government whether there is an implied international law duty not to increase statelessness. The Government's response is that Article 13 of the 1961 Convention cannot be read as detracting from Article 8, which expressly permits States to retain the right to deprive a person of their nationality on certain grounds. It also invokes the observations of the Court of Appeal and the Supreme Court that the current UK law goes further than is required as a matter of international law.

29. We accept the Government's argument that, in strict legal terms, enacting the power in clause 60 to deprive a naturalised citizen of their citizenship even if it renders them stateless does not involve any breach by the UK of its obligations under the UN Conventions on Statelessness. The new power will lead to an increase in statelessness, which represents a significant change of position in the human rights policy of the UK, which has historically been a champion of global efforts to reduce statelessness. It does not per se, however, put the UK in breach of any of its international obligations in relation to statelessness.

Intended scope and purpose of the power

30. As Professor Goodwin-Gill states in his memorandum, however, compatibility with the UN Conventions on Statelessness does not exhaust the questions of compatibility with international law, including international human rights law, to which the power gives rise.

31. The Home Secretary told the House of Commons²¹

The important point is that the process applies in cases where the individual could access the citizenship of another country, and it would be open to them to apply for such citizenship. That is the whole point.

32. We asked the Government whether it is intended that the new power to deprive citizenship should only be exercised when the person is entitled to acquire citizenship of another country. The Government replied:

To clarify the position, the power is not limited only to those who have recourse another nationality. The new clause could result in a naturalised person being left stateless as a consequence of being deprived of their British citizenship. The point that I and other Ministers have made on this issue is that we expect a high

21 HC Deb 30 Jan 2014 col 1045.

proportion of such cases to be able to acquire another nationality. However, we accept that will not always be possible.

33. We were surprised by the Minister's response, compared to what the Home Secretary told the Commons, because it suggests that the scope of the power is intended to be significantly wider than was first indicated.

34. It appears from various statements by ministers that one of the principal purposes, and possibly the only purpose, of the new power is to enable the Secretary of State to remove from the UK individuals who are deemed to be dangerous and therefore a risk to national security. The International Law Commission is charged with codifying the rules and principles of customary international law, and Article 9 of its recently adopted Draft Articles on the Expulsion of Aliens concerns deprivation of nationality for the sole purpose of expulsion. It provides:

Article 9

A state shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

35. The Government, however, acknowledges that it may in practice be difficult to deport a person who has been deprived of their citizenship and left stateless while present in the UK. However, it has made clear that it intends to exercise the new power, leaving individuals stateless, when they are abroad. We asked the Government whether making a British citizen stateless whilst they are in the territory of another State would be compatible with the UK's international obligations to that State, and whether, in international law, the other State would be entitled to deport the former British citizen back to the UK, which would be required to re-admit them.

36. The Government answered this important question purely in terms of the UN Conventions on Statelessness which, it rightly says, do not establish any obligations between Contracting States concerning making a citizen stateless while they are in another State. The Government's answer suggests that it does not consider there to be any entitlement in international law to deport back to the UK a former British citizen who has been made stateless whilst in another State, nor any obligation on the UK to re-admit a former British citizen in such circumstances.

37. Professor Goodwin-Gill strongly disagrees with this analysis. In his view, international law distinguishes between deprivation of citizenship where the individual is in the territory of the depriving State, which is permissible within certain bounds, and deprivation of citizenship resulting in statelessness where the individual is abroad in the territory of another State. In his view,

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 UK. If the UK were to refuse re-admission, 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. ... the UK 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.

38. We would be very concerned if the Government’s main or sole purpose in taking this power is to exercise it in relation to naturalised British citizens while they are abroad, as it appears that this carries a very great risk of breaching the UK’s international obligations to the State who admitted the British citizen to its territory. This concern about the intended use of the power makes it all the more important, in our view, that the Government provides to Parliament the information we have requested about the number of cases since 2006 in which the power to deprive of citizenship has been exercised while the individual is abroad, as this will help Parliament to reach a view about the likely use of the new power.

39. We also recommend that the Bill be amended to make it a precondition of the making of an order by the Secretary of State that, in the circumstances of the particular case, the deprivation is compatible with the UK’s obligations under international law. The following probing amendment is intended to focus debate on this issue:

Page 47, line 40, insert—

“and (d) in the circumstances of the particular case the deprivation of citizenship is consistent with the UK’s obligations under international law.”

Applicability of the ECHR

40. The Government correctly accepts in its supplementary ECHR Memorandum that deprivation of citizenship is capable of engaging Article 8 ECHR, because nationality is part of a person’s identity and therefore, potentially at least, their private life.²²

41. However, the Government appears to consider that the ECHR only applies where the person concerned is within the UK at the time of the order of deprivation. It appears to be the Government’s view that where an individual is not in the UK’s jurisdiction, the ECHR does not apply to them and their Article 8 rights therefore are not engaged by a deprivation of decision.²³ Similarly, the Government considers that the implications of a deprivation decision for an individual’s right to life under Article 2 and right not to be tortured or subjected to inhuman and degrading treatment under Article 3 ECHR differ depending on whether the individual is within the UK’s jurisdiction for the purposes of the ECHR.²⁴ In such cases, the Secretary of State has a “practice” of not depriving individuals of British citizenship when they are not within the UK’s jurisdiction if satisfied that to do so would expose them to a real risk of treatment in breach of Articles 2 or 3, but does not accept that this is a legal requirement.

42. We asked the Government to explain the circumstances in which it does not envisage that a person will be outside the UK’s jurisdiction when the power to deprive them of their citizenship is exercised, and to explain by reference to the Strasbourg Court’s case-law on

22 Supplementary ECHR Memorandum, para. 12.

23 Supplementary ECHR Memorandum, para. 13.

24 Supplementary ECHR Memorandum, para. 16.

extra-territoriality why an individual's ECHR rights are not engaged by a decision to deprive them of their citizenship while they are abroad.

43. The Government explained in response that its position was based on its understanding of the extra-territorial scope of the ECHR as explained by the European Court of Human Rights in the case of *Al-Skeini v UK*. It does not consider that the ECHR routinely has extra-territorial effect, and considers that, other than in exceptional circumstances, a person who is not physically present in the territory of the UK when they are deprived of their citizenship will not be within the jurisdiction of the UK for ECHR purposes.

44. The Government's invocation of the Court's case-law concerning the extra-territorial application of the Convention overlooks the important fact that the very act of depriving a naturalised citizen of their citizenship is itself an exercise of jurisdiction over that individual. Professor Goodwin-Gill, in his memorandum, describes it as "wishful legal thinking to suppose that a person's ECHR rights can be annihilated simply by depriving that person of citizenship while he or she is abroad [...] the act of deprivation only has meaning if it is directed at someone who is *within* the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or her rights."

45. We do not accept the Government's argument that, generally speaking and in the absence of exceptional circumstances, a decision to deprive a naturalised citizen of their citizenship while they are physically in the territory of another State does not engage the individual's Convention rights under Articles 2, 3 and 8 ECHR because they are outside the UK's jurisdiction for ECHR purposes. In our view, a deprivation decision must be compatible with those Articles whether the citizen concerned is abroad or in the UK at the time of the deprivation decision.

