Borders, Citizenship and Immigration Bill
House of Lords Committee
Part 2 Citizenship

Clause 40 Children born in the UK etc. to members of the armed forces

Clause 42 Children born outside the UK etc. to members of the armed forces

GENERAL

In Clause 40 the Government has made provision for those born within the UK or a qualifying territory at least one of whose parents are serving in the British armed forces, to be born British citizens. The clause benefits those born after a day to be appointed. It also makes provision for children born in the UK (but not a qualifying territory) after the to appointed day whose parents enter the British armed forces while the child is under 18, to register, while under 18, as British citizens, subject to a good character test (see clause 43).

In Clause 42 the Government has made provision for those born outside the UK or a qualifying territory, at least one of whose parents is a serving member of the British armed forces at the time of the birth, to register as British while still children. The clause benefits those born after a day to be appointed. Unlike clause 41, there is no provision for registration of those whose parents serve in the armed forces while still a child.

These provisions follow the publication of the Ministry of Defence Command Paper of July 2008, *The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans*[1].

Those eligible to serve in the British armed forces are British citizens, British nationals other than British citizens, Commonwealth citizens and Irish citizens. At a time when the government appears intent upon writing the Commonwealth out of the

[1] Cm 7424 available at www.mod.uk/NR/rdonlyres/415BB952-6850-45D0-B82D-C221CD0F6252/0/Cm7424.pdf

UK's immigration and nationality laws, we find provision made here for some Commonwealth citizens.

The first group who stand to benefit from these provisions are children born to serving members of the armed forces who are British Citizens by descent. British citizens by descent are, for the most part, British citizens born outside the UK or a qualifying territory, although some registration provisions also allow people to register only as a British citizen by decent. A British citizen by descent cannot pass on his or her nationality to a child born abroad. The situation in which a parent born abroad has a child also born abroad but retains close links to the UK and/or a qualifying territory is not uncommon in families where subsequent generations have served in the British armed forces. The second group is that of children born to British nationals other than British citizens, Commonwealth citizens and Irish citizens. These people are allowed to serve in the British armed forces in the first place because of their connection with the UK.

Somewhere inside Clauses 40 and 42 there is a clause struggling to get out. A simple, sensible clause that does not create new iniquities. A clause that says, you were eligible to become members of the armed forces because of close ties with the UK, your service in the armed forces has strengthened those ties, therefore your children shall either be born British Citizens or be eligible to register as British Citizens. Parliament could then debate who should be British by birth and who by registration, whether registration should only be available to those under 18, and whether registration should be by entitlement or subject to a good character test. The amendments discussed in this briefing do not necessarily take us as far as to that sensible, simple clause, but they provide an opportunity to begin to see its main lines clearly. If the intention was to create a clause of such complexity that people would not be able to understand it but would have instead to accept it as drafted, that intention cannot be allowed to succeed.

Another matter that parliament may wish to consider in debating this clause is the situation of those who also serve on British ships, but as subcontractors and therefore not persons considered to be in Crown Service. On 3 November 1997 the Rt Hon John Reid MP, then Secretary of State for Defence confirmed that there were 38 Chinese nationals serving on British ships, and 28 ex-Gurkhas, both subcontracted to Worldwide Laundry Services.[2] In his book *British Nationality Law*, Laurie Fransman QC writes:

> *'…a Chinese laundryman working for many years on a British warship may have taken an oath under the Official Secrets Act and may have seen action during the Falklands and Gulf wars, but will not be recognised as a Crown Servant because he is paid as a sub-contractor and not direct from public funds. This seems an indefensible distinction because in this context the laundryman's life is as much at risk as the seaman's.*[3]

Peers may wish to take this opportunity to press a Minister likely to be better informed than most on this matter, on whether the introduction of clauses 40

[2] *Hansard* HC 16 December 1983 3 November 1997, vol 300 col 82W, see also *Hansard* HC 16 December 1983, vol 50 col 591W, and *Hansard* HC Report 28 Oct 1997 Col 757 describing both those laundrymen who lost their lives and those who have been decorated.
[3] *Fransman's British Nationality Law* (1998) at page 301.

and 42 provides an opportunity to look again at the definition of the Crown Service requirement for naturalisation purposes to recognise the service of these people.

ILPA supports the following Amendment 86, laid in the names of the Lord Avebury and the Baroness Falkner of Margarvine

Page 33, line 3, leave out "on or after the relevant day"

PURPOSE

The amendment would ensure that all those born to serving members of the armed forces in the UK or in a qualifying territory, whether before or after the commencement of this Act, are entitled to be registered as British citizens.

