15 United Kingdom

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15.1 Introduction

British nationality law defines six types of legal nationality. These are British Citizenship (BC), British Overseas Territories Citizenship (BOTC – formerly called British Dependent Territories Citizenship or BDTC), British Overseas Citizenship (BOC), British Subjects (BS), British Protected Persons (BPP) and British Nationals (Overseas) (BNO). By far the largest category is British citizenship. This status is the only one which confers right of residence and entry in the UK, together with EEA freedom of movement.

The main mode of acquisition of British nationality has always been by birth to anyone (except foreign diplomats) on the national territory. This ancient ius soli rule had for seven centuries made a child of any parentage a national whether the parent was legally present or not, and had the important effect of assimilating into nationality the children of successive alien immigrants.

Since 1 January 1983, a child born on the national territory is a British citizen only if a parent is a citizen or 'settled' under immigration law, that is, having been given indefinite leave to remain without any conditions of stay. If a parent subsequently becomes a citizen or settled, the child has a right to registration. Foundlings on the national territory are citizens, and children born stateless there, or who have lived there for ten years, are entitled to registration.

The national territory now encompasses the United Kingdom itself and the Islands (Channel Islands and Isle of Man) together with the Overseas Territories (i.e., British colonies), whose inhabitants then living, perhaps 200,000 in all, if they were already British Overseas Territories Citizens, automatically became British citizens on 26 February 2002. It should be noted that all these territories have restrictive immigration laws, so that many inhabitants and their children do not qualify for either BOTC or British citizenship, not being 'settled' under local laws.

Whereas the ius soli rule originated in English common law, ius sanguinis rules have always been statutory. There has always been additional, exceptional provision for children born to some, but not all, Brit-

ish nationals outside the national territory. Today, a person classified as a 'citizen by descent' cannot automatically pass on British nationality to a child born outside the national territory except under certain conditions (see sect. 15.3).

At the end of 2004, a child born outside the national territory was a British citizen if either parent was a British citizen otherwise than by descent. An illegitimate child was a citizen only if the mother was a citizen: however an Act of 2002 will make an illegitimate child eligible through the father when sect. 9 comes into force. Meanwhile, the Home Secretary will usually register as a citizen a child whose parents are unmarried.

The Home Secretary has discretion to register any minor child of any parentage wherever born. Registration is the term used instead of naturalisation for the granting of citizenship when the applicant is a minor. It is also used for resumption of citizenship by adults after renunciation, and for BOCs, BSs and BPPs acquiring British citizenship. Formerly, registration was used for wives of citizens and for Commonwealth-country citizens acquiring British status: these uses have been phased out. Generally, registration is easier and cheaper than naturalisation, but the term describes several different processes.

Naturalisation of settled persons has recently been made more difficult and expensive in practice. An applicant needs five years' residence or five years' designated service, good character, knowledge of the English, Welsh or Scottish Gaelic language, knowledge of the way of life in Britain and an oath of allegiance to the Queen to be taken at a citizenship ceremony. Decisions are at the discretion of the Home Secretary and there is a limited appeal against refusal. A spouse needs only three years' residence to qualify.

The UK has always tolerated plural nationality (except for some limitations between 1870 and 1948).

Expatriates have the right to return and reside at any time. Their spouses and children, if not British citizens, have to qualify under immigration law. Certain rights in the UK, e.g., health care and access to financial help with university education, depend on residence and not on citizenship. Voting in Parliamentary elections is possible to many but not all expatriates provided they register to vote.

Except where European Community law provides otherwise, European Community nationals have no special privileges in the UK: they can be naturalised only on the same basis as all other aliens. Commonwealth-country citizens likewise now have no special access.

Although some of his functions are fulfilled in the Overseas Territories by the local Governor, the Home Secretary effectively has power over all nationality decisions under the legislation.

British citizenship can be renounced in order to obtain another nationality, and there is an entitlement, to be used once only, to resume it. Naturalised and registered citizens may be deprived of their status if they obtained it by fraud, misrepresentation or concealment of a material fact. Under the Nationality, Immigration and Asylum Act 2002, the Home Secretary may deprive *any* citizen of the status if he is satisfied that the person has done anything seriously prejudicial to the vital interests of the UK or an overseas territory (provided the person would not then become stateless). There is an appeal, but not to an ordinary court.

The Home Secretary may not discriminate on racial or religious grounds in his nationality functions.

There is no constitutional basis in UK law for citizens' rights; these depend on statutory provisions made separately from nationality laws, with one exception. The British Nationality Act 1981 specified that British citizens have 'right of abode' in the UK.