46. The effect of the ECHR applying to all deprivation of citizenship decisions is to reinforce the requirements contained in other treaties. These are that nationality must not be taken away arbitrarily, but must be in accordance with the law; that the power must be regulated by a legal framework which ensures that the power is not exercised arbitrarily or in a discriminatory manner,²⁵ but only where necessary and proportionate; and that there must be a practically effective right of access to a court and a fair hearing in the determination of the lawfulness of the deprivation, including its compatibility with other international obligations.

Impact on children and dependants

47. The Government accepts that a deprivation of citizenship decision could have an impact on the Article 8 rights of the person's family, and that it would be necessary to consider the Article 8 rights of the whole family unit, just as it is in relation to deportation and exclusion decisions.²⁶ It relies on the high threshold of the test for deprivation of citizenship as the main guarantee that deprivation would only be ordered where it is

25 See e.g. *East African Asians v UK*, Application no. 4403/70, [1973] ECHR 3 (14 December 1973).

26 Supplementary ECHR Memorandum, para. 13.

necessary and proportionate in respect of the individual's family as well as the individual themselves.

48. We asked the Government what assessment it had made of the likely impact of the exercise of the power on the rights of children whose citizenship has been taken away, and the rights of dependants whose immigration status depends on the citizenship of the individual concerned. In the Government's view, the clause will not have any impact on the UK's compliance with the UNCRC. Where a dependant's immigration status is reliant on the citizenship of the British citizen being deprived, the Government says it is likely that their immigration status will be resolved either by being British or holding other immigration status. In the rare case that a dependant has a form of temporary leave, such as a spouse on a temporary family visa, any application to remain would be considered on the basis of any human rights issues with regard to the best interests of the child.

49. We welcome the Government's acceptance that a deprivation order should not be made without taking full account of the impact on the whole family unit, and with regard to the best interests of any child affected. To ensure that the best interests of the child are treated as a primary consideration, as required by Article 3 UNCRC, we recommend an amendment to the Bill which requires the Secretary of State to take into account the best interests of any child affected when deciding whether to make a deprivation order under the new power. The following amendment gives effect to this recommendation:

Page 48, line 1, after "Secretary of State" insert—

"must take into account the best interests of any child affected by the decision."

Differential treatment of naturalised citizens

50. The Government has considered whether the fact that only naturalised citizens can be rendered stateless under the new power is discriminatory and therefore incompatible with the right not to be discriminated against in relation to nationality (Article 14 in conjunction with Article 8 ECHR).²⁷ It is satisfied, however, that there is an objective and reasonable justification for treating naturalised citizens differently from others. It notes that the distinction between naturalised citizens and others is recognised in international law, and that the 1961 Statelessness Convention itself recognises the distinction. The objective justification relied on for the difference of treatment is that "naturalised citizens have chosen British values and have been granted citizenship on the basis of their good character, and it is therefore appropriate to restrict a measure with such serious consequences as becoming stateless to naturalised citizens".

51. Concern about the discriminatory effect of the provision featured strongly in the Westminster Hall debate on UK Citizenship initiated by Diane Abbott MP on 11 February 2014.²⁸ She was concerned that the clause introduces into UK law a two-tier citizenship which will leave many communities feeling as though they have only second class citizenship. The same concern was expressed by Jacob Rees-Mogg MP at the Bill's Report

²⁷ Supplementary ECHR Memorandum, paras 14–15.

²⁸ HC Deb 11 Feb 2014 col 255WH–262WH.

Stage, who argued for the importance of equality before the law for all British citizens and worried that creating a power to take citizenship away from a certain category of British subject but not others would create “a second category of citizen.” The Government, however, does not accept that the clause gives rise to a two-tier citizenship system, arguing that the proposal merely reflects the fact that there are different routes to citizenship.

52. We note with interest the fact that at the drafting group which worked on what became Article 8 of the 1961 Statelessness Convention, permitting certain limited exceptions to the prohibition on deprivation of citizenship resulting in statelessness, a distinction between naturalised and natural born citizens was considered but rejected:²⁹

There had been considerable discussion as to whether or not separate grounds of deprivation of nationality should be applied to natural-born and to naturalised 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 naturalised persons. Hence the grounds mentioned applied to both types of cases.”

53. We draw to Parliament’s attention the fact that the provision in the 1961 Convention on Statelessness which permits States to retain the power to deprive a person of their citizenship even if it leaves them stateless does not differentiate between naturalised and natural-born citizens. We do not advocate the extension of the power to natural-born citizens, but we invite the Government to consider whether the historical justification it invokes for treating naturalised citizens differently is still appropriate today.

“In accordance with law”

54. Article 8(4) of the 1961 Convention on the Reduction of Statelessness provides that a State shall not exercise a power of deprivation of citizenship permitted by that Article “except in accordance with law”. The right to respect for private and family life in Article 8 ECHR, which is engaged by decisions to deprive of citizenship, similarly requires that any interferences with that right must be in accordance with the law. The requirement means that there must be some basis in domestic law for the power in question, but also that the measure in question is compatible with the rule of law, which depends on the law having certain minimum qualities.

Legal certainty in the definition of the relevant conduct

55. One of the settled meanings of the requirement that an interference must be in accordance with the law is that the law must be formulated with sufficient precision to enable the individual to regulate his conduct.³⁰

56. We asked the Government whether the test for deprivation, that the Secretary of State must be satisfied that the deprivation is “conducive to the public good because the person [...] has conducted him or herself in a manner which is seriously prejudicial to the vital

29 Cited in Memorandum of Professor Goodwin-Gill, p. 3.

30 See e.g. *Gillan and Quinton v UK* (Application no. 4158/05) paras 76–77.

interests of the UK”,³¹ satisfies this requirement of legal certainty. We also asked for some examples of the sort of conduct which it is envisaged will satisfy the test.

57. The Government considers that the test for deprivation satisfies the requirements of legal certainty. It points out that the test in the new provision in the Bill tracks the wording of one of the permitted exceptions in the 1961 Convention on Statelessness.³² It says it will apply when naturalised citizens act inconsistently with their duty of loyalty to the UK “in the most extreme circumstances”, for example if they engage or attempt to engage in acts of terrorism or espionage, or fight against British or allied forces.

58. We are grateful for the Government’s clarification of the sorts of conduct which it is envisaged will satisfy the test. We accept that the test of “seriously prejudicial to the vital interests of the UK” is a higher threshold than “conducive to the public good” on its own: indeed, in 2006 when the latter test was substituted for the former in the statutory scheme, one of the reasons given by the Government was that the “vital interests” test was too high.³³ Although the language of conduct “seriously prejudicial to the vital interests of the State” is somewhat antiquated and for that reason less accessible than equivalent phrases in modern legislation, it is nevertheless well established and understood that it enshrines a relatively high threshold, and we accept the Government’s argument that it meets the requirements of legal certainty.

59. We note, however, that the Government considers that suspected attempts to engage in acts of terrorism would be caught by this definition of conduct attracting the sanction of deprivation of citizenship. “Terrorism” is very broadly defined in our law, and if the Secretary of State can render a person stateless on the basis of suspicion of involvement or attempted involvement in such broadly defined conduct, it is important to consider the adequacy of other safeguards against arbitrary deprivations of citizenship.

Adequacy of safeguards against arbitrariness

60. For the law authorising deprivation of citizenship to meet the requirements of being “in accordance with law”, it must also afford a measure of legal protection against arbitrary deprivations. We asked the Government specifically about whether there are sufficient safeguards against arbitrariness which apply before the power is exercised, and why there is no provision for prior judicial permission such as that which applies to TPIMs, or any right to be heard before the power of deprivation is exercised.

