Immigration Bill House of Lords Third Reading 6 May 2014: Briefing to amendments tabled from the Immigration Law Practitioners' Association

The Immigration Law Practitioners' Association (ILPA) is a registered charity and 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.
In this briefing we identify matters to which the House may wish to return on third reading, in line with the rules on what can be discussed on third reading. We have many concerns beyond the matters set out below and should be happy to discuss ways of returning to a wider range of matters at Third Reading.

ILPA has already produced a preliminary briefing for third reading. It is available at http://www.ilpa.org.uk/resources.php/26301/ilpa-preliminary-briefing-for-third-reading-of-the-immigration-bill-1-may-2014

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Clause 1 Removal of Persons unlawfully in the United Kingdom

GOVERNMENT AMENDMENT 1

Purpose

Limits the scope of the regulation-making power in clause 1 to the removal of family members would be the time period (if as now, then subsequent to the removal of the principal) during which a family member could be removed under the section and the service of a notice of removal under the section, the two matters on the face of the Bill and thus addresses

Briefing

The Lord Taylor of Holbeach indicated at Report:

> *Further to the D*[elegated] *P*[owers and] *R*[egulatory] *R*[eform] *C*[ommittee]*'s 24th report… we will make a further amendment at Third Reading to take out the reference to "in particular" from line 27 [now page 3 line 5] so that it will be completely clear that the scope of the regulations cannot extend beyond these two provisions.* (1 Apr 2014: Column 852)

The Committee said in its 24th report

> 10. Despite our recommendation, the powers under section 10(6) of the Immigration and Asylum Act 1999 remain subject to the negative procedure. The Government

explain that they have not accepted our recommendation because the tabled amendment will modify the Secretary of State's power to make regulations to limit it to procedural matters. We are not convinced by this description of the effect of the Government's amendment. Its effect is solely to amend the paragraphs which give examples of the kind of provisions which may "in particular" be included in the regulations. It does not alter the broad scope of the powers conferred by section 10(6) which allow the Secretary of State to make further provision about the removal of family members both under section 10 and any other provision of the Immigration Acts. **Accordingly we remain of the view that the delegated powers conferred by section 10(6) should be subject to the affirmative procedure.**[1]

Clause 15 Right of appeal to First-tier Tribunal

GOVERNMENT AMENDMENT 2

Purpose

To limit the situations in which the Secretary of State has power to consent to a matter's being considered by the Tribunal to matters within the Tribunal's jurisdiction.

Briefing

The Minister says in his letter of 29 April 2014

> *…we agree with the arguments put forward by many peers that the power to give or withhold consent to a new matter being considered by the Tribunal is drafted too broadly. As currently drafted, a "new matter" can include something outside the Tribunal's jurisdiction. The Government has tabled an amendment…to clarify the definition of a "new matter" limiting the power to give consent to matters which are within the Tribunal's jurisdiction."*

Clarify is the appropriate word. This appears to be a formal and wholly meaningless amendment. Consent to the Tribunal's considering a matter not within its jurisdiction would be of no effect, for the Tribunal could not consider the matter. Despite the Minister's assertion in his letter of 29th April 2014 to Baroness Smith of Basildon that the Government acknowledges that the power to withhold consent is too widely drawn, the amendment in no way limits the circumstances in which the Secretary of State can prevent the Tribunal considering a matter which could affect the outcome of the appeal.

There are two options. To amend the Government amendment at Third Reading, probably by way of a manuscript amendment, or to accept the amendment at third reading and return to the matter in the Commons. One option would be:

> Replace the words "to "and" in line 13" in the amendment with
>
> "and the Tribunal has determined that it is in the interests of justice that it invite the Secretary of State to consider the matter before it is considered by the Tribunal"

[1] Available at http://www.publications.parliament.uk/pa/ld201314/ldselect/lddelreg/159/15903.htm#a2

The Government says in its letter of 29 April 2014 to Baroness Smith of Basildon that it will publish detailed guidance as to when the consent should be given. The House might want to ask for the opportunity to debate that guidance. This may increase transparency but there are no guarantees as to what the guidance will say and the Government's proposed residence test for legal aid will mean that many of those affected by the Secretary of State's withholding consent will not be eligible for legal aid to challenge her decision to do so as not in accordance with the guidance. Those who would not be eligible for legal aid will in very many cases e unable to afford a judicial review, where they are at risk of paying the Government's costs if they lose.