15.2 Historical development

15.2.1 The thirteenth century to 1608

'There is not, and never has been, any domestic concept of British nationality as such', wrote Professor Clive Parry, Fellow of Downing College, Cambridge (1957: 5). There is still some truth in this remarkable observation, for in 1981 the British government refused to insert in the major British Nationality Act of that year any definition of a British national. The Minister introducing the measure in the House of Lords said, 'The concept of British national is not something known to our domestic law'. Very reasonably, Viscount Simon objected, 'I do not understand how there can be anything called "British nationality" unless there are people who enjoy it'.

Lord Trefgarne replied that an amendment to the Bill, proposed by Lord Geddes and supported by some members of all parties in the House of Lords, defining the holders of all three of the proposed new 'citizenships' in the Bill as British nationals, 'would serve only to generate confusion'. It would 'raise expectations among the less well informed which in the event could not be realised'. It would 'imply some sort of eventual immigration commitment in the minds of some less informed people. That is the principal difficulty which we face'.[1] The Geddes amendment narrowly lost, by 102 votes to 105.

International law clearly requires that a state may not deny entry to its own nationals. Since such denial had been happening for nearly twenty years in 1981, and the government intended to continue it under a new set of labels, there had to be a pretence that the United King-

dom was abiding by international law. Therefore it was not possible to define the particular people it wanted to exclude as 'nationals', although that is undoubtedly what they were on the international plane.

This kind of fiction was possible because of the extraordinarily confused history of British nationality, a history that began with the concept of the 'subject' in mediaeval times. Although it is an anachronism to call mediaeval subjecthood a nationality, I shall have to call it one because of the continuous use up to 1948 of the term 'subject' to denote persons belonging to the country.

English, then British, history has been the story of a land and not of a people. Birth on or association with the land has always been the primary rule for acquiring nationality. Provision for ius sanguinis and for naturalisation has always been secondary, though both types of acquisition also go back to the middle ages. There was significant immigration to England in the mediaeval period of craftsmen and traders from France, Italy, Germany and the Low Countries, and the children of these aliens became subjects under the ius soli rule, as did the children of more numerous immigrants in later centuries.

The original rule of ius soli was a feudal one. A person born on any lord's land was that lord's subject and owed him allegiance. From the fact of birthplace arose rights and obligations on the part of both lord and subject. By the end of the thirteenth century it had become established that birth in the king's 'ligeance' made a person the king's subject, and the term 'ligeance' denoted both a tract of land and loyalty to the king (Pollock & Maitland 1952). From the king's point of view, a subject was a person who could provide military service and also be taxed. Those born outside the ligeance were aliens born. However, one should not suppose a hard-and-fast distinction between subjects and aliens that served for all purposes. The most important attribute of a subject in lawyers' eyes was the capacity to hold land in England, and for this reason disputes about who was a subject and who was not were for over four centuries concerned with property and inheritance.

In 1204, King John of England seized the lands of all those Norman barons who had not returned to England by a given date and who held English lands: war with the king of France then continued intermittently until 1244, when King Louis of France insisted that all those living in France must choose between him and Henry III of England. Traditionally, these events are supposed to be the origin of the common-law rule that only subjects could hold land in England. But the law was not consistently applied.

English common law was a customary law, 'common' in the sense of applying throughout the realm but also in the sense of being rooted in shared assumptions. It was not written in any code, but was developed

by judicial decisions on the basis of unwritten assumptions. These were supposed, in turn, to rely on immemorial usage but in fact lawyers and judges had an important role in their formation. The common law is both conservative and flexible. It looks back to judicial precedent, but it also provides room for interpretation. 'Its roots', wrote C. K. Allen in 1927, 'strike deep into the soil of national ideals and institutions' (1939: 66).

The events of the early thirteenth century still have modern consequences. When King John lost his Norman possessions, he retained the Channel Islands. The islands, though constitutionally separate from the United Kingdom for some purposes, notably in their separate tax regimes and their relationship with the EEA, are for nationality purposes part of the United Kingdom, and birth there makes one a national.

Similarly, the Isle of Man is constitutionally separate from the United Kingdom but not for nationality purposes. It was granted by the Scottish Crown to earls of Derby in the fifteenth century and later to the dukes of Atholl. It was brought under the British Crown's administration in 1765.

The common law made no distinction between the different origins of aliens. For example, it barred aliens from sitting on juries empanelled to try English defendants or to hear civil cases between English parties, but from an early date alien merchants were given a jury composed half of Englishmen and half of aliens, to ensure them of impartiality. However, the alien jurors could be of any country or language, the principle evidently being that all these foreigners were the same. The half-tongue jury rule was confirmed in a statute of 1353: remarkably, it was confirmed again several times, the latest occasion being in 1825.