61. The Government replied that it would not be appropriate in these cases to apply for permission in advance, because that would place the court in the position of primary decision-maker, which would be out of step with all other immigration and nationality decisions. However, the Government did state that it would adopt the approach advocated by the UNHCR in its recent Report, *Preventing and Reducing Statelessness* (2010), that “In deciding whether to deprive an individual of his or her nationality, the State should consider the proportionality of this measure, taking into account the full circumstances of the case.”

31 New s. 40(4A)(b) of the British Nationality Act 1981, inserted by clause 60(1) of the Bill.

32 Article 8(3)(a)(ii)

33 See Memorandum of Professor Goodwin-Gill, p. 6.

62. We welcome the Government’s indication that it would adopt a proportionality approach to deciding whether or not to exercise the new power in clause 60 to deprive of citizenship. However, in our view the importance of the concepts of necessity and proportionality as safeguards against arbitrariness is such that we recommend that they are included on the face of the Bill as conditions which have to be satisfied before the Secretary of State makes a deprivation order. In our view this could make a real practical difference in particular cases. We note, for example, that the Government does not want to rule out the possibility that deprivation of citizenship leaving a person stateless is necessary in the interests of the economic well-being of the country, whereas it is hard to imagine the circumstances in which such a serious measure could ever be necessary and proportionate for such a purpose. The following amendment would give effect to this recommendation:

Page 47, line 41, after sub-paragraph (b) insert—

“(c) the deprivation of citizenship is a necessary and proportionate response to such conduct”

Retrospectivity

63. Another aspect of the requirement that deprivations of citizenship must be “in accordance with law” is that the law governing the power must be sufficiently accessible, predictable and foreseeable to enable individuals to regulate their conduct in full knowledge of the consequences provided for by law. Generally this means that retrospective laws are not permissible other than in the most exceptional circumstances.

64. The new power of the Secretary of State to deprive a naturalised British citizen of their citizenship even if the effect of the order would be to make the individual stateless would have retrospective effect: in deciding whether to exercise the power, the Secretary of State may take account of the manner in which a person conducted him or herself before the section came into force.³⁴

65. It is also clear from the Government’s answer to a written question asked by Lord Roberts of Llandudno that there will be no time limit placed on how long ago the activity considered to have been seriously prejudicial to the UK’s vital interests needs to have taken place, provided it was after the individual became a British citizen.³⁵

66. We asked the Secretary of State to explain the justification relied on for taking the exceptional step of giving the new power retrospective effect. The Home Office considers that the new clause does not change the law in a way that those affected could not reasonably have expected, “because the UK has retained the right to render individuals stateless in the circumstances described in clause 60 as a matter of international law since 1966.” The Government also believes that it is a reasonable expectation for any naturalised person, who has taken an oath or pledge when they were granted British citizenship to be loyal to the UK and its values, that any subsequent conduct which contradicts those values could threaten the status of their nationality.

³⁴ Clause 60(2).

³⁵ HL Deb 10 Feb 2014 col WA 101 (Lord Taylor of Holbeach).

67. We do not find persuasive the Government's reliance on the position in international law to provide the necessary legal certainty and predictability when the position in national law since the 2002 Act has been absolutely clear: since the passage of the Nationality, Immigration and Asylum Act of that year, the power to deprive of citizenship and leave a person stateless because of their conduct was expressly given up and no longer retained in national law. The fact that the UK may have been entitled, as a matter of international law, to change its law back again without breaching its obligations under the UN Convention on the Reduction of Statelessness does not mean that all naturalised citizens could reasonably have expected that change. From 2002 they were entitled to assume, on the basis of UK law, that they were no longer exposed to the risk of statelessness.

68. The Government declined to comment on whether it intends to exercise the power in relation to Mr Al-Jedda, so as to deprive him of the benefit of the Supreme Court's judgment in his favour, arguing that it would be inappropriate to do so while his appeal against the Home Secretary's latest deprivation decision is ongoing. However, it is clear that the clause giving retrospective effect to the power would enable the Secretary of State to exercise it in relation to Mr. Al-Jedda if she considered the conditions of deprivation to be satisfied.

69. It is a well established feature of our constitutional arrangements that there is no constraint on Parliament changing the law prospectively where it disagrees with an interpretation of the law reached by even the highest court in the land. Changing the law with retrospective effect, however, is recognised to be an exceptional step which requires weighty justification; and all the more so when the effect of such retrospectivity is to enable particular individuals to be deprived of the benefit of court judgments in their favour.

70. These considerations are even weightier where the provision which is being given retrospective effect is a sanction in respect of previous conduct. In such cases, legal certainty is especially important, so that individuals are aware of the possible consequences of their conduct. That is why there is an absolute prohibition on retrospective criminal penalties. While we do not suggest that deprivation of citizenship is equivalent to a criminal penalty, it is nevertheless a very serious sanction for previous conduct, particularly where it leaves the individual stateless, and therefore akin to a penalty,³⁶ making the presumption against retrospectivity even stronger.

71. We are not persuaded that there are sufficiently weighty reasons to justify the new power being made retrospective, and we recommend that the Bill be amended so as to prevent it having retrospective effect. The following amendment would give effect to this recommendation:

Page 48, line 1, after "Secretary of State" leave out "may take account of the manner in which a person conducted him or herself before this section came into force."

³⁶ Cf. *Trop v Dulles* 356 U.S. 86 (1958) in which the US Supreme Court held that the federal Government violated the constitutional prohibition on cruel and unusual punishment when it imposed deprivation of citizenship on a soldier who had deserted during wartime.

Fair hearing

72. Article 8(4) of the 1961 Convention on the Reduction of Statelessness also requires that the national law which provides for a permitted power of deprivation “shall provide for the person concerned the right to a fair hearing by a court or other independent body.” That provision reflects the requirement in other relevant human rights treaties, such as the right of access to court and to a fair hearing in the determination of civil rights in Article 6(1) ECHR, as well as the common law right of access to a court or tribunal.

73. The Government’s supplementary ECHR Memorandum states that “anyone subject to deprivation would have a right of appeal under section 40A of the 1981 Act”, so that deprivation decisions would be subject to supervision by the courts to ensure that they were necessary and proportionate and not otherwise unlawful.³⁷ The supplementary Memorandum did not mention, however, that where the decision to deprive of citizenship is based on information which the Secretary of State considers it would not be in the public interest to disclose, including because it would not be in the interests of national security, the ordinary right of appeal is displaced by the Secretary of State’s certificate to that effect,³⁸ and replaced by a right of appeal to the Special Immigration Appeals Commission.³⁹

74. Before the Special Immigration Appeals Commission, the Secretary of State can rely on the information in a closed material procedure (“CMP”), without disclosing it to the individual or his legal representatives. The individual’s interests are represented in the closed material procedure by special advocates. However, unlike in other statutory contexts in which CMPs are used, such as TPIMs and asset-freezing proceedings, there is no requirement in proceedings before SIAC that there must be sufficient disclosure of the gist of the closed material to enable the individual concerned to give effective instructions to those representing his interests in the closed proceedings.