The Minister, Lord Wallace of Tankerness, promised (1 April 2014, col 893) to reflect on Amendment 10, laid at report in the names of the Baroness Berridge and the Lord Avebury ((1 April 2014, col 881), which gave effect to the recommendation of the Joint Committee on Human Rights in its Eighth report[2]

> 46…. **In our view, the Tribunal itself, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new matter raised on an appeal. We would expect the Tribunal, in the exercise of its inherent power to prevent abuse of its own process, to permit a new matter to be raised only if there were good reasons for not raising the matter before the Secretary of State.**
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> 47. **In view of the admitted novelty of new s. 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002, inserted by clause 11 …we recommend that the Government amends the Bill to achieve its purpose in a way which does not appear to make the scope of the tribunal's jurisdiction depend on the consent of one of the parties to the appeal before it, but leaves to the Tribunal the question of whether or not it may consider a new matter.**

The Select Committee on the constitution also criticised the provision in its Sixth Report[3] and the Minister's promise to reflect followed a debate in which powerful speeches were made in support of the amendment:

Baroness Berridge:

> *The scope of the tribunal's jurisdiction is dependent on the consent of the respondent to the appeal. If I am counsel in the case… I must turn away from the judge towards my opponent and start making submissions, pleading for consent for the new matter to be raised. That would be a most unusual situation. That was conceded by the Government in a response to a question by the Joint Committee, in which they stated,*
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> > *"as far as the Home Office is aware there are no other similar provisions in other statutory contexts".*
>
> *This would be new law.*

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[2] Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (8th Report, Session 2013-14, HL Paper 102, HC 935), available at http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/102/10206.htm#a9

[3] Paragraphs 6 and 7, available at http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/102/10206.htm#a9

There has been one other attempt by the Government to have control over the way the court operates when they are party to proceedings. As your Lordships may remember, in the Justice and Security Bill the Government, as party to the proceedings, tried to determine whether a closed material procedure would be used. This Chamber said that that was a matter for the judge to determine, and the Government conceded the point.
That opposing sides require an independent adjudicator in charge of proceedings is a fundamental common law principle. (1 April 2014, cols 883 -884)

and

"…a matter may remain before the tribunal solely because a barrister makes every effort to avoid being at the hearing and cannot get hold of the Home Office to get a fresh decision made, and yet the tribunal is not allowed to take that conduct into account at all …

*I also ask the Minister to consider the resources that will have to be put behind presenting officers and barristers, who are often very junior. If consent has to be given on the day of the hearing you are going to have to get hold of the Home Office to get instructions on whether to give consent there and then, otherwise we can have yet another thing clogging up the system. …" (*cols 894-5)

Lord Avebury

It is not suggested that the tribunal has allowed the abuse of its own process in the past, or that it has treated the Secretary of State unfairly, or that the existing process is inefficient. What can happen not infrequently, however, is that the Secretary of State withdraws her decision, saying that she wishes to reconsider the case, and then returns several months later with a new decision very similar to the previous one, wasting the time and money of both the appellant and the tribunal. The Tribunal Procedure Committee is consulting on a rule for the First-tier Tribunal similar to the one that prevents the Secretary of State from putting a stop to an appeal in the Upper Tribunal by withdrawing her decision. The Immigration Law Practitioners' Association suspects that the subsection we seek to amend is designed to thwart such a change. (col 885)