In the thirteenth century, King John's Great Charter (Magna Carta) had given alien merchants the right to come and go freely in and out of the kingdom. Subjects also had this right, of course, but the royal prerogative overrode the rights of some subjects and aliens together when Jews were expelled from England in 1290, not to return (officially at least) until 1656.

From the late-thirteenth century onwards, the king began to issue letters patent under his prerogative power to make certain aliens into denizens. This was an intermediate status between subjects and aliens, similar to the ancient Greek status of metic. It gave permission to hold land (but not to inherit it or bequeath it to children born before endenisation). The attributes of endenisation varied over the centuries, and it became very rare from the early-nineteenth century onwards.

The earliest example of naturalisation was the grant made to Elyas Daubeny in 1295 of the right to be heard in all royal courts *ut Anglicus*

and to be taken and reputed as *Anglicum purum*. The grant was made by the king acting alone. From then on, there were occasional Acts of Parliament conferring naturalisation on certain individuals: these continued until the nineteenth century, when in 1844 Parliament provided for naturalisation by the executive power of the Home Secretary, after which legislation to naturalise individuals became very unusual.

In 1351, the statute *De Natis Ultra Mare* was passed, naming a list of individuals who had been born beyond the sea, out of the ligeance of the king, providing that they could all inherit property on the same terms as those born within the ligeance.[2] They were all children of the king or of fathers in the king's service. The statute furthermore added that *all* children born beyond the sea whose fathers and mothers were at the faith and ligeance of the king of England, and provided that the mothers had gone outside the realm with the permission of their husbands, could inherit, i.e., that they were subjects. ('Ligeance' is here used in the sense of allegiance rather than of a tract of land.)

The wording of the statute provided endless disputes over the next four centuries about which children born abroad were subjects and which were not, also about through how many generations born abroad subjecthood could pass. It was variously interpreted. But the statute had one permanent, clear consequence: birth abroad to a person in Crown service has always made a British national, however the parent's nationality was acquired. (Until 1983, the parent concerned had to be male.)

A rare example of theoretical discussion of the nature of allegiance and of subjecthood is found in Calvin's Case.[3] King James VI of Scotland had become James I of England, but the two kingdoms remained separate. J. Mervyn Jones calls the judgment 'the pure milk of the common law' (1947). It established certain doctrines which lasted a long time. Allegiance was to the person of the king, not to the kingdom. Allegiance was indelible: it could not be shaken off. Subjects were under the king's obedience, and he would protect them. The loyalty of the subject was due to the king by the law of nature and the law of nature was part of the law of England. Annexation of territory by the king made the inhabitants his subjects. Aliens within the kingdom owed a local allegiance, unless they were diplomatic servants of another ruler.

The case arose from the question, whether persons born in Scotland before James became king of England (the *antenati*) were subjects in England or not. The court decided they were not. But the *postnati*, born in Scotland after James's accession to the English throne, were subjects in England.

Incidentally, the case confirmed toleration of plural nationality, quoting from the thirteenth-century English jurist Bracton, who had considered the case of a knight who owed allegiance to two different lords.

15.2.2 Religion and nationality

Between 1529 and 1540, King Henry VIII made himself head of both church and state in England, by a series of Acts of Parliament. Church and nation were to be one. English nationalism became and remained for a long time fiercely anti-Catholic.

In 1570, the Pope excommunicated Queen Elizabeth and declared that her subjects were freed from their allegiance to her. In 1580, Parliament legislated to make any attempt to convert the queen's subjects to the Roman Catholic faith a treasonable offence. Priests made by the See of Rome since her reign were to be banished from the kingdom, and if they re-entered they were to be executed. These measures affected the rights of subjects as well as aliens.

Under James I, religious tests were incorporated in naturalisation law. An Act of 1609 required anyone becoming naturalised by private Bill to take the oath of supremacy (i.e., of royal supremacy over the Church) and to have taken the Anglican communion. Later, when new modes of naturalisation were introduced in order to encourage immigration between 1660 and 1714, the religious tests were still imposed. Endenisation survived until the nineteenth century, because it imposed no religious tests.

