ILPA's Briefing for the House of Commons Committee Stage for the Nationality and Borders Bill – Part 1: Nationality

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Introduction

This briefing proposes two amendments to Part 1 of the Nationality and Borders Bill. Please note that the absence of a proposed amendment in this briefing to a clause in Part 1 of the Bill should not be taken as support by ILPA for that clause. Please see our Second Reading briefing for a fuller exposition of ILPA's views on Part 1 of the Bill.

Proposed Amendment to Clause 7 – British Overseas Citizens

Page 11, after line 8, insert:

(3A) After section 23, insert—

"**23A Acquisition by registration: special circumstances**

(1) If an application is made for a person of full age and capacity ("P") to be registered as a British Overseas citizen, the Secretary of State may cause P to be registered

as such a citizen if, in the Secretary of State's opinion, P would have been, or would have been able to become, a British Overseas citizen but for—

(a) historical legislative unfairness,
(b) an act or omission of a public authority, or
(c) exceptional circumstances relating to P.

(2) For the purposes of subsection (1)(a), "historical legislative unfairness" includes circumstances where P would have become, or would not have ceased to be, a British subject, a citizen of the United Kingdom and Colonies, or a British Overseas citizen, if an Act of Parliament or subordinate legislation (within the meaning of the Interpretation Act 1978) had, for the purposes of determining a person's nationality status—

(a) treated males and females equally,
(b) treated children of unmarried couples in the same way as children of married couples, or
(c) treated children of couples where the mother was married to someone other than the natural father in the same way as children of couples where the mother was married to the natural father.

(3) In subsection (1)(b), "public authority" means any public authority within the meaning of section 6 of the Human Rights Act 1998, other than a court or tribunal.

(4) In considering whether to grant an application under this section, the Secretary of State may take into account whether the applicant is of good character."

Briefing

There are people who would be British Overseas citizens (BOCs) today but for historical unfairness in the law, an act or omission of a public authority, or other exceptional circumstances.

In a welcome development, Clause 7 of the Bill attempts to rectify the position for those who would be British citizens or British overseas territories citizens (BOTCs) today but for such error. But it does nothing for people who would be BOCs today. This is wrong. Those who would be BOCs but for such

error should not be excluded from the proposed remedy. They have suffered from historical unfairness just like those who would be British citizens or BOTCs today.

Prior to 1983, there was one substantive class of British nationals: Citizens of the United Kingdom and Colonies (CUKC). When the British Nationality Act 1981 came into force on 1 January 1983, CUKCs were divided and re-classified into three classes: (i) British citizens (connected to the UK), (ii) British Dependant Territories citizens/now BOTCs (connected to the remaining British overseas territories, such as the Falkland Islands and Gibraltar), and (iii) BOCs (connected to former British colonies).

The Home Office acknowledges that past unfairness in British nationality law includes where men and women were unable to pass on citizenship equally (sex discrimination), and unmarried fathers could not pass on citizenship (discrimination for being born to unmarried parents)[1]. The Home Office makes that acknowledgement where such persons would be British citizens or BOTCs today. Many persons who would be BOCs today suffered this prejudice as well.

As a result of British overseas expansion and later decolonisation, there are pockets of BOCs around the world, for example in Kenya, Malaysia, South Africa, and Anglophone West Africa (e.g. Sierra Leone). When the category of BOC was created under the British Nationality Act 1981, it gave effect to the fact that BOCs were British nationals and should remain so. But the newly created status gave them no home or right of abode in the UK or any other remaining British territory.

Although BOCs have no right to come to the UK or a remaining British overseas territory, the status still has real value. It enables a person to seek and use a UK BOC passport. Possession of such a passport enables BOCs (i) to seek UK consular assistance in third countries; (ii) to seek residence and permission to work in third countries under local rules, something that may be useful where the passport of another nationality they hold is considered unreliable; and (iii) where their children are born stateless, to benefit from UK laws that reduce statelessness.

BOCs around the world make active use of the status. For example, many persons of Somali heritage born in Aden (Yemen) when it was a British colony rely on their BOC status as they were and are shut out from Yemeni nationality. Their BOC passports enable them to obtain lawful residence and permission to work in Gulf states. It also enables them to secure a visa to study in other countries.

