

ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 1: Nationality, Clause 7 Amendment – British Overseas Citizens

Summary

Clause 7 of the Nationality and Borders Bill attempts to rectify the position for those who would have been or would have become British citizens or British overseas territories citizens but for historical unfairness in the law, an act or omission of a public authority, or other exceptional circumstances. The amendment proposed below seeks to rectify the position also for those who would have been or would have become British Overseas citizens but for such error.

Background

The Immigration Law Practitioners' Association ('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.

Proposed Amendment to Clause 7 – British Overseas Citizens

Clause 7, Page 11, line 8, at end insert—

“(4) After section 23 (Citizens of UK and Colonies who are to become British overseas territories citizens at commencement), 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.

However, 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 historic unfairness in the same way as 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. However, the Home Office *only* 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. As evidence of the importance of this status to them, there have been numerous cases brought regarding recognition of their status.²

¹ See the Explanatory Notes to the Nationality and Borders Bill, para 119:
<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>.

² See, for example, *R (Suleiman) v SSHD* [2018] EWHC 2273 (Admin); *R (Taher) v SSHD* [2018] EWHC 2274 (Admin); and *R (Nooh) v Secretary of State for the Home Department* [2018] EWHC 1572 (Admin).

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.

This amendment was tabled and moved at Committee Stage in the House of Commons.³ The Government opposed this amendment when it was debated in the Public Bill Committee in the House of Commons.⁴ It was wrong to do so. The Government's objection may be summarised as being that BOCs reflect a finite class of British nationality, and thus BOC status was extended as far as it would be. Accordingly, the Government has no intention to seek to correct the errors of the past for those who no longer have a connection to a remaining British territory.

The finite class objection is misconceived on a number of bases. First, new BOCs are in fact being born to BOC parents, where they would be otherwise stateless, see Schedule 2 to the British Nationality Act 1981. Second, there remains power to register a minor child as a BOC, see section 27 of the 1981 Act, and it is used albeit exceptionally.

The Government has put forward no adequate explanation for failing to correct historical discrimination against BOCs in the same manner as it is proposed to be corrected for BOTCs and British citizens. Although the advantages of BOC status as compared to British citizenship are not so great, they are nonetheless real, as set out above. It is not right that the children of BOC men are BOCs but the children of BOC women are not. To refuse to correct this perpetuates the sex discrimination, like refusal to assist those born out of wedlock perpetuates the discrimination against them. Rectification is required. In a society committed to equal treatment and non-discrimination, this should not be controversial.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners' Association at info@ilpa.org.uk.

³ House of Commons, Nationality and Borders Bill (Amendment Paper) for Committee Stage (18 October 2021), amendment 34
<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/amend/natbord_rm_pbc_1018.pdf> accessed 20 January 2022.

⁴ HC Deb 19 October 2021, vol 701, col 195
<[https://hansard.parliament.uk/Commons/2021-10-19/debates/69c8f9cb-4500-4595-bae4-3b06d5823063/NationalityAndBordersBill\(SixthSitting\)](https://hansard.parliament.uk/Commons/2021-10-19/debates/69c8f9cb-4500-4595-bae4-3b06d5823063/NationalityAndBordersBill(SixthSitting))> accessed 20 January 2022.