THE OVERSEAS TERRITORIES WHITE PAPER AND PROTOCOL 4 - a response from the Immigration Law Practitioners' Association

In March 1999 the Government published a White Paper on the Overseas Territories and in this paper the Immigration Law Practitioners' Association (ILPA) responds to the parts of it impacting upon immigration and nationality policy and the prospective ratification and incorporation into domestic law of Protocol 4 to the European Convention on Human Rights.

- ILPA, NOVEMBER 1999

1. INTRODUCTION

1.1 On 16 March 1999 the Secretary of State for the Foreign and Commonwealth Office presented to Parliament a White Paper entitled *Partnership for Progress and Prosperity – Britain and the Overseas Territories* (Cm 4264). On the same day the Foreign Secretary, Robin Cook, made a statement to the House of Commons introducing the White Paper. He explained that the White Paper was being published following the completion of a major review of the relationship between the UK and the remaining dependent territories. He stated there had been wide consultation during the review period and that the governments of the various dependent territories expressed no desire for independence. He said they are "energetic, self-governing, and anything but dependent" and therefore legislation will rename them "UK Overseas Territories" and that terminology in practice will be used right away.

1.2 In respect of citizenship, the Foreign Secretary in his statement said this:

> "There is a strong sense of grievance in many Overseas Territories that their right of abode in Britain was taken away from them, and that is felt particularly strongly in St. Helena. The residents of the Overseas Territories are proud of their connection with Britain, but often puzzled that Britain appears not to be proud to have them as British citizens.
>
> I can announce today that we will be offering British citizenship to all those residents of the Overseas Territories who wish to take it up.

> This improved status will be welcome throughout the Overseas Territories. It will give its residents the right to travel freely throughout the European Union, and will enable their young people to support themselves through work experience while they study in Britain.
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> We do not expect this change in status to result in any substantial number taking up permanent residence in the United Kingdom. 70% of the citizens of the Overseas Territories have a higher per capita income than the United Kingdom and their residents have no incentive to leave on a permanent basis.
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> The offer of right of abode will be on a non-reciprocal basis. The unanimous view in consultations with the Overseas Territories was that they were anxious that their small communities did not have the capacity to absorb uncontrolled numbers of new residents. Our decision on this follows the precedent set by Gibraltar and the Falkland Islands whose existing right of abode is also non-reciprocal.
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> We are not extending the offer of citizenship to British Dependent Territories Citizens who were associated with the British Indian Ocean Territory and the Sovereign base areas in Cyprus, all of whom have alternative nationality".

1.3 The Foreign Secretary's statement further explains that one of the objectives of the review was to ensure that the UK "could discharge its international responsibilities" in respect of the Overseas Territories and the statement confirms the White Paper's commitment to this objective. The statement refers to one of the international responsibilities as "the best international standards in financial regulation" and this is aimed, for example, at the eradication of money laundering. This falls outside ILPA's area of interest. The second concerns human rights. The Foreign Secretary said the Overseas Territories

> ".....must abide by the same standards of human rights and good governance that we demand of ourselves. We require our Overseas Territories to maintain legislation that fully complies with the European Convention on Human Rights, and the International Convention on Civil and Political Rights, to which the United Kingdom is a party".

1.4 The White Paper is accordingly predicated upon the *quid pro quo* for the extension of British citizenship to the Overseas Territories being compliance within

those Territories with the European Convention on Human Rights (ECHR) and International Covenant on Civil and Political Rights (ICCPR). The Foreign Secretary might have gone on to say, but did not, that the ECHR has been declared by the UK Government at various times since 23 October 1953 (the date of the first declaration) to extend to virtually all the remaining Overseas Territories and this is the legal imperative underlying the *quid pro quo*.

1.5 The UK Government's commitment to human rights in general and the ECHR in particular is not only to respect the rights and freedoms already ratified but, if possible, to extend the catalogue of rights and freedoms by ratifying other human rights instruments, notably Protocol 4 to the ECHR.

1.6 In the White Paper *Rights Brought Home: The Human Rights Bill* (October 1997, Cm 3782) the Government said Protocol 4 had not been ratified "because of concerns about what is the exact extent of the obligation regarding a right of entry" (at paragraph 4.10) but that Protocol 4 contains "important rights" and should be ratified "if the potential conflicts with our domestic laws can be resolved" (paragraph 4.11).