Conformity to the Church of England was enforced systematically, down to parish level in England and Wales. However in Ireland, which was ruled as a separate kingdom by English monarchs, the population remained stubbornly Catholic. Elizabeth I demanded uniformity of worship in 1560: forty years of war between England and the Irish rebels followed. James I settled Protestant landowners from Scotland and England in Ulster, on the ground that Catholic landowners had committed treason and forfeited their rights. The Irish rebelled in 1641 against the Ulster settlers and massacred great numbers of them. In revenge, in 1649, the English Protestant revolutionary leader, Oliver Cromwell, led an army into Ireland and in turn massacred many civilians, and in 1652 the English Parliament required forfeiture of the lands of almost every Irish landlord.

Irish immigration into England and Scotland has continued for economic reasons from the early centuries up to the present day, and many people in both countries have some Irish ancestry. Except in Elizabeth I's reign, when it was strictly limited in order to keep out potential subversives, Irish immigration has never been controlled. It has been too economically useful.

In 1662, a new measure, to encourage skilled craftsmen and in particular French Huguenot refugees, provided that skilled artisans could be naturalised after spending three years engaged in their trades in England, and from 1708 to 1710 a Foreign Protestants' Naturalisation

Act allowed any alien to become naturalised after taking the oaths of supremacy and allegiance and receiving Anglican communion.[4] These persons had also to declare before a court their support for the Protestant succession to the throne.

Jews had been re-admitted to England in the revolutionary period of the seventeenth century, and their children became British subjects by ius soli. Some became friends of princes: it was a Rothschild who brought the first news of the battle of Waterloo to the king in 1815.

The Dutch, although Protestants, who came while William of Orange was king, were unpopular in England, and a section was incorporated into the Act of Settlement 1701 prohibiting naturalised and endenised subjects from being Privy Councillors, MPs or Crown servants. These and other disabilities on naturalised subjects remained until 1844. The Act also prohibited any English king from being, or marrying, a Catholic, a provision which is still law today. (There is no such prohibition on any other religion.)

Disabilities on dissenting Protestants were relaxed from the early eighteenth century, but Catholics were not emancipated until 1829.

15.2.3 Britain and the United Kingdom

Wales was annexed to the English Crown in 1284 and later assimilated into England by Acts of Parliament in 1536 and 1542.[5]

James VI of Scotland, who became king of England also in 1603, wanted the two kingdoms to be united, but Parliament refused and an Act of Union between England and Scotland was not made until 1707.[6] The United Kingdom of Great Britain was then born, the basis of British nationality.

Kings of England had long been lords of Ireland, which had suffered English invasion as early as 1172, and which had been treated as a colony by successive monarchs. Ireland had its own Parliament, which in 1634 passed a statute to naturalise resident Scots, including those who had been born before 1603 in Scotland and who were therefore at the time aliens in England. In *Craw v. Ramsey* an English court decided that naturalisation did not make a person a subject in England, because legislation was effective only within the territory over which the legislator had authority.[7] But a person naturalised in England was a subject in Ireland, because Ireland was subordinate to England: it had been 'conquered and subjugated'.

This decision was to have very large consequences in the British empire overseas.

By an Act of Union passed in 1800, Ireland became in 1801 part of the United Kingdom. Irish demands for Home Rule were a major factor in British politics from then on. Just before the First World War, a

Home Rule Bill was at last passed in Britain, but its implementation was suspended because of the war. Violent revolt in Ireland followed, ruthlessly put down by the British army. At a general election in 1918, the nationalist Sinn Fein party carried all the southern counties, and set up a republican government there. In 1920, Britain, refusing to recognise the republic, established two Home Rule parliaments, one in the south and one in Ireland's Protestant north. Armed conflict continued, and eventually an Irish Free State was recognised in the south, while the six northern counties remained part of the United Kingdom. In 1937 the Irish in the south proclaimed national sovereignty and renamed the country Eire. In 1949, Eire declared herself the Republic of Ireland.

At Westminster, the British Parliament recognised the Republic and declared that Ireland had left the Commonwealth but was not a foreign country. Under the Ireland Act 1949, rules of law referring to the monarch's dominions would continue to apply *as if* the Republic were part of those dominions.[8] So Irish citizens retained the rights of British subjects in Britain, including political rights. By a reciprocal arrangement, British subjects held rights in Ireland. This system still holds. The Irish have gained further rights in Britain as a result of European Community law, notably in exemption from some provisions of British immigration law on the admission of relatives.

The Ireland Act also provided that Irish citizens born before 1949 could opt to remain British subjects by making a simple declaration, thus becoming dual nationals.