Lord Brown of Eaton-under-Heywood

"I am…strongly against Clause 15(5)…This provision seems to me to represent a bridge too far. The noble Baroness, Lady Berridge, has already clearly explained the basic objections to this provision and has noted that serious reservations have been expressed about it: expressed twice now by the Joint Committee on Human Rights and yet more recently by the Select Committee on the Constitution. …. Suffice it to say that it seems intrinsically objectionable for the Government, one of the parties before the tribunal on the appeal, themselves to have the last word with regard to what the tribunal may or may not consider.
By all means let the Government object to a new ground of appeal or some new reason for the appellant seeking to stay if they are genuinely unable to deal with it or, indeed, if they are genuinely unable to reach and declare their own decision on it by the time it is raised. Indeed, the tribunal may well hold that the Government are entitled to an adjournment if, in truth, they are prejudiced by the point being taken late. However, it is quite another thing to say, as Clause 15(5) does, that the Government can deny the tribunal the right to deal with a new matter on the appeal before it, and thus force the appellant—assuming that he wishes to pursue the point—to start all over again, with all the delay and, as we have heard, the prohibitive expense that that would necessarily involve. That, I respectfully repeat, goes altogether too far. Your Lordships should prefer instead wording which—if not here in perfect formulation—is in some way akin to that here proposed, which, heaven knows, is a modest enough power to confer on the tribunal itself."(col 886)

Lord Pannick

> *I simply cannot understand why the Secretary of State does not trust the tribunal to decide on the application of the criteria which Parliament sees fit to lay down.* (col 887)

Lord Woolf

> *…the transfer from the tribunal that has jurisdiction to deal with matters of this sort… to one of the parties of the proceedings, is just totally and utterly contrary to principle …. It would be a very undesirable precedent indeed to create a situation where one of the parties to the proceedings has in effect to give its consent to the other party doing something that justice may require. In addition, the suggestion that something should go back to the beginning is just out of accord with what is now the practice in the courts. …for years, in my experience, the courts, when a new point has arisen, have taken the view that it is more practical and more in accord with common sense for the tribunal that is dealing with the matter to continue to deal with the new matter, if it thinks that it is right to do so, rather than to send it back to the Secretary of State… discretion is exercised by the court to save everybody's time and money by dealing with it themselves. (cols 888-9)*

Lord Hope of Craighead

> **…** *[*Baroness Berridge*] made a very valuable point when she referred to the issue as raising an issue of constitutional principle, because it goes right back to the formation and foundations of the rule of law, where one of the two basic principles is that no man should be a judge in his own court. … it is absolutely basic rule of law teaching, and it acquires particular force as a principle when the party that one is talking about is the Executive. One is taught that there should be a separation of powers between the judiciary and the Executive, and one can think of many countries that one would not wish to live in where the Executive are able to dictate to the courts whether or not they will entertain an argument. …*
>
> *As for practice in the courts… it is quite common in judicial review for fresh grounds to call for a fresh decision in the course of the same process. The courts do not as a matter of practice send the whole thing back to the beginning...*
>
> *The way of doing it to fit in with the constitutional principle, which surely a Government who believe in the rule of law would wish to uphold, is to put the test that the Secretary of State would wish the tribunals to apply into the Bill at the appropriate standard and then, of course, the Secretary of State can be represented and present the argument to the effect that that test is not being satisfied. So I respectfully suggest that it would be dangerous to create what is plainly a precedent, and the wrong kind of precedent to set" (cols 889-890)*

Baroness Smith of Basildon

> *"the idea that the scope of the tribunal's jurisdiction should depend on the consent of one of the parties to the appeal is something that offends a great many noble Lords and their sense of justice and fairness* (col 891)

The Lord Wallace said in response **"**the principal reason why the Government have proposed this measure is that we do not believe it is right for the tribunal to be the primary decision-maker" (col 891). But no one has argued with that. They have simply asked that when a new matter is raised it should be for the Tribunal, rather than the Secretary of State, to determine that it is necessary for the matter to go back with the Secretary of State. The Secretary of State

if free to address the tribunal on the matter and it seems unlikely that her reasonable request for an adjournment would be refused. She has not produced evidence to suggest that reasonable requests have been refused in the past. The person who would be consenting would be the presenting officer and the less experienced Presenting Officers, whether incentivised by Waitrose vouchers or not, are in our experience generally wary of making anything that might be regarded as a concession and of not standing on any power that the Secretary of State has. We are aware of no letters on the point. It seems appropriate that the matter be raised again, as was indicated would be proper (col 894) at Third Reading.