1.7 On 3 March 1999 the Home Secretary said in answer to a parliamentary question:

> "We intend to ratify the Seventh Protocol to the European Convention on Human Rights (ECHR) as soon as Parliament removes inconsistencies in our family law provisions. We will seek a suitable opportunity to propose those changes. *We are also considering whether legislation is necessary to enable the United Kingdom to ratify the Fourth Protocol to the ECHR*" (Hansard, 3 March 1999, col. 756; emphasis supplied).

1.8 The extension of British citizenship to the Overseas Territories is undoubtedly a major step in facilitating ratification of Protocol 4 and therefore the Government's objective to ratify it is high in mind in ILPA's response to the White Paper. It makes it appropriate for ILPA not to confine itself to a direct response to the White Paper's

proposals but, additionally, to respond more broadly to the desired ratification of Protocol 4. The title of this paper reflects this.

2. THE WHITE PAPER AND BDTCs

2.1 In paragraph 3.7 of the White Paper it is stated that the Government has decided that British citizenship – and so the right of abode – should be offered to those British Dependent Territories citizens (BDTCs) who do not already have British citizenship and who want to acquire it. ILPA welcomes this decision but is concerned as to the manner in which the task is to be carried out legislatively. The legislation in respect of Gibraltar simply gives Gibraltar's BDTCs an entitlement to register as British citizens whereas in respect of the Falkland Islands the conferment of British citizenship upon the BDTCs of that dependent territory was automatic. ILPA recommends the Government should, applying the principle underlying the Gibraltar legislation, provide for existing BDTCs to be registered on application. This is in keeping with the consultation process concluding British citizenship should be *offered* (which we take to be different from *imposed*). ILPA further recommends the Government should, applying the principle underlying the Falklands legislation, provide for all persons becoming BDTCs after commencement of the proposed law to become British citizens automatically at the time of birth, adoption, registration or naturalisation. In any of these circumstances a person should only be a British citizen by descent if s/he is a BDTC by descent. This would be in line with the Falklands legislation (the legislation in respect of Gibraltar treats all those registered under it as British citizens by descent only, but equivalent treatment under the proposals could not be justified).

2.2 ILPA is concerned that a regime of dual citizenship (dual British citizens/BDTCs) will further complicate British nationality law but acknowledges this will be necessary at first. Not all BDTCs initially offered British citizenship may wish to avail themselves of that offer so British Dependent Territories citizenship cannot be abolished from the start. Further, it will take time for the local laws of the Overseas Territories to be re-written to refer to British citizens rather than BDTCs. However,

the perpetuation of British Dependent Territories citizenship should be seen to be strictly transitional.

3. THE EXCLUDED BDTCs

3.1 The generality of paragraph 3.7 of the White Paper is subject to paragraphs 3.12 and 3.13. Paragraph 3.12 concerns British Overseas citizens and we refer to these below. Paragraph 3.13 provides:

> "Nor does the Government propose to extend the offer of citizenship to British Dependent Territories citizens who owe their status to their association with the Sovereign Base Areas in Cyprus or with the British Indian Ocean Territory. Both are special cases. British usage of these territories is defence-related".

In the Foreign Secretary's statement of 16 March 1999 it was said the excluded BDTCs have "alternative nationality" in any event.

3.2 ILPA is aware that the exclusion in relation to the British Indian Ocean Territory (BIOT) affects a community of approximately 1,000 to 1,500 known as the Ilois. The Ilois were residing on the Chagos Islands which were then detached from the Colony of Mauritius three years prior to the independence of Mauritius in 1968 and those Islands became part of the newly constituted dependent territory of BIOT. The Ilois were removed from the Chagos Islands preparatory to the UK leasing the Islands to the USA for defence purposes. The community was removed to Mauritius where they remain today. Some are also in the Seychelles.

3.3 The majority of the Ilois are BDTCs because although the legislative arrangements for the independence of Mauritius did not deny them citizenship of the newly independent country, neither did those arrangements provide for the automatic loss of citizenship of the UK and Colonies. So the community comprises a mixture of BDTCs by birth and by descent.

3.4 A representative group of Ilois are currently challenging the legality of their continued exclusion from BIOT; they have been granted permission to apply for judicial review in the English High Court and a full hearing of the application is fixed for March 2000. If they succeed in any measure, they will be re-establishing themselves in BIOT (even if only on the outer islands).