15.2.4 Naturalisation and plural nationality

Parliament's power to naturalise aliens by legislation directed at individuals was cumbersome. The Aliens Act 1844 empowered the Home Office (which already issued certificates of endenisation) to naturalise a resident alien by a simple procedure on presentation of a character reference.[9] The oath of allegiance must be taken and a fee paid. This Act also in part removed restrictions on aliens' holding land. The purpose was to encourage naturalisation at a time when immigrants were beneficial to industry and trade.

The Naturalisation Act 1870 removed all remaining restrictions on alien landholding, provided for naturalisation at the Home Office's discretion after five years' residence or Crown service, and allowed renunciation of British nationality for persons acquiring another nationality.[10] The Act was however restrictive and confused in some respects. A woman, upon marrying an alien, was to lose her British status while an alien woman became British, upon marrying a British husband. Since British authorities could not tell other countries who should ac-

quire their nationality, some married women became stateless. Any subject being voluntarily naturalised in a foreign country and not being under a disability was to lose Britishness. Thus the 1870 Act initiated the only period in the history of British nationality when plural nationality was limited, and the position was not fully rectified until 1948.

15.2.5 The British Empire

It cannot be emphasised enough that British nationality law has often been imprecise and uncertainly applied. The history of nationality in the British Empire exhibits many muddles and contradictions, which had somehow to be sorted out in the twentieth century.

At first, around 1600, there was no problem about the status of people in the overseas colonies: those who had left England for the new lands were subjects, and the common law followed them to make all colonial-born children (except children of slaves and of American Indians) into subjects by ius soli. The colonies were part of the monarch's common-law dominions. However, the territories were left to run themselves in many respects. The governing authorities in the colonies soon took new powers upon themselves, including the power to naturalise. There was little or no religious discrimination in colonial naturalisations, so Catholics, Jews and Quakers could become local subjects. This enabled them to hold land. But such naturalisations took effect only in the colony concerned: someone naturalised in Virginia was a subject there but an alien in Pennsylvania. He was also an alien in England itself: following the judgement in *Craw v.* Ramsey legislation was effective only in the territory over which the legislator had authority.[11]

The empire grew in size and complexity in the eighteenth and nineteenth centuries, by treaty or by annexation. Some territories had native rulers: here the British regarded inhabitants not as subjects but as British Protected Persons; e.g., in several hundred princely states in India. BPP status originated in 1815, with British protection of the Ionian Islands. It was created under the royal prerogative. In practice, there was little difference between the treatment of subjects and of BPPs in the countries concerned, and internationally both were recognised as fully British. In 1945 there were about 100 million BPPs in the world, and about 400 million British subjects.

BPP status was occasionally granted to individuals, but mainly it was acquired by birth in a 'protected' territory, e.g., in the Malay states, which had their own Sultans. It was also bestowed on inhabitants of countries mandated to British rule by the League of Nations after the First World War (e.g., Palestine, Iraq, Tanganyika; the Iraq mandate ended in 1932). Some later remained under British administration as

United Nations trust territories. A British Nationality and Status of Aliens Act 1943 provided that the child of a British subject born in a protected territory was a subject.[12] BPP emigrants did not have the same right of transmission to children, but if their children were born within the common-law dominions of the Crown they would be subjects by ius soli. Children born in other protected territory would be BPPs.

It would be a mistake to suppose that this complex system was always applied with precision in practice. 'There must be a multitude of persons', wrote Sir Francis Piggott, 'who cannot say with certainty whether they are British subjects or not' (1907: Preface).

From the mid-nineteenth century onwards, Canada, Australia, New Zealand and South Africa were granted a large degree of autonomy, and from around 1900 began to control immigration, particularly by Indians and Chinese, many of whom were British subjects from other parts of the empire. Those who came had few citizenship rights after arrival. A British Nationality and Status of Aliens Act 1914 created an Imperial Certificate of Naturalisation valid anywhere in the empire but local certificates continued to be issued.[13] However, all subjects from any part of the empire had right of entry to the UK.

Pride in the expansion of empire made British governments happy to create as many British nationals in the world as possible. Ius sanguinis was extended indefinitely for children of British subjects, born abroad, in Acts of 1918 and 1922, e.g., in Argentina.[14]

The civic and political rights of subjects varied enormously from one territory to another, but all of them exercised the full rights of a subject if they came to the United Kingdom. This is why Commonwealth citizens still, today, vote and stand for office in the UK. BPPs however were in domestic law aliens under British protection and had no such rights.

15.2.6 The British Nationality Act 1948

The British Nationality Act 1948 made fundamental changes in British nationality law, as countries of the empire on every continent of the world moved toward independence.[15]

Britain tried to retain subjecthood as a nationality of the empire. The challenge to British rule had first succeeded in Ireland (see sect. 15.2.3). Then in 1946, Canada, already virtually independent, decided to assert her own citizenship internationally and issue her own passports. As a result, the British government responded by convening a group of legal experts to decide what changes must be made to the imperial system in general.

