5 SAH
FIVE ST ANDREW'S HILL
+44 (0) 207 332 5400

How to remove someone's citizenship and get away with it: Sharmistha Michaels writes for the Solicitors Journal

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Sharmistha Michaels

Sharmistha Michaels argues the government's Nationality and Borders Bill could have severe consequences for citizenship

A controversial new clause in the UK government's Nationality and Borders Bill, currently in the House of Lords, could extend the power for the Secretary of State for the Home Department (SSHD) to remove citizenship without notice if "conducive to the public good".

This clause has faced backlash from human rights groups and politicians and has been described by many critics as racist, ill-defined, unfettered and unjust. The deprivation of citizenship is not a new power – it has been around for over 100 years. But this takes it into new territory where citizenship can be removed without notice. Below we explore that history and examine who is most at risk from these significant new state powers.

The history of removing citizenship

Deprivation of citizenship dates back to the British Nationality and Status of Aliens Act 1914 (1914 Act). In the 1914 Act, the power to remove nationality was most often used as a deterrent for British women living across the empire from marrying foreign born residents or 'aliens.' If they did, they would automatically lose their British nationality by doing so. Section 7 of the 1914 Act also conferred power to deprive a person of British nationality on various grounds.

But with it came a requirement under section 7(3) to give notice of such a decision: "the Secretary of State shall, by notice given to or sent to the last-known address of the holder of the certificate, give him an opportunity of claiming that the case be referred for such inquiry, and if the holder so claims in accordance with the notice the Secretary of State shall refer the case for inquiry accordingly".

The 1914 Act was replaced by the British Nationality Act 1948 and section 29(1)(d) conferred power to make regulations for the giving of notice. However, it was after the London bombings in 2006 that section 40(2) British Nationality Act 1981 (1981 Act) came into force, granting the government powers to deprive dual-national British citizens of their citizenship, if it was considered "conducive to the public good".

In a recent article, Free Movement noted that since 2006, approximately 175 people have been deprived of their citizenship where someone has obtained their citizenship by fraud or on national security grounds. This included removing the citizenship of British citizens by birth. In 2014, the powers to deprive citizenship were extended to include foreign-born British citizens without dual nationality and naturalised UK citizens, where the SSHD had determined they were eligible for foreign citizenship and who have conducted themselves "in a manner which is

seriously prejudicial to the vital interests of the United Kingdom...". However, the requirement for notice remained.

The government's use of current powers around the giving of proper notice has previously been challenged. In R(D4) (notice of Deprivation of Citizenship) v SSHD [2022]EWCA Civ 33, D4 challenged the decision of the SSHD to deprive her of British citizenship without notice of the decision.

D4, a British citizen with Pakistani nationality, was assessed to have travelled to Syria in order to align herself with the Islamic State. She was later detained at Camp Roj in Syria. Her lawyers wrote to the Foreign Office to seek assistance with repatriation and it was only in October 2020 that D4 became aware of the deprivation order.

The initial decision to deprive D4 of her citizenship was made by the Chancellor of the Exchequer and placed on D4's Home Office file on 27 December 2019. On the same day, the decision was acted on and a deprivation order was made. As D4 was detained in Camp Roj, there was apparently no correspondence address for notice. The SSHD argued that notice was deemed to have been given, by placing the notice on D4's Home Office file as per regulation 10(4) of the British Nationality (General) Regulations 2003.

The issue before the court was, therefore, whether regulation 10(4) was ultra vires and whether it would meet the requirements of section 40(5) of the 1981 Act which obliged the SSHD to give written notice of such a decision prior to making a deprivation order. Perhaps unsurprisingly a (split) Court of Appeal agreed with the High Court and determined regulation 10(4) was ultra vires, parliament had not given the SSHD the power to make regulations to avoid giving notice.

> *The order depriving D4 of her British citizenship was therefore void. This decision showed clearly the requirement for notice and as Whipple LJ said at [53], " …section 40(5) thus represents a balance between the public interest in permitting the SSHD to deprive a person of their citizenship, and the individual's rights to know that has occurred, why, and what avenues are open to challenge the decision".*

Significantly, clause 9 contains a subsection that appears to give it retrospective effect on cases were an individual has had their citizenship removed without notice such as D4.

Today's law and new proposals

Current legislation which allows for the removal of citizenship appears to be predicated on the basis that proper notice should be given of such a decision and the British national has the right to challenge the decision through an appeals process. Yet we see from the case of D4, the government has tried unsuccessfully to get around giving notice.

Per clause 9 of the new bill, ministers will be allowed to revoke the citizenship of British nationals without notice on 'public interest' grounds. These proposals remove the notice requirement in section 40(5) of the 1981 Act in particular circumstances where the SSHD lacks the information needed to give notice or it is not for any other reason practicable to give notice under section 40(5). It also states notice should not be given if it is "in the public interest" not to do so.

Who is most at risk from this? In December 2021, The New Statesman reported "two in five people in England and Wales from an ethnic minority background could become eligible to be deprived of their citizen status without warning." Ethnic minorities are being established as second class citizens fearing a single misstep could find themselves removed from the UK and stripped of the rights which come with citizenship.

The Home Office said this power would only be used in exceptional circumstances and an individual still has the right of appeal. Yet this lack of notification will make appeals harder; they should be conducted in a timely manner in order to be effective, but that is impossible if

one is not aware of the decision. Further deprivation orders are often served with immediate effect when an individual is outside the UK thereby preventing the affected person being able to return to the UK to argue their appeal in person.

Citizenship is a fundamental status and a sense of belonging. It is argued the proposed expansion of these powers to remove the need for notice flies in the face of the protection of the fundamental rights of a person. In light of these broad executive powers by virtue of clause 9, it is surprising there is nothing to ensure the integrity of the decision making and no safeguards to protect individual rights. Furthermore, it is hard to see how clause 9 cannot be described as discriminatory, given the people it is most likely to affect, and the distinction that is evidently being made between those who are born in the UK and have no links to other countries and those who are British citizens but may have links to other countries.

After Windrush, the government should have learnt a salutary lesson. Yet it appears that under the guise of maintaining national security and keeping the public safe, the government's Nationality and Borders Bill is proposing to yet again erode the rights of its citizens facing a deprivation order.

Sharmistha Michaels is a barrister specialising in Human Rights, Extradition, Immigration, Asylum and Professional Discipline & Regulatory law.

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