75. Since most cases of deprivation of citizenship on the ground that the individual concerned has engaged in conduct “seriously prejudicial to the vital interests of the UK” are likely to involve reliance by the Secretary of State, in whole or in part, on closed material, we asked the Government whether it accepted that in such cases the person concerned is entitled to have disclosed to them sufficient information about the case against them to enable them to give effective instructions to their special advocate.

76. The Government’s response is that it considers that “the same statutory procedural safeguards apply to any closed appeal in the deprivation context as they do ordinarily in other appeals before SIAC, and the Government will fulfil its responsibility to disclose as much underlying information as possible without compromising national security.” In other words, the Government does not accept that the so-called “AF disclosure obligation” (after the House of Lords case in which the principle was established) applies in appeals against deprivation of citizenship decisions.

77. In our view it is clear that an appeal to Special Immigration Appeals Commission will not be a fair hearing unless the AF disclosure obligation applies, so that the Secretary of State is legally required to disclose to the individual concerned sufficient

37 Supplementary ECHR Memorandum, para. 12.

38 Under s. 40A(2) of the British Nationality Act 1981.

39 Under s. 2B Special Immigration Appeals Commission Act 1997.

information to enable him to give effective instructions to his special advocate. So long as the legal framework does not make such provision, the UK will be in breach of Article 8(4) of the Statelessness Convention. We recommend that the Bill be amended to ensure that the AF disclosure obligation applies in all appeals against orders made by the Secretary of State under the proposed new power.

Access to a practical and effective remedy

78. In view of the likelihood that the power will be exercised in relation to naturalised British citizens while they are abroad in the territory of another State, we also asked the Government some questions about the practical effectiveness of the right of appeal in such cases.

79. We welcome the Government’s clarification that appeals to the Special Immigration Appeals Commission against deprivation of citizenship under the new power will not be subject to the proposed residence test for eligibility for legal aid, even where the appeal is brought from outside the UK. We ask the Government to confirm that the residence test also will not apply to appeals to the First Tier Tribunal.

80. However, the Government maintains that out-of-country appeals against deprivations of citizenship are an effective remedy. It says that this is demonstrated by the fact that a number of appeals against deprivation decisions have been brought by individuals against the UK while they are overseas. This fact only demonstrates that such appeals can be brought; it does not say anything about the effectiveness of such appeals. To make a proper judgment about the effectiveness of out-of-country appeals against deprivations of citizenship, we would need more information about such appeals, such as the proportion of appeals which have succeeded. Professor Goodwin-Gill points out in his memorandum that courts have expressed misgivings about the effectiveness of out-of-country appeals,⁴⁰ and in his view, in order to be an effective remedy, an appeal should have suspensive effect. We see the force of this view, but do not feel that we have seen enough evidence about the way in which out of country appeals operate in practice in deprivation cases to warrant making a recommendation.

81. We note, however, that the Government has not answered our question about whether the 28 day period for lodging an appeal against a deprivation decision would start to run before the individual concerned has actually been notified of the decision. This is an issue of real concern where the individual is abroad at the time the deprivation decision is made. Under the current law there is an obligation on the Secretary of State to notify the individual concerned, including a statement of the reasons for the decision, but as far as we are aware the time for lodging an appeal starts to run from the date of the decision, even where the individual is abroad at that time and may have no way of knowing that such an order has been made. **We recommend that, in order to ensure that the right of appeal is practical and effective, the legal framework provides that the time for lodging an appeal only begins to run either when the individual has actually received the notification or when the Secretary of State can demonstrate that she has taken all reasonable steps to bring the decision to the individual’s attention, whichever is the earlier.**

40 Memorandum of Professor Goodwin-Gill, p. 17, citing *BA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 119 at para. 21 (Sedley LJ) and *E1(OS Russia) v Secretary of State for the Home Department* [2012] EWCA Civ 357 at para. 43 (Sullivan LJ).

3 Follow up to first Report

Removal powers (clause 1)

82. In our first Report, we welcomed the Government’s clarification that family members will always be notified if they are facing removal, but questioned why, in the light of that clarification, the Secretary of State requires a power to make regulations about “whether” a family member to be removed is given notice.⁴¹ We recommended that the regulation-making power in the Bill be amended to reflect the Government’s intention.

83. In the Government’s response to our first Report, it says that it will give consideration to our suggested amendments to the Bill on this point.⁴² To date, however, the Government has not tabled any amendment to address our concern.

84. We recommend the following amendments to the regulation-making power in clause 1(6)(c) of the Bill to ensure that the Bill reflects the Government’s stated intention that family members will always be notified if they are facing removal:

Page 2, line 28, leave out “whether” and insert “where”

Page 2, line 28, after “is” leave out “to be”

Page 2, line 29, leave out “and, if so”

Effective access to justice (clauses 11–14)

85. In our first Report, we expressed a number of concerns about the effect of Part 2 of the Bill, which significantly limits rights of appeal against immigration decisions, on the fundamental right of effective access to justice protected by both the common law and international human rights law; and we made some recommendations designed to mitigate that impact.

86. When introducing the Bill at its Second Reading in the House of Lords, the Minister, Lord Taylor of Holbeach, included in his list of “myths” surrounding the Bill that it undermines access to justice.⁴³ The Government says that the Bill does not do this. Rather, the Government says that the Bill makes essential reforms to appeal rights in order to tackle head-on concerns that the appellate body in immigration cases is being turned into a first-instance decision-maker.

Removal of appeal rights and the right of effective access to court

87. In our first Report, we were concerned that the Bill’s significant limitation of appeal rights against immigration and asylum decisions is not compatible with the common law right of access to a court or tribunal in relation to unlawful decisions, and the right to an effective remedy, because the practical ability to access the legal system to challenge such

41 First Report on the Bill, paras 21–27.

42 Government response, para. 4.

43 HL Deb 10 Feb 2014 col 416.

unlawful decisions would be severely curtailed, having regard to matters such as the poor quality of initial decision-making, the lack of information about the proposed system of administrative review, and the cumulative impact of proposed changes to legal aid and judicial review.⁴⁴

88. The Government's response is that "the right of access to a court or Tribunal is preserved in all cases where it is alleged an unlawful decision has been made as either an appeal can be brought or judicial review proceedings commenced."⁴⁵ It believes it is "important that a full right of appeal before the Tribunal is limited to those cases where fundamental rights are engaged",⁴⁶ and it relies on a combination of the new system of administrative review and the continued availability of judicial review to challenge decisions that are not resolved by administrative review.⁴⁷ The new administrative review process, it claims, will provide a quicker and cheaper process to correct case working errors where there is no longer a right of appeal, and judicial review, rather than a full appeal, is the appropriate forum to consider whether a decision is "in accordance with the law."

89. The Government does not accept that the wider reforms being made to judicial review and legal aid will threaten the practical ability of individuals to challenge immigration decisions where those challenges have merit. It says that the aim of the judicial review reforms is to reduce the burden placed on courts by unmeritorious claims, and that the legal aid reforms will not substantively alter the current position of immigration applicants. The proposed residence test, the Government says, will not make any substantive difference because legal aid will continue to be available to asylum claimants for appeals to the Tribunal, and is not currently available anyway for other immigration applicants for appeals to the Tribunal.

90. We have considered carefully the Government's argument that the right of effective access to a court or tribunal in immigration and asylum cases will be preserved by a combination of the continued availability of full appeals in cases concerning fundamental rights, the new system of administrative review, and the availability of judicial review, and its argument that the practical effectiveness of judicial review will not be affected by the proposed reforms to legal aid and judicial review itself. We do not share the Government's confidence.

