



ILPA Proposed Amendments Borders, Immigration and Citizenship

House of Lords Report Stage – citizenship by registration or acquisition

ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-government organisations working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government, court and tribunal stakeholder and advisory groups.

PROPOSED AMENDMENT (AMENDMENT TO THE GOVERNMENT AMENDMENT)

As an amendment to the following government amendment

Before Clause 43

LORD WEST OF SPITHEAD

Insert the following new Clause—

"Minors

- (1) Section 3 of the British Nationality Act 1981 (c. 61) (acquisition by registration: minors) is amended as follows.
- (2) In subsection (2), for "within the period of twelve months from the date of the birth" substitute "while he is a minor".
- (3) Omit subsection (4)."

Text of proposed amendment to the government amendment [Minors]

Line 5, at end insert

(2A) In subsection (2), omit subsection 2(c)(ii).

Purpose

To remove the requirement that the British parent of the child to be registered must not have been absent from the UK for more than 270 days of the three years necessary to qualify for registration under this section.

Briefing note

The child and the non-British parent may have been present for the whole of this three year period (if counting from the date of the child's birth) or, if counting from a date before then, the non-British parent may have been present for the whole of that period and the child for the whole of his/her life. The government rationale for removing the 12 month requirement is, according to the letter of the Lord Brett to the Lord Avebury on 20 March 2009, that it is no longer appropriate 'in the context of wider changes in employment practice and globalisation' and in the light of the changes in Clause 42. This rationale also supports the removal of the absences provision as travel on business, for holidays and to visit friends and family may add up to more than 90 days in a year without the connection with the UK being any the weaker.

PROPOSED AMENDMENT – CLAUSE 43

Clause 43 Descent through the female line

Page 36, line 45 leave out from 'and' to the end of line 5 on page 37

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

ILPA prepared a briefing to this clause at Committee stage which addresses this amendment. The 20 March 2009 letter of the Lord Brett to the Lord Avebury tries to argue that the use of the word 'would' in the 2002 Act shows that it was always intended to have this effect and states that the government does not think it appropriate to make assumptions about what the parent would have done had the law been framed differently. These are weak responses to the positive case – that the present day effects of historical discrimination against women still affect the children of those women. Registration of a child's birth at a British Embassy or consulate was not a complex matter and a refusal to register would have been extremely unlikely, but mothers would not have sought to register their children because it would have availed them nothing – they could not pass on their nationality to their children born overseas.

PROPOSED AMENDMENT AFTER CLAUSE 43

Insert the following new Clause—

"The Ilois: citizenship

Section 6 of the British Overseas Territories Act 2002 (c. 8) (the Ilois citizenship) is amended as follows.

After subsection 2 insert

- (2A) (1) A person shall be entitled to register as a British citizen if-
- (a) his father or mother was or is a citizen of the United Kingdom and Colonies or a British citizen by virtue of birth in the British Indian Ocean Territory or by operation of subsection 6(1) and
 - (b) he is not a British citizen
- (2) A person shall be entitled to register as a British overseas territories citizen if
- (a) subsections (2A) (1) (a) and (b) apply to him and
 - (b) immediately prior to registration under subsection(2A)(1) he was not a British overseas territories citizen.
- (3) In subsection 2A(1) (a) 'father' has the meaning given in section 50(9A) of the British Nationality Act 1981.
- (4) No charge or fee shall be imposed for registration under this section.

Purpose

To ensure that Chagos Islanders born in exile can be registered as British citizens.

The amendment would protect all those born to parents born on the Chagos Islands – thus all of the first generation born in exile. Regardless of whether the parent was a man or a woman, and regardless of whether the parents were married. There is no start date, so those still living will be able to register. It is the case that this may capture some Chagos Islanders who were outside the islands by choice and thus help a group wider than those outside the islands because of exile.

In addition it protects those born in exile to persons who registered under section 6(1) of the British Overseas Territories Act 2002. Such people (those born on or after 26 April 1969 and before 1 January 1983) became British Citizens by descent upon registration. Therefore they cannot pass on their nationality or citizenship to their children and need this provision if their children are not protected.

The amendment also offers the possibility of arguing for those not covered by the provisions above to be registered (while still children) by discretion under section 3(1) of the 1981 Act as British citizens, a matter that could be effected by a change of guidance/policy. Not obvious to me that there will be anyone in that group, but you may be able to think of examples.

As drafted the amendment makes people full British citizens, not British citizens by descent upon registration. Therefore they would be able to pass on their nationality or citizenship to their children born overseas. (If this is not wanted, we could change the amendment and make provision for those registering to be British citizens by descent but there seems no good reason to do so while exile continues.) This will thus protect some of the second generation born in exile. Those children, because born overseas, could not pass on their nationality or citizenship to their own children born overseas so the process is finite.

The amendment is drafted so that people register by entitlement; there is no good character test.

The Lord Brett's only answer to the proposal in his letter to the Lord Avebury of 20 March 2009, which deals with earlier versions of these amendments, is that 'whilst the government has not sought to justify the actions taken in the 1960s and 1970s it maintains the case that its obligations, legal and otherwise, have been settled by previous compensation awards and by the grant of British citizenship under the British Overseas Territories Act 2002. But this cannot be right when the 2002 Act treated exile as ending on the date that s6 of that Act, dealing with Chagos, came into force. Exile has continued. Families are split, some members have British citizenship others do not.

