



Borders, Citizenship and Immigration Bill
House of Lords Committee
Part 2 Citizenship
After Clause 41
Amendment 98 new section 4BA

ILPA supports the following amendment, laid in the names of the Lord Avebury and the Baroness Falkner of Margravine:

98 Insert the following new Clause—

"Acquisition by registration: British nationals

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

"4BA Acquisition by registration: British nationals

- (1) This section applies to a person who has the status of—
 - (a) a British Overseas Citizen,
 - (b) a British subject under this Act,
 - (c) a British Protected Person,
 - (d) a British National (Overseas).

- (2) A person to whom this section applies shall be entitled to register as a British citizen if he applies for registration under this section."

PURPOSE

To provide for all British nationals to register by entitlement as British citizens. The amendment provides an opportunity for parliament to debate the Lord Goldsmith's review and to review the provisions of this Bill in that context.

BRIEFING

At the heart of this amendment is the question "What is a nationality?". This Bill has seen much debate on citizenship: who should be allowed to be a citizen; what requirements should a citizen have to satisfy; what entitlements should be reserved for citizens? The government's proposals are built on the notion that a person should not

enjoy Indefinite Leave to Remain in this country, an indefinite stay, without becoming a British citizen or its comparable, and equally difficult to attain, alternative, a Permanent Resident.

But what of those in the opposite position? Those who hold British nationality but have no entitlement to an indefinite stay in this country, indeed, do not even have an entitlement to come to the UK? Beneath the question of citizenship lies the question of nationality and that question the Bill has sought to dodge. This is particularly regrettable given that it is a piece of legislation on the subject coming just one year after the Lord Goldsmith produced his review of citizenship: *Citizenship: our common bond*.

If you ask a person what are the most basic entitlements of a national, they are not very likely to say ‘a right of abode’. (Unless of course they have read the Lord Goldsmith’s review *Citizenship: our common bond*¹ – he lists it the top of the summary of his report as the first of the legal rights and responsibilities of citizenship). In most countries of the world the notion that there could be a nationality without a right of abode would not make sense. The most intrinsic, the most fundamental right of nationals is to enter and to remain in their country of nationality. Other rights and entitlements flow from that and make sense in that context, whether the national takes advantage of that basic right or not. Most British citizens would be astonished to learn that their right to enter and stay in the UK derives from statute, the Immigration Act 1971, section 2, which states:

“2(1) A person is under this Act to have the right of abode in the United Kingdom if –
(a) he is a British citizen [...].”

Forty-two out of the forty-six member States of the Council of Europe have ratified Protocol 4 to the European Convention on Human Rights. Three have signed but not ratified, including the UK. The UK’s reason for not doing is Article 3 which states

Article 3

1. *No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
2. *No one shall be deprived of the right to enter the territory of the State of which he is a national.”*

The UK has ratified the International Covenant on Civil and Political Rights, which states at Article 12 that

*“no one shall be arbitrarily deprived of the right to enter his own country.”*¹²

This is what happened to those listed in amendment 98, but it happened. The right of abode was been carved out from the old British nationality: the nationality ‘Citizen of the UK and Colonies’. The Lord Goldsmith provides a summary in his report² and concludes:

¹ February 2008, available from <http://www.justice.gov.uk/docs/citizenship-report-full.pdf>

² Chapter 2: A short history of British Citizenship.

“..the link between an immigration right to enter the UK and the possession of citizenship was cut from the 1960s onwards, though steps have been taken in recent years – as in the two 2002 Acts – to address this”³

Those categories of British national listed in amendment 98 are those who were left without a right of abode and with a British nationality that gives them UK consular protection abroad and no more. The tentative steps to address the anomalies have been made towards, in the words of the Rt Hon David Blunkett MP then Secretary of State for the Home Department

“...about righting an historic wrong..”⁴

One was to give British overseas territories citizens British Citizenship, in the British Overseas Territories Act 2002. Another was to provide for all the categories listed in amendment 98, with the exception of BN(O)s, who had no other nationality or citizenship and thus no right of abode in the country of their only nationality, to register as British Citizens.