3.5 The Ilois apart, it is believed the number of BDTCs affected by the exclusion would be very small. In respect of both the Sovereign Base Areas of Cyprus and BIOT any woman associated with either defence facility is more likely than not to give birth outside the colonial jurisdiction and even in the isolated case where the birth occurs within it, under Section 15(1) of the British Nationality Act 1981 the child would only become a BDTC in respect of a birth since 1 January 1983 if either parent is a BDTC or settled there. In practice, the few persons concerned are likely to be Cypriot or US citizens.

3.6 We suggest the exclusion of BDTCs from the general proposal cannot be justified on the basis that British citizenship would otherwise be extended to significant numbers of people having only a connection of military convenience with either territory.

3.7 We further suggest it cannot be right to justify the discrepant treatment on the basis that the excluded BDTCs have alternative nationality, because some of the BDTCs from the Overseas Territories to which the proposals do apply already have a non-British nationality (e.g. BDTCs from Montserrat having US citizenship) and in any event all will become dual BDTCs/British citizens under the proposed legislation. Moreover, British nationality law since 1 January 1949 has fully accepted the policy of multiple nationality - a policy increasingly accepted in international law.

3.8 ILPA therefore opposes the exclusions. British citizenship should be extended to all BDTCs equally further to the principles of clarity and certainty and because

exceptions based on the avoidance of multiple nationality would be contrary to policy and could not be applied uniformly. Also, to provide for exceptions might put the UK in breach of Protocol 4 (once ratified) and, in any event, the only community affected by the exclusion is the Ilois, who wish not to go to the UK but to return to BIOT.

4. SOME IMMEDIATE ISSUES UNDER PROTOCOL 4

4.1 The demand of Article 3(2) of Protocol 4 - that no one shall be deprived of the right to enter the State of which s/he is a national - should apply, in our view, not only to British citizens but also to BDTCs, British Overseas citizens (BOCs), British Nationals (Overseas) (BN(O)s), British subjects under the Act and British Protected Persons (BPPs). At common law BPPs were not British nationals but protected aliens, though in several modern statutes UK nationals are defined to include BPPs. In *Manjit Kaur* and *Hung*, pending before the ECJ on references from the High Court, a BOC and BN(O), respectively, are arguing they are Union citizens under Community law. The application of Protocol 4 in ECJ jurisprudence in such cases puts further pressure on the UK to ratify Protocol 4 and, in so doing, to define its nationals for Article 3(2) purposes consistently with our international obligations.

4.2 Apart from the issue of who is a British national for Protocol 4 purposes, there is the question of whether Protocol 4 requires every national to have the right to enter the UK or whether only those with no other effective nationality need be admitted. There is also the question of whether the 'right to enter' protected by Protocol 4 equates to the right of abode or whether facilitated admission under the Immigration Rules would suffice. A refusal under the Immigration Rules usually means there can be a merits review of that refusal before the independent immigration appellate authorities.

4.3 As for the meaning of 'British nationals' for Protocol 4 purposes, ILPA takes the view that the contemporary reality is that all the remaining categories referred to in paragraph 4.1, above, are categories of British nationality. It would also be in keeping

with the broad protective purposes of Article 3(2) not to construe British nationals restrictively. ILPA also argues that all those who are British nationals accordingly have a right to enter protected by Article 3(2); at the very least, those with no other, *effective*, nationality are within the provision. ILPA further argues that those within the provision should have the right of abode under domestic law. If, however, provision is only made within the Immigration Rules, the terms of the Rules could not be such as to undermine the generality of Article 3(2) and could not be inconsistent with the rights and freedoms of the Convention as a whole. Admission would therefore have to be unconditional save, perhaps, as to having no other effective nationality.

5. BDTCs AND PROTOCOL 4

5.1 BDTCs are British nationals within Article 3(2) and the proposed extension to them of British citizenship is a quantum leap towards consistency with Protocol 4. The only remaining issue concerns the Ilois and some others who would be affected by the White Paper's paragraph 3.13 exclusion (about which we have already commented in paragraph 3, above).

5.2 Having alternative nationality would not be sufficient to exclude the Ilois from Protocol 4 because notwithstanding their nationality of Mauritius or Seychelles, they are ethnically and culturally different, had such nationality imposed upon them, have failed naturally to integrate during the last 30 years, and are seeking to re-establish in BIOT thereby again being on a par with other BDTCs established in an Overseas Territory of their own.