91. We have already reported our concerns about the implications of the proposed residence test on effective access to justice.⁴⁸ We have also inquired into the Government's proposed reforms to judicial review and we will be reporting our conclusions in due course. For present purposes it is sufficient to say that, while we accept that it is a perfectly legitimate objective for the Government to seek to reduce the risk of unmeritorious claims being brought, we do have serious concerns about the effect of some of the Government's proposed judicial review reforms on the practical

44 First Report, paras 29–39.

45 Government response, para. 12.

46 *Ibid.*, para. 10.

47 *Ibid.*, para. 11.

48 Seventh Report of Session 2013–14, *The implications for access to justice of the Government's proposals to reform legal aid*, HL Paper 100/HC 766, chapter 2.

ability to bring meritorious challenges to decisions, including in the immigration and asylum context.

92. We also draw to Parliament's attention the paradoxical fact that after years of seeking to reduce the number of immigration and asylum judicial review cases that have been causing backlogs in the High Court, including by transferring such cases from the High Court's jurisdiction to the Upper Tribunal, the Government is now seeking to justify a significant reduction in appeal rights by reference to the continued availability of judicial review.

93. In light of our concerns, we recommend that the removal of appeal rights for which the Bill provides should not be brought into force until Parliament is satisfied that the quality of first instance decision-making has improved sufficiently to remove the risk that meritorious appeals will be prevented from being brought.

Limits on Tribunal's powers to consider "new matters"

94. In our first Report, we expressed our concern about whether it is compatible with the right of access to court, the principle of equality of arms and the rule of law for the Tribunal's power to consider a new matter to depend on the "consent" of the Secretary of State.⁴⁹ In our view, the Tribunal itself, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new matter raised on appeal, and the Tribunal should be entrusted to use its inherent power to prevent abuse of its own process to ensure that new matters are not permitted to be raised in the absence of good reasons for not raising them before the Secretary of State. We recommended that the Bill be amended to achieve the Government's purpose in a way which does not make the scope of the Tribunal's jurisdiction depend on the consent of one of the parties to the appeal before it.

95. The Government rejects this recommendation. In the Government's view, it is right for the Secretary of State rather than the Tribunal to decide whether the Tribunal may consider a new matter.⁵⁰ It says that the Tribunal was created by legislation which establishes the scope of its jurisdiction, and "it is an appellate Tribunal established to decide an appeal against a decision made by the Secretary of State, not a Tribunal established to make decisions instead of the Secretary of State."

96. We accept that the Tribunal is an appellate tribunal, not an original decision-maker, and that the scope of its appellate jurisdiction is defined by statute. However, jurisdictional questions, such as whether the Tribunal has power to consider a particular matter, are for the Tribunal itself to determine in the first instance, by interpreting its parent statute, subject to correction by a superior court if it errs in its interpretation. It is wrong in principle for the Secretary of State, who is the respondent to the appeal, to be the arbiter of that jurisdictional question and to have the power to decide whether or not to confer jurisdiction on the Tribunal.

97. In our view, the Government's objective in this provision, which is to prevent the Tribunal from becoming the primary decision-maker by considering matters not

49 Which would be the effect of new s. 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002, as inserted by clause 11(5) of the Bill: see First Report, paras 40–47.

50 Government response, para. 10.

previously considered by the Secretary of State, can be achieved in a way which does not make the scope of the Tribunal's jurisdiction dependent on the consent of the respondent to the appeal. We recommend that the Bill be amended by removing the condition of the Secretary of State's consent and leaving it to the Tribunal to decide the legal question of the scope of its own jurisdiction. The following amendment would give effect to this recommendation:

Page 9, line 39, leave out "the Secretary of State has given the Tribunal consent to do so" and insert—

"the Tribunal is satisfied that the matter is within its jurisdiction and there were good reasons for not raising the matter before the Secretary of State."

Out of country human rights appeals

98. We were not satisfied in our first Report by the Government's reliance on the continued availability of judicial review to challenge the Secretary of State's certification that a human rights appeal can be heard out of country, having regard to the unavailability of civil legal aid to bring such a claim and the proposed reforms of judicial review which will make it hard to bring such applications.⁵¹

99. The Government's response relies on its belief that the practical ability to challenge immigration decisions will not be adversely affected by either the legal aid or the judicial review reforms.⁵²

100. **In the absence of legal aid, we do not consider that an out of country appeal against deportation on the grounds that it is in breach of the right to respect for private and family life is a practical and effective remedy for the purposes of Article 8 ECHR and Article 13 in conjunction with Article 8. We recommend that legal aid be available for such out of country human rights appeals, or alternatively that new s. 94B of the Nationality, Immigration and Asylum Act 2002, inserted by clause 12(3), be deleted from the Bill.**

Public interest considerations in Article 8 claims

Best interests of children a primary consideration

101. In our first Report, we accepted that the provisions in the Bill⁵³ which seek to guide courts and tribunals in their determination of Article 8 claims in immigration cases are compatible with that Article, because they do not seek to make the prescribed public interest considerations exhaustive, or to exclude other considerations from being taken into account. They therefore do not purport to go so far as to determine individual applications in advance or to oust the courts' jurisdiction.

51 First Report, paras 48–53.

52 Government response, para. 13.

53 Clause 14, inserting a new Part 5A (sections 117A–D) into the Nationality, Immigration and Asylum Act 2002.

102. We were concerned, however, as to whether the statutory guidance provided to courts and tribunals was compatible with our other international obligations, and in particular with the requirement in Article 3 of the UN Convention on the Rights of the Child (“UNCRC”) that the best interests of the child must be “a primary consideration”.⁵⁴ We welcomed the Government’s clarification of its intention that nothing in the Bill is intended to change or derogate in any way from the “children duty” on the Secretary of State in s. 55 of the Borders, Citizenship and Immigration Act 2009, which requires her to make arrangements for ensuring that her immigration, nationality and asylum functions are discharged having regard to the need to safeguard and promote the welfare of children. The Government said that this statutory duty ensures that consideration of the best interests of the child as a primary consideration will always be given on the facts of an individual case.

103. Although reassured that the important children duty in s. 55 of the 2009 Act was intended to be left unaffected, we remained concerned about the scope for possible confusion by front-line immigration officials administering the legal regime who might be unclear about the relationship between the s. 55 duty and the provisions concerning children in this part of the Bill. We therefore recommended that new guidance be issued to ensure that the Government’s intention, that the children duty is unaffected by the Bill, is achieved in practice, and asked for confirmation that it is the Government’s intention that the s. 55 duty applies to all children, and not merely those who are within the Bill’s definition of a “qualifying child.”

104. We welcome the Government’s confirmation, in its response, that the s. 55 children duty applies to all children in the UK, not only those within the definition of “qualifying child”, and the Government’s indication of its intention to update relevant guidance to front-line immigration officials to reflect legislative developments.⁵⁵ However, we note that this part of the Government’s response is in very general terms, referring broadly to its intention to issue updated guidance to front-line officials to reflect legislative developments, and does not address our specific concern in this part of our first Report, which was the need for such guidance to provide an explanation as to how the Bill’s provisions concerning the public interests considerations relevant in cases concerning Article 8 ECHR are to be read alongside the s. 55 children duty.