AFTER CLAUSE 43

PROPOSED AMENDMENT

"Stateless children of British nationals

- (1) Schedule 2 to the British Nationality Act 1981 (c. 61) (amendments to Immigration Act 1971) is amended as follows.
- (2) In paragraph 4, omit sub-paragraph (1)(c).
- (3) In paragraph 4, for sub-paragraphs (2)(a) and (2)(b) substitute "shall be registered under it as a—
 - (a) British citizen, or
 - (b) in the case of a child whose mother or father is, or would have been but for their death, a British overseas territories citizen, as a British overseas territories citizen."
- (4) In sub-paragraph (4) of paragraph 4, for "sub-paragraphs (1) to (3)" substitute "sub-paragraph (1)".
- (5) In sub-paragraph (4) of paragraph 4 after "British Overseas Citizen" insert "British National Overseas"

Purpose

To ensure that the stateless children born after 1 January 1983 to British nationals (British citizens, British overseas territories citizens, British Overseas citizens, British Nationals (Overseas) and British subjects) wherever in the world, are entitled to be registered as British Citizens, and that the children of British overseas territories citizens can be registered as both British citizens and British overseas territories citizens.

Briefing

ILPA prepared a separate briefing to a version of this amendment (amendment 93) at Committee stage. This illustrated clearly that there are children affected by this amendment. The response in the letter of the Lord Brett to the Lord Avebury on 20 March 2009 is a week one. The Lord Brett says 'the UK cannot always make up the shortfalls created by the failure of other countries to provide for children born in their territories'. This is true. But when the parents hold a form of British nationality and no other, the only link those children have to a

nationality at all is to the UK. The UK cannot hide behind the failures of other states to ignore its own obligations.

The government says that it distinguishes the 'perpetually stateless' from 'citizens in waiting'. But, as illustrated in the briefing for Committee stage, children affected will spend the whole of their childhood, and beyond, with no nationality or citizenship. The prolonged statelessness of a child or young adult cannot be ignored on the basis that it will come right one day. It may be one thing to be a 'citizen in waiting' for a matter of weeks; it is quite another to be a citizen in waiting for decades.

The government should be pressed, if it will not accept this amendment, to give assurances that it will amend its guidance to s3(1) of the British Nationality Act 1981 (registration of any child) so that stateless children in this position can be registered under this section.

AFTER CLAUSE 43

PROPOSED AMENDMENT

4.4 LEGITIMACY

LORD ROBERTS OF LLANDUDNO

99 Insert the following new Clause—

"Legitimacy

- (1) The British Nationality Act 1981 (c. 61) is amended as follows.
- (2) After section 4C insert—

"4D Acquisition by registration: legitimacy

- (1) 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.
- (2) The first condition is that the person was born before 1st July 2006.
- (3) The second condition is that the person is not already a British citizen.
- (4) The third condition is that the father of the child satisfies any requirements as to proof of paternity prescribed under section 50(9B) of this Act.
- (5) The fourth condition is that the person would have been a British citizen had his father been married to his mother at the time of his birth."

Purpose

To make provision for those born before 1 July 2006 to British fathers not married to their mothers to register by entitlement as British Citizens.

Briefing

ILPA prepared a briefing to this amendment (then amendment 99) at Committee Stage. Lord Brett in his 20 March 2009 letter to the Lord Avebury acknowledged that the proposal in part replicates the current exercise of discretion in relation to those born to a father not

married to the child's mother. It goes on to state that it considers the amendment unnecessary 'in relation to children born illegitimately who are still minors'. This seems a poor reason for refusing to enact it in the case of minors. But, not all those born to fathers not married to their mothers are still minors. In the case of clause 43, descent through the female line, the government has taken steps to mitigate the present day effects of historical discrimination against women – regardless of whether those who continue to suffer those effects are now children or adults. Why not the same for the effects of historical discrimination against men – denying them the ability to pass on their British nationality to their children ?

CLAUSE 45

PROPOSED AMENDMENT (AMENDMENT TO THE GOVERNMENT AMENDMENT)

[As an amendment to the government amendment: Clause 45 LORD WEST OF SPITHEAD Page 38, line 5, after "3(1)" insert ", (2)"]

Line 1 after "(2)" insert "(save in the case of a person born stateless)"

Purpose

To limit the good character test to children registering under this clause who are not born stateless.

Briefing note

The government has laid amendments to this clause that would allow a child to be registered at any time while still a minor, instead of up to 12 months by entitlement and up to six years old by discretion. Children over 10 will thus be registering under the clause and the government has imposed a good character test. This is regrettable, but in line with government policy. But the government amendment would apply the test in the case of children who are stateless, as well as other children registering under the clause. This is contrary to stated government policy not to apply good character tests in the case of the stateless – as described when the good character requirement was introduced by the Immigration, Asylum and Nationality Act 2006.

An exception would continue to be made in a small number of cases where, because of our obligations under the 1961 United Nations convention on the reduction of statelessness, it would not in general be possible to refuse on character grounds where statelessness would be the result. Tony McNulty MP, Minister of State, Standing Committee E, 7th sitting, 27 October 2005 am, col. 256

It is important to keep in mind the effect of a good character requirement. What a good character requirement does is to prohibit the Secretary of State from registering a person who is not of good character. It in no way fetters or limits the Secretary of State's powers to *decline* to register a person who is not of good character.

PROPOSED AMENDMENT

Clause 45

Page 38, line 21, leave out subsection (2)

Purpose

To remove from Hong Kong War Wives and Widows from the list of those who must satisfy a good character requirement to register as British. An opportunity to probe the use of the good character requirement more generally.

Briefing

See ILPA's committee stage briefing to this amendment . Government arguments against are *de minimus* and precedent. Well, as to *de minimus* – the government are the ones legislating this again,; as to precedent the only precedent it sets is that of applying the good character test where it is silly to do so.

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