5.3 It is therefore ILPA's view that at least in respect of the Ilois, the exceptions to the generality of the White Paper's citizenship proposals would leave the Government vulnerable to a Protocol 4 challenge.

6. BOCs AND THE WHITE PAPER

6.1 Paragraph 3.12 of the White Paper provides:

> "We do not intend to offer British citizenship to British Overseas Citizens. Many have access to or have acquired dual nationality. Many have access to the UK through our voucher scheme. Moreover we have particular responsibility to people in areas for which we have sovereign responsibility".

6.2 ILPA has already observed that multiple nationality is fully accepted in domestic law and cannot, *per se*, be a ground on which to exclude our own nationals. Further, ILPA opposes the suggestion that there is a lesser responsibility towards British nationals who acquired their nationality by virtue of a connection with a territory that is no longer within sovereignty.

6.3 ILPA recommends that the proposed legislation should also extend British citizenship to at least those BOCs in respect of whom the UK would have an obligation under Protocol 4.

7. BOCs AND PROTOCOL 4

7.1 In practice the issue regarding BOCs and Protocol 4 concerns the dual BOC/Malaysian population (of perhaps around 1 million) and the ethnically Asian BOCs with no other nationality whose British status originates from former British colonies, protectorates and protected states in East and Southern Africa. Even if the Malaysian BOCs fall outside Article 3(2) because they have another, effective, nationality, the Asian BOCs with no other nationality pose an insuperable difficulty for the Government. Only the special voucher scheme facilitates their access to the UK, but ILPA is confident that because it is narrow and discriminatory the scheme as presently in force falls substantially short of the sort of Immigration Rule category envisaged in paragraph 4.3 above; at present it is not even a proper category of the Rules. Its exclusion from the scope of the immigration appeals system exacerbates its shortcomings.

7.2 There are probably about 150,000 to 200,000 BOCs with no other, effective, nationality. Reliable figures are not available, though, and some put the number at less than 100,000. ILPA proposes that these BOCs should be granted British citizenship forthwith, along with all BDTCs. At the very least, to comply with Protocol 4 they should be granted, on application, indefinite leave to enter the UK under the Immigration Rules (though if it is established in *Manjit Kaur* - see paragraph 4.1 - that a BOC with no other nationality is a Union citizen, indefinite leave will not be good enough as Union citizens have a right to enter a Member State and so do not require leave).

8. BRITISH NATIONALS (OVERSEAS)

8.1 Approximately 3.4 million people became BN(O)s under the provisions of the Hong Kong (British Nationality) Order 1986/948 up to the point of the Colony's return to China. Of these, about 8,000 to 10,000 are not ethnically Chinese and therefore do not additionally have Chinese nationality under the laws of the PRC. These ethnic minorities have no other, effective, nationality. In respect of them the UK might point to the provisions of the British Nationality (Hong Kong) Act 1997, which provides for certain British nationals with no other nationality to be registered as British citizens but, again, ILPA has grave concerns as to whether the coverage provided by that statute could be sufficient for Protocol 4 purposes. In practice the Secretary of State has through the Ethnic Minorities Unit of the British Consulate General, Hong Kong SAR, refused many applications. The most common ground of refusal by far is that the applicant has not demonstrated that s/he was settled in Hong Kong immediately before 4 February 1997 and/or on the date of application. A number of Judicial Review applications have been brought in respect of the way in which the Secretary of State is applying the law on ordinary residence under this Act. It is complained his interpretation is too strict, but in the present context the real difficulty for the UK is that the extension of British citizenship to these otherwise stateless British nationals is heavily conditional.

8.2 Where BN(O)s with no other, effective, nationality have emigrated to countries such as Australia, Canada, the UK and Singapore and have settled there and are eligible to apply for nationality of those countries, the rationale of the ordinary residence requirements of the 1997 statute may make sense, but there are many BN(O)s who are not in that position yet are excluded from the scope of the Act's provisions. To this extent ILPA takes the view the UK would be in violation of Protocol 4 if it ratifies that instrument without making better provision in respect of the 8 –10,000 stateless BN(O)s.