At the same time, Indian independence, after a long struggle, had become inevitable. In haste, the sub-continent was divided into two new states, India and Pakistan, in 1947. India soon rejected the Queen as Head of State, declaring itself a republic.

The foundation of subjecthood, and also the link which had bound together the empire and was now supposed to bind the Commonwealth of Nations as a voluntary association of countries, was allegiance to the monarch. This was an idea which British politicians found hard, after seven centuries, to reject. They had become accustomed too to defining Britishness in terms of imperial and not merely national identity. So the British Nationality Bill, which they drew up in 1948, retained subjecthood as in theory a nationality of the whole empire, within which there were to be separate citizenships, explaining that nationality (subjecthood) was to be the genus, citizenship the species. Other countries were expected soon to become independent, but all would be linked together in the Commonwealth. Within the overall scheme there would be a single citizenship of the United Kingdom and Colonies. As each colony became independent, its inhabitants would change this status for the citizenship of a new state.

All subjects would continue, as before, to have the right of entry to the UK and the rights of the subject (voting etc.) there. It would have been politically unthinkable at the time to remove these rights from persons anywhere in the empire: imperial troops had fought for Britain in the Second World War, and British people's pride and sense of identity were still bound up with empire. However one unfortunate result was that the new status of citizen of the UK-and-Colonies (CUKC) had no rights attached to it: only the opportunity (it was not even a right) to be granted a British passport. For anything else, the British had still to rely on being subjects.

From the beginning, the scheme was unworkable. There were Hindu-muslim riots in India and Pakistan; about two million people fled from one country to the other to escape massacre, and hundreds of thousands of these failed to obtain citizenship in either country. According to the British Nationality Act 1948, they should have been transformed then into CUKCs when these countries' citizenship schemes took effect. Taking effect meant being incorporated in British law in either a statute or an Order in Council, and in this sense the citizenship laws of India, Pakistan and Ceylon (Sri Lanka) never took effect. Although in practice the new states' laws were recognised, the British subjects omitted from their provisions became known as 'British subjects without citizenship of any Commonwealth country' (BSWCs). The number of people in this category has never been known with accuracy. A few were of British descent, their families having lived and worked in India for generations. The Home Secretary

had discretion to register most of such persons as CUKCs if they applied before January 1950, which some failed to do.[16]

Another group of BSWCs consisted of Irish citizens who were British subjects immediately before 1 January 1949 and who gave written notice to the Home Secretary that they claimed to remain British subjects. Most of the people concerned were resident in Britain.

The status of British Protected Persons remained unchanged. They were mentioned in the Bill only to be excluded from the expression 'alien' in the Aliens Restrictions Acts.

These secondary issues apart, the main scheme of the Bill could not succeed because it failed to recognise the reality that new states' citizenships were also new states' nationalities. Internationally, no country regarded an Indian citizen/British subject as anything but an Indian national. Moreover, once the new states declared themselves republics, as many did, allegiance to the monarch could no longer be the basis of their status in British law. It was agreed in 1949 that the Queen should be Head of the Commonwealth, a courtesy title with no constitutional implications. But what now was subjecthood?

For the future the Bill provided that a person would become a subject if he or she had citizenship of any Commonwealth country. The terms 'British subject' and 'Commonwealth citizen' were to be interchangeable in law. This was a gesture towards republicans in India and elsewhere who understandably resented the word 'subject'. But people in Britain never came to think of themselves as 'Commonwealth citizens', though that was what they were under the 1948 Act.

Persons becoming naturalised in the UK and in the colonies still had to take the oath of allegiance to the Queen, although allegiance was no longer the basis of subjecthood or of the new CUKC status: both were now to be determined by statutory definition.

The new law attracted very little attention. Its one newsworthy aspect was to return rights to married women. British women who married aliens would retain their British nationality. And alien women marrying British men would have the choice, whether to retain their alien nationality or exercise the right to register as CUKCs without any residence qualification, a right available even if the women were divorced or widowed.

The main provisions of the new law on citizenship of the UK-and-colonies (CUKC) used elements of both ancient and modern law concerning subjecthood:

- since the mediaeval period, the basic rule of ius soli, tolerance of plural nationality, citizenship for children born abroad to English (then British) parents, also of parents in Crown service;
- since the nineteenth and early twentieth centuries, executive decisions on naturalisation, conditions for naturalisation including five

> years' residence and evidence of good character, and sufficient knowledge of the English language.

