



**Borders, Citizenship and Immigration Bill
House of Lords Report
Part 2 Citizenship**

**Clause 43 Descent through the female line
Amendment 44
Amendment 46 proposed new Clause after Clause 43**

ILPA supports amendment 44 in the names of the Lord Avebury and the Baroness Falkner of Margravine

Page 37, leave out lines 1 to 5

Purpose

To ensure that the scope of section 4C of the British Nationality Act 1981, as inserted by the Nationality, Immigration and Asylum Act 2002 is retained and that registration of those born to British mothers overseas is not restricted so as to exclude those who would have needed to make an application for registration. To ensure that applicants are not put in the impossible position of having to prove whether or not they would have succeeded in an application made many decades ago.

Briefing

Prior to 1 January 1983, when the British Nationality Act 1981 came into force, British citizen mothers, could not pass on their British citizenship to their British citizen children born overseas. British fathers could do so. The first attempt to address the present day effects of this historical discrimination took the form of a concession at the time of the coming into force of the 1981 Act, whereby those born to British citizen women outside the UK could register as British citizens while still children. Not all managed to do so. In 2002 the government was persuaded to use the Nationality Asylum and Immigration Act 2002 to amend the law so that those who had missed out (those born between 7 February 1961 and 1 January 1983 could do so.

It was argued forcibly at the time that those born before 7 February 1961 should be allowed to register. Not only individual examples of the human consequences of the clause, but also the legal consequences were put to Ministers: the most forcible argument being that the amendment would allow the government to rescind their reservation to the Convention on the Elimination of all forms of Discrimination against women¹.

¹ *Hansard* HL Report 7 February 2006, cols 628ff

Clause 43 takes sixty-nine lines to remove the words ‘after 7 February 1961’. Simplification indeed. What are subclauses (3) and (4) doing? Why is the situation of a child born on 6 February 1961 so much more complicated than that of a child born after 8 February 1961? This is not because the British Nationality Act 1948 used different language to the British Nationality Act 1981, that of ‘Citizen of the UK and Colonies’ and British subject (which had a different meaning than it was given in the 1981 Act) instead of ‘British Citizen’. That much was as true of a child born after 7 February 1961.

The Lord Brett contended, in his letter to the Lord Avebury of 20 March 2009 and copied to peers that the word does no more than the word ‘would’ (‘would have become British’) had the law not, in the words of the Lord Brett ‘discriminated against women’. Were that the case, why not leave the wording of the clause as it stands?

Instead, what we have is a restriction not a clarification. The new subsections will make it more difficult for those born both before and after 7 February 1961 to register as British Citizens. What the Explanatory Notes describe as a ‘clarification in new subsection 4C(3C)(b) of the British Nationality Act 1981, that acquiring British citizenship cannot depend upon an application having been made for registration, is a restriction. Section 5(1) of the British Nationality Act 1948 provided:

‘5(1) Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at this time of his birth:

Provided that if the father of such a person is a citizen of the United Kingdom and Colonies by descent only, that person shall not be a Citizen of the United Kingdom and Colonies unless...

(b) that person’s birth having occurred in a place in a foreign country [...] the birth is registered at a United Kingdom consulate within one year of its occurrence, or, with the permission of the Secretary of State, later’

The British Nationality Act 1958 did not amend this provision. Nor did the Commonwealth Immigrants Act 1962. Nor did the British Nationality Act 1964, nor did the British Nationality (No.2) Act 1964, although in any event they postdate the 7 February 1961 cut –off date for which provision was made in 2002. It is a reasonable argument that had women been able to pass on their nationality to their children born overseas then they should have registered those children because that was a required step. Given that they could not pass on their nationality, there was not the same pressure to do so. The Lord Brett notes in his letter that some women did register their children at the British consulate, and that the children of such women will be able to benefit from the amended section. That some women did so does not change the force of the argument that others saw no reason to do so because they could not pass on their nationality to their children born overseas.

