ILPA briefing for the short debate
Requirements for those who apply for UK citizenship or nationality
Lord Roberts of Llandudno/Lord Taylor of Holbeach
for debate on 10 October 2013

The Immigration Law Practitioners' Association (ILPA) is a professional membership association 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 an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups.

Provisions of British Nationality Law are set out in the British Nationality Act 1981. This was last examined in 2009, during the passage of the Borders, Citizenship and Immigration Act 2009.

As requires the acquisition of citizenship, ILPA suggests that the following could usefully be examined in the forthcoming immigration bill, as well as in the current debate.

Chagos Islanders

Chagos Islanders cannot be born in the British Indian Ocean Territory, which is a qualifying territory, because they remain in exile from that territory. Thus people who would, but for exile, be British citizens by virtue of birth in a "qualifying territory" are, because of exile, prevented from becoming British citizens by birth unless it be by birth in the UK.

The Chagos Islanders have described what this means in practice. It can be argued that the option of having their children in the UK is open to the islanders. But in practice this is not the case. Those members of a family who are British can come to the UK. But they can only bring members of the family who are not British if they can demonstrate that those people will have no recourse to public funds immediately on arrival. This has resulted in split families, where one parent comes to the UK and works until such time as they can afford to have their spouse It has resulted in those who cannot or will not leave their partner behind being unable to come to the UK at all, and the chances of amassing sufficient funds in Mauritius to meet the 'public funds' requirement are slim.

For those who have no ability or desire to come to the UK the route of birth in the UK
to ensure that their children become British is not open. They may have family in

Mauritius. They may wish to remain there to continue to campaign for return to the islands. Family members may be elderly or sick and unable to travel.

The British Overseas Territories Act 2002 treated the exile of the Chagos Islanders exile as ending on the date that section 6 of that Act, dealing with Chagos, came into force. Exile has continued.

ILPA therefore proposes that the law be changed to ensure that Chagos Islanders born in exile can be registered as British citizens. An entitlement to register as a British citizen should be given to those still living who were born to parents born on the Chagos Islands – thus all of the first generation born in exile. The entitlement to register should not depend upon whether the parent was a man or woman or whether the parents were married. In addition the children of those who registered under section 6(1) of the British Overseas Territories Act 2002 should be allowed to register as British citizens. Those who were able to register under s 6(1) were those born on or after 26 April 1969 and before 1 January 1983). They became British Citizens by descent upon registration. Therefore they cannot pass on their nationality or citizenship to their children and need a change to the law if their children are to be protected.

The generation affected need this amendment because a subsequent return to the Chagos islands will not cure the problem of their not having become British, although it would of course assist the future generations who would be born there.

This topic was last debated in 2009 when the then Government indicated that it should not be treated as a separate issue at that time but as part of on-going discussions about the fate of the islanders, without closing the door on the change[1].

British citizenship by birth

In 2009 Lord Roberts proposed an amendment that would have achieved two things.

First, it would have ensured that those born in a qualifying territory to parents who are British citizens or settled are British citizens whether born before or after the appointed day (21 May 2002 see the British Overseas Territories Act 2002 Section 8 and see SI 2002/1252 (C.34)). The 'qualifying territories are the British overseas territories other than the Sovereign Base Areas of Akrotiri and Dhekelia.

Secondly, it would have amended the British Nationality Act 1981 s 1(1) so that not only the children of British Citizens and the settled, but also the children of British passport holders other than British Citizens born in the UK or a qualifying territory are British Citizens.

ILPA supported these amendments and considers that they could usefully be reintroduced. The first part would assist a small group – those born to parents who were British citizens by descent (i.e. who could not transmit their nationality to their children born overseas), where those children were born in a qualifying territory in

[1] HL Report 1 Apr 2009 : Column 1082, see http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90401-0003.htm#09040160000488

which the parents were not settled. This is not about the children born to British dependant territories citizens before 2002; they derive their British citizenship from the British Overseas Territories Act 2002. Nor does the amendment affect whether the child has the citizenship of the overseas territory. It is thus about the situation of British citizens who live overseas, rather than those who are also British overseas territories citizens in their particular territory.