105. In the absence of a more specific response to our recommendation, and in view of similar concerns expressed in parliamentary debates,⁵⁶ we have revisited the question of whether express statutory provision should be made to ensure that in Article 8 immigration cases where children are concerned the best interests of the child are still taken into account as a primary consideration, in accordance with the UK’s obligation under Article 3 UNCRC.

106. We note that a recent UNHCR audit of Home Office decision-making found that in many family asylum cases the analysis of children’s best interests was piecemeal and was not always specific to the child’s individual characteristics or situation.⁵⁷

54 First Report, paras 61–63.

55 Government response, para. 15.

56 See e.g. Sarah Teather MP, HC Deb 30 Jan 2014 cols 1075–6.

57 See UNHCR Report [ref].

107. We recommend that the Bill be amended to remove any scope for doubt about the effect of the Bill on the s. 55 children duty, by requiring the best interests of the child to be taken into account as a primary consideration.

108. The following amendment to the Bill, which has been suggested by the Refugee Children’s Consortium and tabled by Baroness Lister of Burtersett at Committee stage in the Lords, would give effect to this recommendation:

Page 12, line 25, before sub-paragraph (a) insert new sub-paragraph—

“() first, to the best interests of any child affected by a decision as specified in s. 117A(1).”

Prescribing the weight to be given to certain considerations

109. In our first Report, we acknowledged that clause 14 of the Bill could be considered to be Parliament’s fulfilment of the important obligation imposed on it by the principle of subsidiarity, to take primary responsibility for the protection of Convention rights in national law by providing a detailed legal framework to give effect to them.⁵⁸ However, we expressed our unease about the provisions in the Bill⁵⁹ which seek to tell courts that “little weight” should be given to a private life established by a person at a time when he is in the UK unlawfully or when his immigration status is precarious.⁶⁰ We considered this to be a significant, and possibly unprecedented, trespass by the legislature into the judicial function, and we recommended that the Bill be amended so as to retain as a relevant consideration whether a private life or relationship were established at a time when the person was in the UK lawfully or when their immigration status was precarious, but without seeking to prescribe the weight to be given by courts to the person’s private life or relationship.

110. The Government’s response does not specifically address our concern about these particular provisions going too far by seeking to prescribe the weight to be given to certain considerations, but merely repeats the Government’s general justification for the provisions in clause 14 of the Bill: that it is “right and helpful that Parliament should set out what the public interest requires in the clear and practical terms reflected in clause 14, which reflect the case-law.”⁶¹

111. We remain concerned by these provisions in the Bill, which do not seek to guide the courts about the public interest considerations to be taken into account in deciding whether an interference with private or family life is justified, but rather seek to influence the amount of weight given to the right itself in particular types of case. The following amendment would give effect to our original recommendation that the Bill be amended in a way which retains this as a relevant consideration to be weighed in the balance, but does not seek to prescribe the weight to be given to the right in that balancing exercise:

58 First Report, para. 55.

59 New s. 117B(4) and (5), as inserted by clause 14 of the Bill.

60 First Report, paras 58–60.

61 Government response, para. 14.

Page 13, line 5, leave out “Little weight should be given to” and insert “Whether”

Page 13, line 8, leave out “that is” and insert “was”

Page 13, line 10, leave out “Little weight should be given to a private life” and insert “Whether a private life was”

Access to services

Access to residential tenancies

112. In our first Report we were concerned about the risk that the Bill’s provisions on access to residential tenancies might expose migrant children to homelessness or separation from family members and we urged the Government to explain fully to Parliament the safeguards that exist to mitigate in practice the possible negative impact of these provisions on children.⁶²

113. The Government in its response says that it considers that there will be sufficient safeguards in place. It mentions four in particular.⁶³ First, it says that those who receive support directly from the Secretary of State under arrangements made by the Home Office to house asylum seekers who would otherwise be destitute have an additional safeguard whereby a family will normally be allowed to remain in that accommodation until they are able to leave the UK.

114. Second, in relation to those who are self-supporting, the Government relies on the fact that the Bill does not require any landlord to take action to evict tenants who are disqualified from renting. Since this depends entirely on private landlords choosing to stay their hand, we do not consider this to qualify as a safeguard at all.

115. Third, those who are disqualified from renting by their immigration status but who have a genuine barrier to leaving will be able to seek a right to rent on a discretionary basis and the decision whether to grant this will include a consideration of the best interests of a child and their needs, as required by the children duty in s. 55 of the Borders, Citizenship and Immigration Act 2009. The Government says that this consideration will take place whether the child is living with the migrant who is otherwise disqualified from renting, in local authority care, or living in any other alternative arrangement. We consider the adequacy of this safeguard below.

116. Fourth, the Government says that the Bill provides important safeguards in the form of exemptions from certain classes of accommodation from the checking requirement in order to protect vulnerable groups, including accommodation provided as a result of a statutory duty or relevant statutory power exercised by a local authority and hostels for the homeless operated by registered housing associations or charities.

117. **We welcome the Government’s indication that the Secretary of State, when exercising her residual discretion to grant permission to occupy premises under a**

62 First Report, paras 75–77.

63 Government response, paras 22–23.

residential tenancy agreement,⁶⁴ will take into account the best interests of any child involved, in accordance with the duty in s. 55. By acknowledging the relevance of s. 55 in this context, this goes beyond the general indication already given by the Government, and welcomed in our first Report, that nothing in the Bill is intended to change or derogate in any way from that existing duty in s. 55.

118. We have considered whether it is legally clear that the s. 55 duty applies to this function of the Secretary of State's, or whether an amendment to the Bill is necessary to make that clear. The duty in s. 55 applies to "any function of the Secretary of State in relation to immigration, asylum or nationality and "any function conferred by or by virtue of the Immigration Acts on an immigration officer."⁶⁵ The Bill also amends the definition of the Immigration Acts to include the Immigration Act 2014 which the Bill will become.⁶⁶ We are satisfied that this makes the legal position sufficiently clear and that the Bill therefore does not require amending in this respect.

119. However, we remain concerned about whether it will be sufficiently clear to front-line decision-makers that the s. 55 duty applies to significant functions such as the Secretary of State's discretion to grant permission to occupy residential premises. Under s. 55(3) of the 2009 Act, a person exercising any of the Secretary of State's functions in relation to immigration, nationality and asylum must, in exercising the function, have regard to any guidance given by the Secretary of State. **We recommend that the Secretary of State issue new guidance specifically on the s. 55 duty, explaining clearly to front-line decision-makers exactly how that statutory duty applies in relation to functions conferred by or by virtue of this Bill.**

Access to health services

120. Similar concerns arise about the possible impact on children of the provisions in the Bill which extend charging for NHS services.⁶⁷ Extending charging to migrants not previously charged for accessing health services, and extending the range of services for which charges apply, are likely to have a deterrent effect on accessing health care, which in turn is likely to have a particularly detrimental effect on the children of such migrants. Those children, as babies, may therefore not benefit from ante-natal and maternity services provided to their mother, and, later, may miss out on immunisations and be exposed to infectious diseases within their families that are not being treated because of the deterrent effect of the extended charging regime. The s. 55 children duty does not apply to charging decisions by health authorities, because it is not the exercise of an immigration function, but the equivalent duty in s. 11 of the Children Act 2004 does apply. **To meet this concern about the impact of extended charging for health services on children's health, we recommend that new guidance be issued specifically on the s. 11 Children Act duty, explaining to front-line decision-makers in the health sector exactly how that duty applies in the context of extended charging for NHS services.**

64 Under clause 16(3) of the Bill.

65 Section 55(2).

66 Clause 66(5).

67 Clause 34.

Sham marriages/civil partnerships

121. In our first Report, we were concerned by the prospect of the Government adopting nationality-based risk-profiling to help it identify suspected sham cases for further investigation, and invoking an exemption from certain of its obligations under the Equality Act.⁶⁸ We encouraged the Government to work closely with the EHRC with a view to developing an approach to identifying suspect proposed marriages or civil partnerships without resorting to unjustified discrimination on grounds of nationality.