Before Clause 66 and Schedule 9

AMENDMENTS 3 and 5 in the names of Lord Avebury and Lord Taylor of Holbeach NEW CLAUSE *Persons unable to acquire citizenship: natural father not married to mother*

Purpose

Amendment 3 To provide for persons born before 1 July 2006 to fathers who are British citizens otherwise than by descent to acquire British citizenship by registration subject to proof of paternity.

Amendment 5 :

- Provides that whether a person registering is a British citizen "by descent or otherwise than by descent" (i.e. able to pass on their British nationality to their children born overseas or not) will depend on what they would have been had their fathers been married to their mothers;
- Makes provision for registration under the new sections 4E to 4I inserted into the British Nationality Act by the new clause to be subject to a good character test;
- Ensures that the provisions of the British Nationality (General) Regulations 2003 as to the means of signalling parental consent operate for the purposes of signalling such consent under these paragraphs
- Ensures that the amendment to the British Nationality (General) Regulations 2003 can be amended by the order-making powers that operate for use of the Act as a whole

Briefing

Children born outside the UK to British fathers who are not married to their non-British mothers have not been able to inherit their father's British citizenship. Since 1983, this also applies to those born in the UK to such fathers and to a mother who was not British nor settled in the UK. Before 1983, a child born in the UK was automatically born a British citizen. The anomaly was addressed for the future by section 9 of the Nationality, Immigration and Asylum Act 2002, inserting section 4C into the British Nationality Act 1981, which came into force on 1 July 2006. But that section applies only to children born on or after 1 July 2006.

The new clause would allow those born to British fathers not married to their mothers and for that reason alone, not British citizens, to register as British citizens. For those born in the UK, the new clause thus assists those born after 1983 and before 1 July 2006. For those born outside the UK to fathers who are British citizens otherwise than by descent (i.e. able to pass on their nationality to their children born outside the UK) it would assist all those born before 1 July 2006 still living.

International conventions

We can derive guidance on what is or is not internationally acceptable from the 1979 Convention on the Elimination of All forms of Discrimination against Women.[4] This Convention was ratified by the UK on 7 April 1986. Article 9(2) states:

> "9 (2) States Parties shall grant women equal rights with men with respect to the nationality of their children."

The UK, given that it did not give men equal rights, was compelled to enter a reservation to Article 9:

> *'The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. 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.'*

The present day effects of historical discrimination go beyond what is 'temporary or transitional'. The discrimination against women was finally corrected in section 4C of the Borders, Citizenship and Immigration Act 2009; this discrimination against men has still only been corrected for their children born after 1 July 2006.

Proof of paternity

The means of showing this are set out in The British Nationality (Proof of Paternity) Regulations 2006, SI 2006/1496:

> 2. The following requirements are prescribed as to proof of paternity for the purposes of section 50(9A)(c) of the British Nationality Act 1981—
>
> (a) the person must be named as the father of the child in a birth certificate issued within one year of the date of the child's birth; or
>
> (b) the person must satisfy the Secretary of State that he is the father of the child.
>
> 3. The Secretary of State may determine whether a person is the father of a child for the purpose of regulation 2(b), and for this purpose the Secretary of State may have regard to any evidence which he considers to be relevant, including, but not limited to—
>
> (a) DNA test reports; and
>
> (b) court orders.

These provisions to end discrimination for the future have worked successfully.