As to the second part, British nationals other than British citizens have no right of abode by virtue of their British nationality. They are in a weaker position than third country nationals settled in the UK or an overseas territory and so are their children. The child of a person who is settled in the UK or an overseas territory is born a British citizen.

Children of stateless persons

On 1 April 2013 the UK introduced new immigration rules that allow for grants of leave to certain stateless persons. At the time of writing our understanding is that there have yet to be any grants of leave under the new rules, but we live in hope. And make a modest request. Which is that the guidance under section 3(1) of the British Nationality Act 1981 be amended to make provision for the children of stateless persons to be registered as British. The power in law is there, for section 3(1) is a power to register any child but a change to the guidance to recognise the children of those given leave as stateless persons would facilitate their registration under the section. The rules make stringent demands of those who wish to register as stateless, as to their character and associations but also that they have nowhere else to go, that they are not admissible to any other country. Thus their children are likely to be in the UK for the foreseeable future. They will not acquire British citizenship if their parents are not British or settled and some will themselves be stateless.

Descent through the female line

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 inserting section 4C into the British Nationality Act 1981. In 2009 those born before 7 February 1961 were given the chance to register.

There remains work to be done. In particular:

- The children of those entitled to register under this clause, the grandchildren of the women discriminated against, may benefit from their parent's registration and inherit their parents' British citizenship if certain conditions are met (the parent is a British citizen otherwise than by descent, or if the child is born in the UK. However, if the parent has died, the effect of the

discrimination against the grandmother can never be rectified. We favour amendments

- While children of British citizen mothers can register, there is no equivalent registration option for those who would have become British Overseas Citizens or British Dependant (now Overseas) Territories Citizens had their mothers been able to transmit their citizenship in the same way as men could. The arguments in favour of allowing registration are exactly the same as for British citizens and we suggest that the opportunity to register could usefully be extended to them.

When some of these matters were debated in 2009 the reasons given for rejecting proposed amendments were less than convincing. The Lord Brett said

> I note noble Lords' intention in providing for children who might be disadvantaged because of the death of a parent before that parent had an opportunity to register under Section 4C. However, I must point out that this situation would not be unique to parents who might have an entitlement to registration under Section 4C. It is wrong to assume that the parent would have wanted to register as a British citizen under Section 4C before their death. It is also wrong to assume that the parent would have met the requirements of registration under Section 4C, including after 2006 the requirement to be of good character. [2]

The Lord Brett, speaking for the Government, added that only a small number of people would be affected. We concur.

The provision concerns the present day effects of historical discrimination against women. In the 2009 debates Lord Avebury highlighted that this affects the UK's position with regard to the UN Convention on the Elimination of Discrimination against women (CEDAW) saying:

> *I take issue with the Minister's assertion that this has nothing to do with our reservation to CEDAW. I have already quoted the article in CEDAW that provides that,*
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> > *"State parties shall grant women equal rights with men",*
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> *with respect to the nationality of their children. The UK specifically entered a reservation to CEDAW relating to Article 9. That was that,*
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> > *"the United Kingdom's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date".*
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> *That means the date when the BNA 1981 came into force. It is clear, therefore, that there was a connection between the reservation and the provisions of Article 9, whatever the Minister may say. There may have been other reasons why there was a reservation to CEDAW, but this was certainly one of them.*

[2] HL Report 2 March 2009 column 610. See http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90302-0016.htm

Registration of children of members of the armed forces

New provisions for the automatic acquisition of British citizenship and for the acquisition of British citizenship by registration for children of members of armed forces were introduced in 2009. Those born within the UK or a qualifying territory at least one of whose parents are serving in the British armed forces, are now born British citizens. Children born in the UK (but not a "qualifying territory" – i.e. a British Overseas Territory other than the military bases on Cyprus) after the appointed day whose parents enter the British armed forces while the child is under 18, were allowed to register, while under 18, as British citizens, subject to a good character test.