122. The Government response says that in designing and operating the scheme and in particular the approach taken to the assessment of proposed marriages and civil partnerships referred under it, the Government will work with the EHRC to ensure that this does not involve unlawful discrimination on nationality grounds.⁶⁹

123. We welcome the Government's commitment to working with the EHRC to seek to avoid unlawful discrimination on nationality grounds and we look forward to seeing the product of that collaboration.

68 First Report, paras. 122–124.

69 Government response, para. 29/

Conclusions and recommendations

Deprivation of UK citizenship

1. We are surprised by the Government's refusal to inform Parliament of the number of cases in which the power to deprive of citizenship has been exercised while abroad, or of the number of cases in which the Secretary of State's decision was taken wholly or partly in reliance on information which in the Secretary of State's view should not be made public. (Paragraph 20)
2. 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, in order to assist it to reach a view as to how the new power is likely to be exercised in practice. We call on the Government to make this important information available to Parliament, or to provide a more detailed explanation as to why this is information which should not be made available to Parliament. (Paragraph 21)
3. In light of the seriousness of the consequences for the individual, in terms of the implications for their opportunity to challenge the deprivation decision before an appellate court, we are surprised that the Secretary of State is not prepared to inform Parliament of the number of cases in which such a certificate has been issued, resulting in only the more limited right of appeal to the Special Immigration Appeal Commission being available. We again call on the Government to make this important information available to Parliament, or to provide a more detailed explanation as to why this is information which should not be made available to Parliament. (Paragraph 22)
4. We do not doubt the need to give serious consideration within Government to the implications of the Al-Jedda judgment. However, we note that the possibility of introducing a power such as this was being publicly floated by the Home Secretary in media interviews, and by Charles Farr, the Head of the Office of Security and Counter-Terrorism in the Home Office, in evidence to the Home Affairs Committee, as long ago as November last year. Even if the Immigration Bill were the only legislative opportunity to bring forward such a measure in the current Session, we consider that there was time to hold a public consultation which would have made for better informed parliamentary scrutiny of the Government's proposal. (Paragraph 25)
5. We accept the Government's argument that, in strict legal terms, enacting the power in clause 60 to deprive a naturalised citizen of their citizenship even if it renders them stateless does not involve any breach by the UK of its obligations under the UN Conventions on Statelessness. The new power will lead to an increase in statelessness, which represents a significant change of position in the human rights policy of the UK, which has historically been a champion of global efforts to reduce statelessness. It does not per se, however, put the UK in breach of any of its international obligations in relation to statelessness. (Paragraph 29)

6. We were surprised by the Minister's response, compared to what the Home Secretary told the Commons, because it suggests that the scope of the power is intended to be significantly wider than was first indicated. (Paragraph 33)
7. We would be very concerned if the Government's main or sole purpose in taking this power is to exercise it in relation to naturalised British citizens while they are abroad, as it appears that this carries a very great risk of breaching the UK's international obligations to the State who admitted the British citizen to its territory. This concern about the intended use of the power makes it all the more important, in our view, that the Government provides to Parliament the information we have requested about the number of cases since 2006 in which the power to deprive of citizenship has been exercised while the individual is abroad, as this will help Parliament to reach a view about the likely use of the new power. (Paragraph 38)
8. We also recommend that the Bill be amended to make it a precondition of the making of an order by the Secretary of State that, in the circumstances of the particular case, the deprivation is compatible with the UK's obligations under international law. (Paragraph 39)
9. We do not accept the Government's argument that, generally speaking and in the absence of exceptional circumstances, a decision to deprive a naturalised citizen of their citizenship while they are physically in the territory of another State does not engage the individual's Convention rights under Articles 2, 3 and 8 ECHR because they are outside the UK's jurisdiction for ECHR purposes. In our view, a deprivation decision must be compatible with those Articles whether the citizen concerned is abroad or in the UK at the time of the deprivation decision. (Paragraph 45)
10. The effect of the ECHR applying to all deprivation of citizenship decisions is to reinforce the requirements contained in other treaties. These are that nationality must not be taken away arbitrarily, but must be in accordance with the law; that the power must be regulated by a legal framework which ensures that the power is not exercised arbitrarily or in a discriminatory manner, but only where necessary and proportionate; and that there must be a practically effective right of access to a court and a fair hearing in the determination of the lawfulness of the deprivation, including its compatibility with other international obligations. (Paragraph 46)
11. We welcome the Government's acceptance that a deprivation order should not be made without taking full account of the impact on the whole family unit, and with regard to the best interests of any child affected. To ensure that the best interests of the child are treated as a primary consideration, as required by Article 3 UNCRC, we recommend an amendment to the Bill which requires the Secretary of State to take into account the best interests of any child affected when deciding whether to make a deprivation order under the new power. (Paragraph 49)
12. We draw to Parliament's attention the fact that the provision in the 1961 Convention on Statelessness which permits States to retain the power to deprive a person of their citizenship even if it leaves them stateless does not differentiate between naturalised and natural-born citizens. We do not advocate the extension of the power to natural-born citizens, but we invite the Government to consider whether the historical

justification it invokes for treating naturalised citizens differently is still appropriate today. (Paragraph 53)

13. We welcome the Government's indication that it would adopt a proportionality approach to deciding whether or not to exercise the new power in clause 60 to deprive of citizenship. However, in our view the importance of the concepts of necessity and proportionality as safeguards against arbitrariness is such that we recommend that they are included on the face of the Bill as conditions which have to be satisfied before the Secretary of State makes a deprivation order. In our view this could make a real practical difference in particular cases. We note, for example, that the Government does not want to rule out the possibility that deprivation of citizenship leaving a person stateless is necessary in the interests of the economic well-being of the country, whereas it is hard to imagine the circumstances in which such a serious measure could ever be necessary and proportionate for such a purpose. (Paragraph 62)
14. It is a well established feature of our constitutional arrangements that there is no constraint on Parliament changing the law prospectively where it disagrees with an interpretation of the law reached by even the highest court in the land. Changing the law with retrospective effect, however, is recognised to be an exceptional step which requires weighty justification; and all the more so when the effect of such retrospectivity is to enable particular individuals to be deprived of the benefit of court judgments in their favour. (Paragraph 69)
15. These considerations are even weightier where the provision which is being given retrospective effect is a sanction in respect of previous conduct. In such cases, legal certainty is especially important, so that individuals are aware of the possible consequences of their conduct. That is why there is an absolute prohibition on retrospective criminal penalties. While we do not suggest that deprivation of citizenship is equivalent to a criminal penalty, it is nevertheless a very serious sanction for previous conduct, particularly where it leaves the individual stateless, and therefore akin to a penalty, making the presumption against retrospectivity even stronger. (Paragraph 70)
16. We are not persuaded that there are sufficiently weighty reasons to justify the new power being made retrospective, and we recommend that the Bill be amended so as to prevent it having retrospective effect. (Paragraph 71)
17. In our view it is clear that an appeal to Special Immigration Appeals Commission will not be a fair hearing unless the AF disclosure obligation applies, so that the Secretary of State is legally required to disclose to the individual concerned sufficient information to enable him to give effective instructions to his special advocate. So long as the legal framework does not make such provision, the UK will be in breach of Article 8(4) of the Statelessness Convention. We recommend that the Bill be amended to ensure that the AF disclosure obligation applies in all appeals against orders made by the Secretary of State under the **proposed new power**. (Paragraph 77)