About the amendment

Nationality law is complex and has a very long shelf life – there are persons whose nationality at birth was determined by the provisions of the British Nationality and Status of Aliens Act 1914,

[4] Signed 18 December 1979. United Nations 1249 UNTS 13. In force 3 September 1981.

others whose nationality was determined by the British Nationality Act 1948. Each amendment to nationality law necessitates complex transitional provisions.

These amendments are an important step towards eliminating the present day effects of historical discrimination in British nationality law on the grounds of legitimacy. They are not the final word, but Lord Avebury, who has made extraordinary progress on this matter in 2002 , 2006 and now, would perhaps not expect that. We make the following brief comments on the amendment.

The amendment includes all provisions under which a person's nationality status could have been affected by whether the parents were married.

Where parental consent is required where minors are registering, the provisions give the Secretary of State power to waive this, which will allow cases where the consent of a parent is being withheld unreasonably to be addressed.

The provisions of new section 4E (b) limit registration to persons who would be entitled to register under the sections 1(3), 3(2) and 3(5) and Schedule 2 paragraph 4 or 5 of the British Nationality Act 1981 were their fathers married to their mothers, with the effect that restrictions of registration under these provisions to minors are preserved. Anyone born prior to 25 April 1996 can no longer as of today benefit from this provision because they would now be an adult. The last date on which a person could be born and benefit from this provision is 30 June 2006, so the provision will completely cease to have effect 18 years from then, on 30 June 2024. In time the provisions will cease to have any effect (since they are unnecessary for persons born after 1 July 2006). The contrast with the provisions that address situations where a person would have acquired British citizenship automatically under the British Nationality Act 1981 were their father married to their mother in striking. Those latter provisions correct the effects of illegitimacy for all those born back to 1 January 1983 when the 1981 Act came into force.

In new section 4G, which addresses whether persons would have acquired British citizenship automatically under the British Nationality Act 1981 were their fathers married to their mothers a straightforward, in application if not in drafting, "but for" approach is taken. If, but for illegitimacy, the person would have been a British citizen under the British Nationality Act 1981 or the British Nationality (Falkland Islands) Act 1983 then they are able to register under the section. The approach is then repeated for the earlier legislation.

We question the need for 4J (2) which provides a power to have a different definition of natural father for purposes of these sections from that used for other cases. It may have been drafted with benevolent purpose, with the notion that because cases under these sections may be much older cases than those normally dealt with under The British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1496), there may be particular evidential problems, but given the breadth of the proof of paternity regulations we question what more could possibly be required. They say:

> *2. The following requirements are prescribed as to proof of paternity for the purposes of section 50(9A)(c) of the British Nationality Act 1981—*
>
> > *(a)the person must be named as the father of the child in a birth certificate issued within one year of the date of the child's birth; or .*

(b) the person must satisfy the Secretary of State that he is the father of the child.

3. The Secretary of State may determine whether a person is the father of a child for the purpose of regulation 2(b), and for this purpose the Secretary of State may have regard to any evidence which he considers to be relevant, including, but not limited to—

(a) DNA test reports; and

(b) court orders.

Thus they appear to provide all necessary flexibility.

It too some four years for section 4C of the British Nationality Act 2002 to come into force. When the Immigration, Asylum and nationality Act 2006 was going through parliament, Lord Avebury pressed Baroness Ashton of Upholland, who was taking the Bill through the House of Lords, on the delay. She said

> *'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.*
>
> *…If I can give specific times and dates, I will ensure that in some way or another I can put that into Hansard so that it has the clarity of having been said before Parliament. At this stage, the question is, I think, merely to do with pressure of time. However, I accept that, as the noble Lord rightly said, this is an important area which we need to resolve.* ' (Hansard House of Lords Report 19 Jan 2006 (Grand Committee: Column GC254-5)

To bring in section 4C involved deciding the way in which paternity should be proven and brining the British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1496) into force. There are no such complications this time and we should welcome an assurance that commencement will be rapid.

There is no fee to register under section 4C only the £80 citizenship ceremony fee is payable. The current Secretary of State got rid of the fee that was being charged[5], recognising arguments that fee was not appropriate in cases designed to address the effects of this discrimination on the grounds of legitimacy. We should welcome an assurance from the Minister that there will be no fee for registration under the new provisions, in line with the Home Secretary's approach.