9. BRITISH SUBJECTS

9.1 British subjects under Section 31 of the 1981 Act (those with Irish nationality) are not in issue for present purposes as by virtue of their alternative nationality they are entitled to enter the UK under domestic laws concerning the Common Travel Area as well as under Community law. As for the rest, by definition (Section 35) they have no other nationality or citizenship and ILPA takes the view it would be indefensible to exclude them from Article 3(2) of Protocol 4. By definition the bulk of British subjects will have been born prior to 1949 and therefore are now over 50 years of age. The extension to them of British citizenship by descent or even otherwise than by descent is not likely to create a pool of British citizens outside the UK.

10. BRITISH PROTECTED PERSONS

10.1 ILPA reiterates its view that BPPs cannot rightly be excluded because traditionally they are aliens in common law. For many years they have in practice been dealt with on the same footing as BOCs (as 'UKPHs' - UK passport holders). They, too, are by definition otherwise stateless (Article 10 of Order 1982/1070).

11. CONCLUSION

11.1 ILPA warmly welcomes the proposal to extend British citizenship to the Overseas Territories and urges the necessary legislation to be adopted at the first possible opportunity.

11.2 ILPA urges the Government to extend British citizenship to *all* BDTCs and also to all other British nationals at least where they have no other, effective, nationality. This would enable the UK to ratify Protocol 4. The British citizenship extended to such BOCs, BN(O)s, British subjects and BPPs could be specified to be British citizenship by descent.

11.3 ILPA considers that a Government committed to respect for human rights cannot further delay ratification of Protocol 4 and certainly cannot delay until the present populations of BOCs, BN(O)s, British subjects and BPPs have shrunk to extinction, as they are programmed by the Act to do.

12. SUMMARY OF KEY POINTS

12.1 The proposals of the White Paper on the Overseas Territories are linked to the incorporation of the European Convention on Human Rights and the Government's declared desire to ratify Protocol 4 to that Convention.

12.2 The proposal to extend British citizenship to BDTCs is warmly welcomed.

12.3 The proposal should be implemented by registering, on application, any existing BDTC as a British citizen and by the automatic conferment of British citizenship on those born, adopted, registered or naturalised after commencement. A person should not be a British citizen by descent in circumstances in which s/he would not be a BDTC by descent.

12.4 British Dependent Territories citizenship should only be perpetuated transitionally.

12.5 ILPA opposes the White Paper's intention to exclude certain BDTCs from the generality of the proposals. The offer of British citizenship should be extended to all BDTCs equally

- further to the principles of clarity and certainty;
- because exceptions based on multiple nationality could not be applied uniformly;
- because for 50 years the UK has fully accepted the policy of multiple nationality;
- because to provide for exceptions may be a breach of Protocol 4; and
- because the only community affected by the exclusion are the Ilois, who wish not to go to the UK but to return to the British Indian Ocean Territory.

12.6 As for the meaning of 'British nationals' for Protocol 4 purposes, ILPA takes the view that the contemporary reality is that BDTCs, BOCs, BN(O)s, British subjects and BPPs are all categories of British nationality.

12.7 ILPA argues that all those who are British nationals accordingly have a right to enter protected by Article 3(2) but at the very least those with no other, effective, nationality are within the provision.

12.8 ILPA further argues that those within the provision should have the right of abode under domestic law but (subject to consistency with Community law - see paragraph 7.2) they should at least qualify for indefinite leave under the Immigration Rules (unconditionally save, perhaps, as to having no other, effective, nationality).

12.9 Regarding BDTCs, ILPA argues that in the event of Protocol 4 being ratified, the Government would be vulnerable to challenge if certain BDTCs are excluded from the generality of the White Paper's citizenship proposals.

12.10 Regarding BOCs, ILPA proposes those with no other, effective, nationality should be granted British citizenship forthwith, along with all the BDTCs (granting, as an alternative, indefinite leave may put domestic law in conflict with Community law).

12.11 Regarding BN(O)s, ILPA takes the view the UK would be in violation of Protocol 4 if it ratifies that instrument without giving the BN(O)s who are otherwise stateless (from Hong Kong's ethnic minorities) better access to British citizenship.

12.12 Regarding British subjects under the Act, save for some with Irish nationality they are by statutory definition persons who are otherwise stateless. ILPA takes the view it would be indefensible to exclude these few from Article 3(2) of Protocol 4.

12.13 Regarding BPPs, who are also by definition otherwise stateless, ILPA proposes they cannot rightly be excluded from Article 3(2) by reliance on their being aliens at common law.