The Lord Brett writes

“We do not think it appropriate to make assumptions about what the parent would have done if the law had been framed differently; we continue to believe it appropriate to focus on the available facts and evidence rather than make assumptions on behalf of parents, many of whom may now be deceased”

But the women who were discriminated against who are now dead are in no position to speak for themselves. They are in no position to say what they would have done. As to those who

are still alive, if the provisions are passed making registration a requirement it will avail them nothing to say what they would have done. They will be ignored.

Under the 1948 Act, the child born to a British father could be registered. Under Section 4C of the British Nationality Act 1981 as inserted by the Nationality Immigration and Asylum Act 2002 a child born to a British mother could be put in the same position as that child. Now, under this clause, a child born to a British mother, whether before or after 7 February 1961, cannot be put in the same position.

New subsection 4C(3D) is a further restriction, again described in the Explanatory Notes as a ‘clarification’. Despite new proposed subsection 4C(3C)(b), with its refusal to consider parallels with children of men who registered, the government has found it necessary to state that it is not to assumed that any registration or other requirements for naturalisation were met. This leaves a person, in 2009, in the position of having to prove that they would have succeeded in an application at the time of their birth or in the first few months of life. This is not a period of which many people have any great recollection, and in many cases the parent will be deceased. Are we to see people rushing to take affidavits from aged parents before they die, in the hope of proving that had their mother been a man in the middle of the last century, they would have become a British Citizen?

In the debates on his proposal to remove the 7 February 1961 provision in 2006, the Lord Avebury said:

‘This Minister went a little further than the noble Lord, Lord Filkin, when she explained in a discussion that we had that—I am paraphrasing what she said—although it is agreed that very few children born abroad to British mothers and foreign fathers would benefit from the removal of the cut-off date and therefore it would have no implications for immigration policy, there could be repercussions in the drafting rules that apply to all statutes.’²

The exchange continued as follows:

***The Baroness Ashton of Upholland** ‘...we cannot simply move policy around on the grounds that it affects only a few people...[...]*

***The Lord Avebury** ‘My Lords, I cannot help observing, as my noble friend Lord Dholakia just reminded me, that when it comes to disadvantaging a group of people, however small it may be, there is no problem with the Government finding room for them in the Bill. It is not a question of numbers; it is a question of fairness.’³*

Here we have the illustration of the Lord Avebury’s point: the government has bothered to propose to amend s(4C) with all these lines of drafting, to disadvantage a group of people, however small it may be. It is not a question of numbers, it is a question of fairness.

ILPA supports Amendment 46 in the names of the Lord Avebury and the Baroness Falkner of Margravine:

THE LORD AVEBURY

BARONESS FALKNER OF MARGRAVINE

46 Insert the following new Clause—

² *Hansard* HL Report 7 February 2006

³ *Hansard* 7 February 2006 cols 630-631

"Descent through female line from mother now deceased

After section 4C of the British Nationality Act 1981 (c. 61) (acquisition by registration: certain persons born between 1961 and 1983), insert—

"4D Acquisition by registration: certain persons born after 1983

A person is entitled to be registered as a British citizen if—

- (a) he applies for registration under this section, and
- (b) he satisfies each of the following conditions—
 - (i) the applicant is not a British citizen on the date on which this section comes into force;
 - (ii) the applicant's mother or father would have been entitled to register as a British citizen under section 4C of this Act but for their death; and
 - (iii) the applicant was born in the United Kingdom or a qualifying territory."

Purpose

To complement the amendments being made to s 4C of the British Nationality Act 1981 by Clause 43 (Descent through the female line) and ameliorate the current day effects of historical discrimination on the grounds of sex. Clause 41 provides for the registration of those born at any to a British mother in circumstances where a father could pass on his nationality to a child born abroad but a mother could not. However, there will be cases where the person who would have been entitled to register is now dead. What of their children? They may have missed out because since 1 January 1983 it has been the case that a person born in the UK or a qualifying territory is only born British if their mother or father is British or settled in the UK. The amendment gives them an entitlement to register as British.