There was provision for the renunciation and resumption of UKC citizenship. Persons from Commonwealth countries were to have privileged access to CUKC through registration: twelve months' residence in the UK was the only condition and no fee was to be charged. As Commonwealth citizens/British subjects retained free entry to the UK, this condition was a very easy one to fulfil.

15.2.7 Immigration and nationality

In the nineteenth century, alien entry and stay were completely uncontrolled, in line with liberal, free-trade theory, and many foreign revolutionaries took advantage of this, Marx and Lenin being among the best-known. However, after the assassination of Tsar Alexander II in 1881, and many subsequent anarchist and revolutionary murders elsewhere in Europe, the British authorities became nervous about aliens as potential subversives. At the same time, new racial theories had gained intellectual popularity: in Britain there were claims that the 'Teutonic' British were intrinsically superior to Latin races, and religious anti-Jewish prejudice was transformed into racial anti-Semitism.

In 1905, an Aliens Act, directed chiefly against poor Jews from Eastern Europe fleeing persecution, placed control of alien entry with the Home Office, the government department responsible for security and policing. Official policy from then on was suspicious and restrictive towards entrants, and a large discretion was written into the law, which made differential treatment of individuals possible. The consequences have lasted up to the present.

Strong anti-German feelings in the following years helped to produce the Aliens (Restriction) Acts of 1914 and 1919. After 1917, the government was very frightened of communism and between the world wars almost all alien immigrants were admitted only temporarily. For example, in 1927, 412,686 aliens were given permission to land, while 409,925 departed. Despite pressure to admit refugees, only 55,000 European Jews were admitted between 1933 and 1939.

In 1939, 239,000 aliens lived in Britain, 80,000 of these being refugees (a group including many east Europeans admitted before 1914 who had been refused naturalisation or not applied for it). In 1920, without referring back to ministers, the Permanent Secretary (chief official) at the Home Office trebled the naturalisation fee to ten British Pounds, a sum equivalent to many weeks' wages for the lowest-paid workers, who included pre-war Jewish immigrants. It was Home Office practice (not written into legislation) that Jews must be resident fifteen

years and not just the statutory five before being considered for naturalisation. John Pedder, a Home Office civil servant, wrote in 1924, 'Slavs, Jews and other races from central and eastern parts of Europe [...] do not readily identify themselves with this country' (Dummett & Nicol 1990: 154).

After the Second World War, the authorities were still reluctant to admit aliens even though Britain was suffering a severe labour shortage and needed massive reconstruction of houses and factories. By 1951, there were only 429,000 aliens in a total population of about 48 million. This figure included about 16,000 European Voluntary Workers (displaced persons) who had been admitted annually *outside* the provisions of the Aliens Acts. Even this small number drew hostility from some trade unions and newspapers.

Alien immigration was far too small to meet the demand for labour, and from the late 1940s onwards immigrants from West Indian and African colonies and then from the independent countries of India and Pakistan began to arrive in search of work. As 'British subjects' under the 1948 British Nationality Act, they were free to do so.

The Labour government (1945-51) did not want 'coloured' immigration, and used some administrative means to discourage it (Dummett & Nicol 1990: 177 ff.). Conservative ministers in the 1950s discussed how they could limit it without excluding immigrants 'of good type' from the white Dominions. Race and colour dominated the immigration debate. In 1962, a Conservative government, under pressure from local Conservative associations, passed a Commonwealth Immigrants Act to control the entry of all Commonwealth citizens (i.e., all British subjects under the 1948 Act) unless they had been born in the UK or Ireland or held passports issued by the UK or Irish governments.[17] The result was that CUKCs from colonies became subject to control, as did citizens of independent Commonwealth countries.

The 1962 Act and Rules gave a large discretion to Immigration Officers, who used it to admit most white Commonwealth applicants freely and to refuse many Asians, Africans and West Indians.

The Bill in Parliament was attacked not on the grounds that Britain was denying entry to her own citizens but with the claim that it was against the Commonwealth ideal and was racially discriminatory. Alien immigration had become much less controversial. During the 1960s, three times as many alien work-permit holders were admitted annually as were 'Commonwealth' work-voucher holders. In practice, though not in law, it was often easier for these aliens to bring their dependants in than for Commonwealth immigrants, who theoretically had some entitlement to be joined by wives and children under sixteen. It was obvious how the Home Office was using its discretion in immigration

policy, but the use of discretion in naturalisation policy could not be known because this process was secret.