18. We welcome the Government's clarification that appeals to the Special Immigration Appeals Commission against deprivation of citizenship under the new power will not be subject to the proposed residence test for eligibility for legal aid, even where the appeal is brought from outside the UK. We ask the Government to confirm that the residence test also will not apply to appeals to the First Tier **Tribunal**. (Paragraph 79)
19. We recommend that, in order to ensure that the right of appeal is practical and effective, the legal framework provides that the time for lodging an appeal only begins to run either when the individual has actually received the notification or when the Secretary of State can demonstrate that she has taken all reasonable steps to bring the decision to the individual's attention, whichever is the earlier. (Paragraph 81)

Follow up to first Report

20. We therefore recommend the following amendments to the regulation-making power in clause 1(6)(c) of the Bill to ensure that the Bill reflects the Government's stated intention that family members will always be notified if they are facing removal. (Paragraph 84)
21. We have already reported our concerns about the implications of the proposed residence test on effective access to justice. (Paragraph 91)
22. We have also inquired into the Government's proposed reforms to judicial review and we will be reporting our conclusions in due course. For present purposes it is sufficient to say that, while we accept that it is a perfectly legitimate objective for the Government to seek to reduce the risk of unmeritorious claims being brought, we do have serious concerns about the effect of some of the Government's proposed judicial review reforms on the practical ability to bring meritorious challenges to decisions, including in the immigration and asylum context. (Paragraph 91)
23. We also draw to Parliament's attention the paradoxical fact that after years of seeking to reduce the number of immigration and asylum judicial review cases that have been causing backlogs in the High Court, including by transferring such cases from the High Court's jurisdiction to the Upper Tribunal, the Government is now seeking to justify a significant reduction in appeal rights by reference to the continued availability of judicial review. (Paragraph 92)
24. In light of our concerns, we recommend that the removal of appeal rights for which the Bill provides should not be brought into force until Parliament is satisfied that the quality of first instance decision-making has improved sufficiently to remove the risk that meritorious appeals will be prevented from being brought. (Paragraph 93)
25. In our view, the Government's objective in this provision, which is to prevent the Tribunal from becoming the primary decision-maker by considering matters not previously considered by the Secretary of State, can be achieved in a way which does not make the scope of the Tribunal's jurisdiction dependent on the consent of the respondent to the appeal. We recommend that the Bill be amended by removing the

condition of the Secretary of State's consent and leaving it to the Tribunal to decide the legal question of the scope of its own jurisdiction. (Paragraph 97)

26. In the absence of legal aid, we do not consider that an out of country appeal against deportation on the grounds that it is in breach of the right to respect for private and family life is a practical and effective remedy for the purposes of Article 8 ECHR and Article 13 in conjunction with Article 8. We recommend that legal aid be available for such out of country human rights appeals, or alternatively that new s. 94B of the Nationality, Immigration and Asylum Act 2002, inserted by clause 12(3), be deleted from the Bill. (Paragraph 100)
27. We recommend that the Bill be amended to remove any scope for doubt about the effect of the Bill on the s. 55 children duty, by requiring the best interests of the child to be taken into account as a primary consideration. (Paragraph 107)
28. We remain concerned by these provisions in the Bill, which do not seek to guide the courts about the public interest considerations to be taken into account in deciding whether an interference with private or family life is justified, but rather seek to influence the amount of weight given to the right itself in particular types of case. (Paragraph 111)
29. We welcome the Government's indication that the Secretary of State, when exercising her residual discretion to grant permission to occupy premises under a residential tenancy agreement, will take into account the best interests of any child involved, in accordance with the duty in s. 55. By acknowledging the relevance of s. 55 in this context, this goes beyond the general indication already given by the Government, and welcomed in our first Report, that nothing in the Bill is intended to change or derogate in any way from that existing duty in s. 55. (Paragraph 117)
30. We recommend that the Secretary of State issue new guidance specifically on the s. 55 duty, explaining clearly to front-line decision-makers exactly how that statutory duty applies in relation to functions conferred by or by virtue of this Bill. (Paragraph 119)
31. To meet this concern about the impact of extended charging for health services on children's health, we recommend that new guidance be issued specifically on the s. 11 Children Act duty, explaining to front-line decision-makers in the health sector exactly how that duty applies in the context of extended charging for NHS services. (Paragraph 120)
32. We welcome the Government's commitment to working with the EHRC to seek to avoid unlawful discrimination on nationality grounds and we look forward to seeing the product of that collaboration. (Paragraph 123)

Formal Minutes

Wednesday 26 February 2014

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland
Mr Virendra Sharma
Sarah Teather

Baroness Berridge
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness O'Loan

Draft Report (Legislative Scrutiny: Immigration Bill (second Report)), proposed by the Chairman, brought up and read.

Ordered, That the Chair's draft Report be now considered.

Paragraphs 1 to 123 read and agreed to.

Resolved, That the Report be the Twelfth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till Wednesday 5 March at 9.30 am

Declaration of Lords' Interests

Baroness Berridge

Trustee, British Future Think Tank

A full list of members' interests can be found in the Register of Lords' Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

List of Reports from the Committee during the current Parliament

Session 2013–14

First Report	Human Rights of unaccompanied migrant children and young people in the UK	HL Paper 9/HC 196
Second Report	Legislative Scrutiny: Marriage (Same Sex Couples) Bill	HL Paper 24/HC 157
Third Report	Legislative Scrutiny: Children and Families Bill; Energy Bill	HL Paper 29/HC 452
Fourth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill	HL Paper 56/HC 713
Fifth Report	Legislative Scrutiny: Transparency of Lobbying, Non-party Campaigning, and Trade Union Administration Bill	HL Paper 61/HC 755
Sixth Report	Legislative Scrutiny: Offender Rehabilitation Bill	HL Paper 80/HC 829
Seventh Report	The implications for access to justice of the Government's proposals to reform legal aid	HL Paper 100/HC 766
Eighth Report	Legislative Scrutiny: Immigration Bill	HL Paper 102/HC 935
Ninth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report)	HL Paper 108/HC 951
Tenth Report	Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011	HL Paper 113/HC 1014
Eleventh Report	Legislative Scrutiny: Care Bill	HL Paper 121/HC 1027
Twelfth Report	Legislative Scrutiny: Immigration Bill (second Report)	HL Paper 142/HC 1120

Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810
Eighth Report	Legislative Scrutiny: Justice and Security Bill (second Report)	HL Paper 128/HC 1014
Ninth Report	Legislative Scrutiny Update	HL Paper 157/HC 1077

Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777