Briefing

Clause 43 amends section 4C of the British Nationality Act 1981 to remove the cut-off date before which restricted the registration as British citizens of those born to a British mother overseas in circumstances where a father could pass on his nationality to a child born abroad but a mother could not (see briefing above).

Before 1983, a person born in the UK was born British. After 1983 only those born to a parent who is British or settled then are born British citizens. As to birth in the qualifying territories, a child born in the qualifying territories on or after the 'appointed day' (26 February 2002) to a parent who is a British citizen or settled in the territory is born British.

There are exceptions to this, for example a child born before 1 July 2006 to a British citizen father not married to the child's mother will not be a British citizen if the mother is neither a British citizen nor settled.

Consider the implications of these rules for the provisions on descent through the female line. Let us assume that a person born overseas to a British citizen mother before 7 February 1961 is now dead. That person would never have been British. But let us assume that that person had a child who was born in the UK after 1 January 1983. Although born in the UK the child would have been born to a foreigner and if the child's parent was not settled, the child would not have been born a British citizen. The effects of historical discrimination thus live on for this group. One can vary the scenario and add in complications including birth in a qualifying

territory, or that the father of the child was a British citizen but not married to the ‘foreign’ (because unable to inherit her mother’s nationality) mother.

The Lord Brett referred to the women discriminated against in his 20 March 2009 letter to the Lord Avebury saying ‘many of whom may now may be deceased’.

The Lord Brett went on to state that

‘In practice however, many of those parents who would, but for their death, have had an entitlement to registration under section 4C would in any case have already been settled in the United Kingdom or in a qualifying territory when their children were born. Those who were Commonwealth Citizens with a mother born in the United Kingdom would have had a right of abode in the United Kingdom and would therefore have been settled for nationality purposes. Others, even though not British citizens, could have acquired settled status here by the time their children were born or been registered or naturalised as British citizens.

Within British nationality law there are also a number of provisions by which a child born in the United Kingdom can acquire British citizenship. This amendment is unlikely to benefit many people and we believe that the target group are already catered for by the current legislation.’

The final sentence contains a contradiction – it refers to ‘unlikely to benefit many people’ and then says ‘the target group are already catered for by the current legislation’. Both cannot be true.

In the debates on this amendment at Committee stage the Lord Brett focused on those born in the UK (2 March 2009 col 608) in arguing that only a small number of people would benefit from the amendment. But those far more likely to be disadvantaged by the provisions are those born in a qualifying territory for it was not until 2002 that birth in a qualifying territory to a British citizen meant that a person became British by birth.

Finally the UK should be asked whether it will now remove its reservation to the Convention on the Elimination of All forms of Discrimination against Women⁴. This Convention was ratified by the UK on 7 April 1986. Article 9 states

“1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

The UK entered reservations on ratification on behalf of the UK, and, in similar terms, on behalf of the Isle of Man, the British Virgin Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. In 1996 the UK withdrew a number of its reservations and declarations. If the first looks familiar, it is because it is in exactly the terms as the reservation to the UN Convention on the Rights of the Child, which the UK withdrew in 2008. Will the government now withdraw the reservation to the CEDAW?

“(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article

⁴ Signed 18 December 1979. United Nations 1249 UNTS 13. In force 3 September 1981.

15 (4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom.”

The UK also entered a reservation to Article 9, in the following terms:

‘British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom’s acceptance of Article 9 shall not, how ever, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.’

In the event, the ‘temporary or transitional’ discrimination against women as far as passing on their nationality to their children is concerned, that led to this reservation being entered, has lasted twenty-eight years beyond parliament’s approval of the British Nationality Act 1981; twenty-one years beyond that Act’s coming into force and seventeen years since the UK’s ratification of CEDAW? Does the government consider that Clause 43 puts it in a position to withdraw the reservation to CEDAW? Will it now do so? If not, should it not notify the Secretary General of the United Nations that the terms of its reservation have not proven to be an accurate reflection of reality?

For further information, please get in touch with Steve Symonds, Steve.Symonds@ilpa.org.uk or Alison Harvey, Alison.Harvey@ilpa.org.uk, 0207 251 8383.