BRIEFING

The clause as drafted will create the situation where one sibling, born after the appointed day, is a British citizen, another, born before, is not. It will create the situation where children born between now and the appointed day are not born British citizens.

Thus the first group of children to benefit from this clause will be those born between now and the appointed day. Experience suggests that there could be a long time lag. By section 9 of the Nationality, Immigration and Asylum Act 2002, the government amended the British Nationality Act 1981 so that children born after the appointed day to British fathers not married to their mothers could, on proof of paternity, acquire their fathers British nationality. The appointed day was 1 July 2006[4], nearly four years after the passage of that Act. Quite possibly those children would be waiting still, but for the persistence of the House of Lords and a stroke of luck. The Baroness Ashton of Upholland was taking the Immigration Asylum and Nationality Bill through the House of Lords for the government, to assist Home Office Ministers. An amendment as moved to probe when section 9 would be brought into force. The Baroness Ashton stated

> *"The thrust of what the noble Lord* [the Lord Dholakia, speaking on behalf of the Lord Avebury] *has sought to do with the amendment is to challenge the Government on not having brought forward the regulations as quickly as we might have. …I am not in a position—I wish I were—to give the noble Lord or the Committee precise details of when the regulations will come forward. However, I completely accept—as a Minister who has done a lot of work around children's issues, as the noble Lord was kind enough to point out—the importance of doing this*." [5]

[4] See SI 2008/1496 and SI 2008/1498

[5] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 19 January 2006, col. GC254-255

Had not a '*Minister who has done a lot of work around children's issues'* being taking the Bill through the House as a favour to Home Office Ministers, those children might be waiting still.

Another example is provided by the question of descent through the female line, the matter addressed in Clause 41. 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. This the government resisted. The reasons given were, to say the least, unconvincing. The Lord Filkin, speaking for the government said

> *"One can only go so far back in seeking to right the wrongs of history and of previous generations".*[6]

In 2006 the Lord Avebury tried again. The Baroness Ashton of Upholland was more verbose than the Lord Filkin, but no more convincing:

> *"…we cannot simply move policy around on the grounds that it affects only a few people, and that we have made a substantive approach to try to redress a problem, which was sexism…I cannot move any further when I fundamentally believe that, as grown-ups and adults, not merely as siblings, people should consider their own position in that context."*[7]

This when the Lord Avebury had put to Ministers not only individual examples of the human consequences of the clause, but also the legal consequences: accepting his amendment would have allowed the government to rescind their reservation to the Convention on the Elimination of all forms of Discrimination against women.

Faced with such perseverance, and with no good arguments on their side, the government has finally agreed to allow those affected born before 1961 to register. The result is Clause 41.

This clause will give rise to a similar campaign – by children born the wrong side of the appointed date. In the meantime, what are serving members of the armed forces to do? Wait until the appointed day to have children?

The second group of people who will benefit from the amendment will be those already born in the UK or a qualifying territory, to a mother or father who was a serving member of the armed forces at the time of their birth. Again, to be serving members of armed forces their parents had to have a particular nationality that

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[6] *Hansard* HL Report 31 October 2002 col 298
[7] *Hansard* HL Report 7 February 2006, col 360

described a close connection with the UK, again they built on that connection through their service. Why should their children not also benefit?

These amendments highlight the iniquities that will result from the clause as drafted. They are not the only way to solve the problem. If the government is concerned at the prospect that some people will suddenly wake up British citizens, then it could amend the clause so that those born before the Act comes into force can register as British citizens. This could be achieved by an amendment to new section 1(3A) of the British Nationality Act 1981, inserted by subclause (4) of this clause. Similarly, the amendments do not address all the iniquities created by the clause. But they serve to highlight them and to make the point that we can do better.

ILPA supports the following amendments, laid in the names of the Lord Avebury and the Baroness Falkner of Margarvine

(**Amendment 86** Page 33, line 3, leave out 'on or after the relevant date' – see amendments above)

Amendment 87 Page 33 line 5 leave out 'while he is a minor'

Amendment 88 Page 33 line 6 at beginning insert 'while he is a minor,'

Amendment 89 Page 33 line 6 after 'mother' insert 'is or'

PURPOSE

The purpose of the first amendment is to ensure that those born in the UK to members of the armed forces are entitled to register as British whenever they are born, whether before or after the section comes into force.

The purpose of the second amendment is to ensure that the application for registration need not be made while the person is still a child.

The third amendment ensures that the parents must have been in the army while the UK born child was under 18 if a person is to register under this clause.

The fourth amendment is consequential on those above.

The combined effect of the amendments is to ensure that UK born children whose parents served in the British army while the child was still a child may register whether they are adults or children at the time of the application.

BRIEFING

See the briefing to the amendments above.