The amendments do not address forms of nationality other than British citizenship, such as British overseas territories citizenship. We understand that this is because there would need to be discussions with the British overseas territories. We should welcome the Minister's assurance that he will bring the provisions to the attention of the administration of the overseas territories so that they can consider the question.

The amendments look only at persons entitled to register now. They thus do not address the present day effects of historical discrimination against earlier generations born illegitimate unless those persons are themselves in a position to register now. We look forward to coming back in the future to work on this and can only hope that when we do a draftsperson equally able to grapple with the complexities of British nationality law is assigned to work on it.

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5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301380/Master_Fees_Leaflet_Apr_2014.pdf

We do not consider that registration should be subject to a good character test. The aim of the provision is to correct discrimination against men as to their ability to transmit nationality to their children. Those born to fathers married to their mothers need not be persons of good character.

Clause 74 Orders and Regulations

GOVERNMENT AMENDMENT 4

Bank Accounts

Purpose
To provide that where the Treasury uses the powers vested it by Clause 43 to amend the provisions (clauses 40 to 42) on bank accounts so that it creates order-making powers, those order-making powers must be subject to the affirmative procedure.

Briefing
The amendment is unobjectionable.

Government Amendment 4

Title

Purpose

To amend the long title of the Bill to include reference to illegitimacy and deprivation of children, but not to guardians for trafficked children

Briefing

Amendments to the long title of a Bill are permissible as set out in Chapter 8[6] of the Companion to the Standing Orders at 8.54:

> 8.54 The House observes the following general rules regarding the admissibility of amendments:
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> - amendments must be relevant to the subject matter of the bill…
> - amendments proposed at committee or any other stage must not be inconsistent with a previous decision taken at that stage,…
>
> - amendments to the long title are not in order unless they are to rectify a mistake in the original title, to restate the title more clearly, or to reflect amendments to the bill which are relevant to the bill but not covered by the former long title;
> - clause headings, and headings placed above parts of the bill or above groups of clauses, are technically not part of the bill and so are not open to amendment. Punctuation is also technically not part of the bill.

[6] http://www.publications.parliament.uk/pa/ld/ldcomp/compso2013/10.htm

The Companion also provides that amendments to the long title be taken last in a marshalled list[7]. What we are less clear on is what precedents there are for a title to be amended at such a late stage and at a stage of the Bill several stages subsequent to that at which a Government amendment was first introduced.

We also question why the amendment makes reference to deprivation of citizenship in terms that have more to do with the clause that was voted out of the bill than the one that replaced it and why it makes no reference to guardians for trafficked children despite that being a new addition to the Bill. Will the Minister confirm that he considers the amendment on guardians for trafficked children to be within the existing long title?

When nationality amendments were raised at Public Bill Committee stage they were treated as being outwith the scope of the Bill. The then Minister said (col 178)

> ***Mr Harper: …****My hon. Friend the Member for Cambridge has raised with me before the issue that his amendment deals with, as he says, and he has thought of a very creative way of raising it in the Bill, given that to solve the problem substantively, as both he and the hon. Member for Hackney South and Shoreditch suggest, would actually be outside the scope of the Bill. …*

ILPA raised this point in our briefing on the deprivation amendment when it was tabled for Commons Report.

Now, given that the amendments on deprivation have at no stage been ruled out of order, we question whether the amendment is necessary. It would be helpful if the Minister would confirm that the proposed amendment to the title is in no way intended to pre-empt any attempt to reverse the changes made in the Lords on deprivation of citizenship and guardians for trafficked children when the Bill returns to the Commons.

A summary of the debates on deprivation of citizenship to date can be found in a post prepared for the European Network on Statelessness and available at http://www.statelessness.eu/blog/uk-house-lords-defeats-government-deprivation-citizenship-leading-statelessness

[7] 8.58