These measures have been hedged around with qualifications and people have fallen through the gaps, as the amendments laid to this Bill have, in some small measure, highlighted. But even taken *en gros* they remain partial, incomplete measures, prompting the Lord Goldsmith to write:

“If citizenship should be seen as the package of rights and responsibilities which demonstrate the tie between a person and a country, the present scheme falls short of that ideal.

Hence the report proposes the following measures to enhance the meaning and significance of citizenship.

- *The residual categories of citizenship – with the exception of British Overseas Territories Citizenship and British Nationals (Overseas) status – should be abolished allowing people who would qualify for those categories with access to full British citizenship. Though this change will only affect relatively small numbers of people, it is important to address the history involved in the residual categories as part of renewing our common bond of citizenship; [...]*”

Thus this was the very first of his recommendations. He gave it priority above earned and active citizenship and the other ideas brought forward in this Bill.

The Lord Goldsmith cites with approval the 6th edition of *MacDonald’s Immigration Law and Practice* and says:

13. The fundamental point about the right of abode linked to British citizenship is that it is a right which should be distinguished from other rules granting freedom of movement into and out of Britain under our immigration scheme:

“What has to be understood is that essentially right of abode stems from citizenship and is an automatic benefit of it, whereas the other

³ Paragraph 27

⁴ *Hansard* HC Report 05 November 2002, col 147

rights ... flow from separate quite specific provisions of the Immigration Act 1971.” [Macdonald’s paragraph 2.5]

It does not escape the Lord Goldsmith that the area in which the law does manage to make extensive provision for those in the categories listed in this amendment is in the area of criminal responsibility. ILPA stated in our submission to the review⁵

“Equality of different types of British nationals is not dead. We contend that rights should be restored to British nationals other than British Citizens. One area of the law has done its best: the criminal law. We trust that this brief survey of offences where British nationals other than British Citizens are singled out as being subject to the criminal jurisdiction of English and other British criminal courts, when these courts exercise an extra-territorial jurisdiction, will be instructive.”

Lord Goldsmith’s recommendation is abolition of the residual categories (he makes an exception for British Nationals (Overseas) discussed below) and a time-limited period for them to register as British citizens, with transitional protection and also protection for the stateless.

ILPA members’ experience would suggest that time-limited registration periods create as many problems as they solve. The history of Clause 41 of this Bill (descent through the female line). There is a hint of this in the Lord Goldsmith’s own caveats to his proposal, those on transitional protection and protection for the stateless.⁶ There would thus appear to be two solutions: registration by entitlement without limit of time, as proposed in amendment 98, or reinstating a right of abode for all categories of British nationality, thus reconstituting them as true nationalities. Arguably the latter collapses into the former, since on what basis would one then distinguish the nationalities, so the direct route is proposed here.

It is notable that all the Lord Goldsmith’s other discussions of the citizenship settlement, are set in the context of his recommendation to ensure that British nationals have a right of abode. Without this perspective, Parliament is debating the right of EEA nationals, of those from within the Common Travel Area and those from outside the EEA in a vacuum.

The Lord Goldsmith would omit BN(O)s from his; amendment 98 includes them. We have set out in our briefing to amendment 90 (New Clause before Clause 41) his views on the reasons for excluding BN(O)s and our views on whether those reasons stand up in law or in practice.

What of the government response to these aspects of Lord Goldsmith’s review? Well, in June 2008 the Prime Minister’s Spokesperson told the press that

“Lord Goldsmith completed a review on Britishness which had a number of recommendations in it and the Government generally supported the general direction of them.”⁷

⁵ December 2007. See the submissions page of www.ilpa.org.uk

⁶ Chapter 4 Part 1.

⁷ <http://www.number10.gov.uk/Page15660>

That is about it, unless one counts the line in the Government's response to *the Path to Citizenship*' consultation

*"We have carefully studied the Lord Goldsmith's report into citizenship"*⁸

The debates on this Bill and on this amendment provide an opportunity for a fuller response, and for parliament to probe that response.

For further information please get in touch with ILPA via Steve Symonds, Legal Officer (Steve.Symonds@ilpa.org.uk) or Alison Harvey, General Secretary (Alison.Harvey@ilpa.org.uk) 0207 251 8383.

⁸The Path to Citizenship : next steps in reforming the immigration system Government Response to Consultation July 2008
www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathto citizenship/governmentreponseconsultation?view=Binary