[1] See the Explanatory Notes to the Nationality and Borders Bill, para 119.

The Home Office proposal in Clause 7 helps those affected by historical unfairness in British nationality law, an act or omission of a public authority, or other exceptional circumstances to become British citizens or BOTCs. Potential BOCs too will have suffered from such historical unfairness in British nationality law, acts or omissions of public authorities, and other exceptional circumstances. All these classes of British nationals were CUKCs prior to the British Nationality Act 1981 and all suffered from these problems. Clause 7 should therefore be supplemented to provide registration as a BOC on the same basis as it enables registration as a British citizen or as a BOTC.

Proposed New Clause – Acquisition of British citizenship by adoption

Page 11, after line 8, insert:

7A Acquisition of British citizenship by adoption

(1) The British Nationality Act 1981 is amended as follows.
(2) In section 1 (Acquisition by birth or adoption.), in subsection (5)(a), for "minor" substitute "person".
(3) In section 1 (Acquisition by birth or adoption.), in subsection (5), for "that minor shall" substitute "that person or minor (as the case may be) shall".

Briefing

British nationality law is out of kilter with adoption law in England and Wales. In those countries an adoption order made by a court may be made where a child *has reached the age of 18* but is not yet 19. Yet such an adoption order only confers British citizenship automatically where the person adopted *is under 18* on the day the order is made.

Obviously, this is a slip. This adoption law was enacted some 20 years after the relevant nationality law and apparently the inconsistency it created was overlooked. It has never been suggested that adoption law and British nationality law should be out-of-step where a court in England or Wales authorises a person to be adopted by a British citizen parent.

The stated problem is not merely theoretical. It does generate victims in real life, including a university graduate who was 18 but not yet 19 when adopted by her aunt (after her mother died of cancer) and

who will have no basis on which to enjoy family life in the UK with her new adoptive mother once her student status has ended.

The position needs correcting. The Nationality and Borders Bill is the perfect vehicle to make this correction. The correction is not controversial or on an issue that divides legislators on party lines. Rightly, it should command support across the House of Commons.

The amendment would bring British nationality law into line with adoption law, so that where our courts make an adoption order in respect of a person who is 18 but not yet 19 and the adoptive parent is a British citizen, British citizenship is conferred automatically on the person adopted. No adoption order may be made in respect of a person who has reached the age of 19, so the proposed amendment affects only those who are 18 when the adoption order is made, and not yet 19.

It is no answer to the problem to say that an 18-year-old adopted by a British citizen will be able to apply for registration as an adult as a British citizen at the Secretary of State's discretion under proposed section 4L of the British Nationality Act 1981 (found in clause 7 of this Bill).

The problem relates to those persons who should be treated as British citizens *automatically* from the date of their adoption by a British citizen. That is what Parliament intends. Where the only solution is a subsequent application for British citizenship at the Secretary of State's discretion, there is a risk that such an application may be overlooked, or may be refused on another basis, such that the intention of Parliament to confer British citizenship on a person adopted by a British citizen will be frustrated.

The sole solution is to make the simple amendment proposed and to align British nationality law with adoption law.

The position under section 47(9) of the Adoption and Children Act 2002

> (9) An adoption order may not be made in relation to a person who has attained the age of 19 years.

The existing position under s 1(5) of the British Nationality Act 1981

(5) Where—

(a) any court in the United Kingdom or, on or after the appointed day, any court in a qualifying territory makes *an order authorising the adoption of a minor* who is not a British citizen; or

(b) a minor who is not a British citizen is adopted under a Convention adoption,

that minor shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be effected under the law of a country or territory outside the United Kingdom.

(*italic* emphasis supplied)

Result of Amendment

(5) Where—

(a) any court in the United Kingdom or, on or after the appointed day, any court in a qualifying territory makes an order authorising the adoption of a *person* who is not a British citizen; or

(b) a minor who is not a British citizen is adopted under a Convention adoption,

that person or minor (as the case may be) shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be effected under the law of a country or territory outside the United Kingdom.

(*italic* emphasis supplied)