These provisions could usefully be improved and we suggest amendments to ensure that those born in the UK to members of the armed forces are entitled to register as British whether they are born before or after the section comes into force, that the application for registration need not be made while the person is still a child and to make provision for those born in the qualifying territories to register.
Versions of these questions were last discussed in 2009[3]. It was suggested by the then Government that they were unnecessary, on the basis that prior to the appointed day, members of the armed forces were treated as settled and thus their children born within the UK were born British. While it is true that there was some protection for those born to serving members of the armed forces, there was no provision for those whose parents joined the armed forces after their birth.

Stateless children of British nationals

At the United Nations Ministerial Intergovernmental Event on Stateless Persons in December 2011[4] the UK pledge included:

> *"Restates its commitment to the 1961 Convention on the Reduction of Statelessness and undertakes to review its response to those that fall under that Convention[5]."*

In so doing it set an agenda for British nationality law for years to come. The 1961 Convention[6] is concerned with the reduction of statelessness and as such touches on many aspects of acquisition and loss of nationality.

Addressing the plight of the stateless children of British nationals would be useful way of giving effect to this pledge.

A British citizen born outside the UK and the British overseas territories (other than the British sovereign bases in Cyprus) will be a British citizen 'by descent': that is he or she will not be able to transmit his or her citizenship to his or her children. In

[3] HL Report 2 Mar 2009 : Column 593
http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90302-0014.htm
[4] Geneva, Palais des Nations, 7-8 December 2011.
[5] Pledges 2011, United Nations Ministerial Intergovernmental Event on Stateless Persons, Geneva, Palais des Nations, 7-8 December 2011.
[6] 30 August 1961, UNTS, *Treaty Series*, vol. 989, p. 175.

addition, there may be parents who acquire British citizenship after the birth of their children. In certain circumstances, where the state of residence prohibits the acquisition of its nationality – often on racially discriminatory grounds - this leaves the children of such persons without the nationality of the state of residence. As they also lack British citizenship they are stateless and have no state in which they are entitled to live and work by virtue of possession of a nationality.

Thus the statelessness of such children arises in circumstances where the state in which they live does not provide for the acquisition its nationality and there is no practical mechanism for children to acquire the British citizenship of their parents.

There are all over the world, small pockets of stateless children whose have a link through their parents' British citizenship to the UK. In respect of their parents, the UK has accepted that they are citizens with the right to live and work in the UK. Most families with parents who are such British citizens, identify with the UK and are treated as identifying with the UK by the state in which they live.

In respect of the stateless children, the UK could register them as British citizens under section 3(1) of the British Nationality Act 1981. Under section 3(1) the Secretary of State has a discretion to register any child, regardless of nationality and regardless of whether or not the parents are British citizens by descent. It is a broad power on the face of the legislation and confers a very wide discretion on the Secretary of State as to how it is to be exercised. The Secretary of State publishes non-statutory guidance as to how the power is to be exercised in the form of Nationality Instructions. The latter do not provide any protection from a refusal to exercise the power and may be changed at will. In addition, there are far too many examples where the Secretary of State has declined to register children under this power.

Therefore ILPA calla on the government to provide statutory rights to acquire British citizenship to the stateless children of British citizens born outside the UK and the British overseas territories (other than the British sovereign bases in Cyprus) in order to ensure that they acquire a nationality, British citizenship, and that that nationality gives them the right to live and work in the UK without restriction; the UK being the state with which they identify.