Before 1983, all children born in the UK were born British and children of serving members of the armed forces were no exception. Since 1983, children have only been

born British if their parents are British Citizens or settled in the UK. Why should such children not benefit from this clause?

Not all the children of serving members of the armed forces in this position are still children. At the time of writing those born between 1 January 1983 and February 1991 would be caught by the 'while still a minor' provision. The group may be bigger by the time the clause comes into force.

By moving the words 'while still a minor', the amendments continue to require that the parents were serving during the child's minority, but do not require that the person be a child at the time of application. The amendment is crafted so that these children and people have to register - no one will wake up one morning to discover that s/he is British. By clause 43 registration will be subject to a good character test.

Once again, the amendments point the way to a better clause, they do not necessarily resolve all the difficulties. Why, for example, do the registration provisions set out in Clause 41 apply only to those born in the UK? Why not, like the provisions in the clause dealing with being born British, to those born, in the inelegant wording of the title of the clause, in the 'UK etc.', that is to say in the UK or the qualifying territories? Will these people be expected to pay a fee for their registration? Why should they be subject to a good character test and not, if aged over 10 years, be allowed to register by entitlement? Under the clause as drafted, all those entitled to register will be under 18 at the time of registration. There remains much to consider.

CLAUSE 42

ILPA supports the following amendments, in the names of the Lord Avebury and the Baroness Falker of Margavine.

Page 34, line 28, leave out from beginning to end of line 8 on page 35 and insert—

"(1) Section 2 of the British Nationality Act 1981 (c. 61) (acquisition by descent) is amended as follows.

(2) In subsection (1)(c) after "Communities" insert "; or

(d) is a member of the armed forces.""

Page 34, line 31, leave out "on or after the relevant day"

Page 35, leave out lines 6 to 8

PURPOSE

The effect of the amendments would be that children born to serving members of the armed forces outside the UK or a qualifying territory shall not be British citizens by birth rather than, as Clause 42 currently proposes, should have to register to become British. The purpose of the amendment is to ***probe*** why such children should have to register to become British citizens instead of being born British citizens.

BRIEFING

Clause 40 provides that children born to serving members of the armed forces in the UK or a qualifying territory after the appointed day. Why does Clause 42 not take the same approach to children born outside the UK or a qualifying territory? British nationality law operates on a combination of the jus soli (nationality depending on place of birth) and the jus sanguinis (nationality depending the upon the nationality of the parents). The British Nationality Act 1981 makes provision for those born outside the UK to British parents in 'Crown Service' or other designated service to be born British[8]. It makes provision for Crown Service overseas to count toward the qualifying period for citizenship[9]. Service in the armed forces is an example of Crown Service and various forms of other service connected with the armed forces fall within the designated services, such as service in The South-East Asia Collective Defence Treaty Organisation (SEATO), The Baghdad Pact Council, , The Australia, New Zealand and Malaya Defence Organisation and the Navy, Army and Air Force Institutes (NAAFI).

Members of the armed forces are posted where they are required; they may have no or limited choice where they go. Families may wish to be together at the time of a child's birth, or it may be a time when funds are limited and a journey back to the UK is not feasible. Thus it may be a matter of the posting at the time of a child's birth, or a result of circumstances outside the control of the family, whether the child is born in the UK or a qualifying territory or not. Given these circumstances, on what basis has the government decided to make the distinction between those children who are born in the UK or a qualifying territory to serving members of the armed forces, and those who are not?

The government argued in 2006 that there was a

> *'…guiding principle that British citizenship should normally be restricted to those having close connections with present day British territory'* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, col. 525-526

No reason or source was given for this principle. It fails to reflect current British nationality law, under which parents have the chance to pass on their British Citizenship to children born abroad for two generations and British citizens do not lose their citizenship, howsoever acquired, because they do not reside in the UK or a British territory. See ILPA's briefing on the clauses dealing with the Ilois for a detailed account of the law on this matter, setting out in detail the statues and case-law that give the lie to the claim that there is any such *'guiding principle'*.

Once again, the amendment points the way to a possible new clause to replace Clauses 40 and 42, it does not exhaust the possibilities. For example, Clause 40 provides for children born in the UK or a qualifying territory to register as British if their parents undertake service in the armed forces while they are still minors. No similar provision is made in Clause 42. A child who is born outside the UK or a qualifying territory because his or her parents were posted overseas at the time of the birth, is thus in a worse position than a child born in the UK or a qualifying territory whose parents join the armed forces when they are in their teens. Why the difference?

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[8] British Nationality Act 1981, s 2 Acquisition by descent

[9] British Nationality Act 1981, s 6 and Schedule 1 paragraph 1.

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