This would be a way of giving effect to the UK's pledge

Registration of children under section 3(2) of the British Nationality Act 1981

This section is a provision under which certain children whose British parent has spent three years in the UK prior to their birth can be registered as British. These are cases where the parent is a British citizen by descent, i.e. a person who cannot pass on their nationality to children born outside the UK and qualifying territories. This affects both stateless children and children who are not stateless. In the case of the former, it is relevant to giving effect to the UK pledge described above.

A key requirement of the section as drafted is that the grandparent must have been a British citizen otherwise than by descent on the date of birth of the parent who is a

British citizen by descent. The section could usefully be amended to give the same right to the grandchild of a British citizen otherwise than by descent. This would assist certain persons whose grandparents acquired British citizenship under the British Nationality (Falkland Islands) Act 1983, the British Nationality (Hong Kong) Act 1990, the Hong Kong (War Wives and Widows) Act 1996, the British Nationality (Hong Kong) Act 1997 and the British Overseas Territories Act 2002. Many of the grandchildren of these people cannot benefit from s 3(2)(a) because it requires the grandparent to have been a British citizen otherwise than by descent at the time of the birth of the child's parent or on commencement of the British Nationality Act 1981.

Examples were given during the debate in 2009:

> "GP from St Helena was conferred British citizenship otherwise than by descent by Section 3 of the British Overseas Territories Act 2002. Her daughter, P, has lived in the UK for more than three years and was granted British citizenship by descent under the same Act. So GP is a British citizen otherwise than by descent and P is a British citizen by descent. P then has a child, C1, who is born overseas and is not entitled to register as a British citizen because GP became a British citizen only on 21 May 2002 and was therefore not technically a British citizen at the time of parent P's birth.
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> …GQ, who registered under Section 1 of the British Nationality (Hong Kong) Act 1990, became a British citizen otherwise than by descent. Her son, Q, born in 1998 was then registered under Schedule 2 to that Act as a British citizen by descent. After living in the UK for nearly 10 years, Q meets the residential test under Section 3(2) of the BNA. While he is on temporary assignment abroad with his wife, she gives birth and the child, C2, cannot be registered as a British citizen under Section 3(2) because the grandparent only became a British citizen otherwise than by descent after the parent's birth.[7]

Lord Brett for the then government indicated[8] that while the change "might bring clarity" the connection with the UK was not sufficiently close in these cases. He recalled that there was a power to register children by discretion under section 3(1) of the Act to register any child.

A child must have sufficient connections to the United Kingdom to be entitled to register under section 3(2) at all: a British grandparent, and a British parent who has resided for a substantial period in the UK (unless the child is born stateless in which case there is no residence requirement). We suggest that this should be sufficient to allay any fears about the strength of the connection.

Legitimacy

The law changed on 1 July 2006 so that children born to fathers who were not married to their mothers could nonetheless acquire the father's British nationality. However, this only applied to those born on or after that date.

[7] Hansard HL Report 1 April 2009, 1084.
[8] Ibid. col 1084.

There is a discretionary power under section 3(1) of the Act to register any child. This can be, and has been, used in these cases where the person concerned is still a child, subject to satisfactory proof of paternity. But there is no equivalent route to register an adult. In 2009, the Lord Brett for the Government, acknowledging that the proposal for change had the support of all benches, said

> "We accept that those who were born illegitimately to British citizen fathers were at a disadvantage compared with those whose parents were married. As such, although we are unable to accept the amendment, the Government will consider further the points made in today's debate"[9]

The points could usefully be considered now.

Repeal of Earned citizenship provisions

ILPA recalls the welcome announcement by the Home Secretary in her speech on 5 November 2010 that

> "We will not implement Labour's policy of earned citizenship, which was too complicated, bureaucratic and, in the end, ineffective."

The provisions are indeed too complicated. They suffered from the policy to which they were to have given effect changing while the Borders Citizenship and Immigration Bill was before parliament. They are not capable of being implemented by a government of any political hue. ILPA urges that the opportunity be taken in the immigration bill shortly to be laid before parliament to repeal these provisions.

[9] Ibid. Col 1093.