There were minor British Nationality Acts in the next few years. The BNA 1964 facilitated renunciation and resumption.[18] The BNA (no. 2) 1964 made registration possible as CUKCs for children born stateless abroad with a British parent (this usually meant the mother of an illegitimate child).[19] The BNA 1965 enabled alien wives of British subjects without citizenship of any Commonwealth country to become BSWCs.[20]

There is a hidden intention in the first BNA 1964: it provided for resumption of CUKC in countries which had become independent only by persons who had a qualifying connection with the UK itself – a connection which in effect applied to people of UK ancestry and excluded people of Indian descent in the newly-independent East African countries.

The East African countries of the empire all had sizeable minorities of Indian descent, forming a middle class of business-people, civil servants, teachers, bank workers etc. between the white minority which ran the country and the large African majority. With independence, the Indians were afraid they would be deprived of their positions by the new African governments. Some opted for citizenship of the new countries concerned; others thought they would play safe by retaining CUKC status after independence – then, if things went wrong, they could go to Britain. Their passports would be issued on behalf of the UK government and they would therefore be free of entry control. Things did go wrong in Kenya, where the new government imposed severe disabilities on non-citizens, who found themselves suddenly forbidden to work. Several thousand came to Britain. The Labour government in power at the time panicked and rushed a Bill through Parliament in only five days to deny entry to the 'Kenya Asians' as they were called. CUKCs had no right of entry to any colony except the one with which they had connections. Kenya was no longer a colony. With entry to the UK barred, these CUKCs (and subsequently others in newly independent territories) had nowhere to go under the Commonwealth Immigrants Act 1968.[21]

Ministers argued that they were not denying but delaying entry, and set up a voucher system, a queue for admission, which allowed only a small trickle of persons to come each year. CUKCs who tried to travel from Kenya were turned back at British ports and turned back again when returned to Kenya. Eventually, many were imprisoned upon arrival in Britain and after a time freed and allowed to stay. Every effort was made to discourage their coming.[22] Racial origin was not named in the law; the device used was a qualifying connection with the UK:

the person or at least one of his or her parents or grandparents must have been born, naturalised, registered or adopted in the UK.

It became very difficult for immigration officials in other countries to determine who was returnable to the UK and who was not: possession of a passport was not enough.

Within the UK there were two distinct sets of controls: one for aliens and one for British subjects and Commonwealth citizens. The Conservative government, which took power in 1970, produced the Immigration Act 1971, designed to combine both systems in one. Persons called patrial would be free of control.[23]

Patrial	**Non-patrial**, subject to control
CUKCs born, registered, adopted or naturalised in the UK (some registrations and adoptions excepted)	All aliens
CUKCs with parent or grandparent as above	British Protected Persons
CUKCs who had been ordinarily resident in UK for at least 5 years at any time	CUKCs whose status derived from colonies
Any CUKC woman married to a CUKC man	Commonwealth-country citizens not qualifying as patrial (i.e., most of them)
Commonwealth-country citizen with a parent born in UK	
Commonwealth citizen woman married to a patrial	

When the Immigration Rules were published, they made clear that there would be privileged access for persons with a British-born grandparent, decisions to be made at discretion. Several million white citizens of independent Commonwealth countries were thus effectively freed of controls.

15.2.8 The British Nationality Act 1981

Patriality had become a quasi-nationality, and the situation was so confusing that it soon became clear that a thorough overhaul of British nationality law was needed. The Labour and Conservative parties, and several independent bodies, produced plans for a new system. The most radical but least regarded came from AGIN (the Action Group on Immigration and Nationality), which proposed right of entry for all those with some existing form of *de lege* British nationality. By this time, most former colonies had become independent and the number of colonial citizens had shrunk. But the great stumbling block for even comparatively liberal-minded politicians was Hong Kong, where it was estimated there were about 2.6 million CUKCs of Chinese origin (the rest of the population consisting mainly of immigrants from the People's Republic of China). The Labour government did nothing.

In 1979 a Conservative government returned to power, having promised in its manifesto that it would introduce a new British Nationality Act 'to reduce future sources of immigration'. When it produced its draft measure, more than one newspaper described it as a new immigration Bill. The government's original proposals, set out in a White Paper of July 1980, drew heavy condemnation. *The Scotsman* newspaper commented: 'They do not define British nationality as having any meaning [...]. British nationality is to have no rights attached to it whatever: The idea that it should do so is specifically rejected by the White Paper.' (12 July 1980)

The Economist said: 'It is taken for granted that the aim of a new law should be to limit in the future the numbers of people in the world eligible to enter and live in the UK. This aim however is not to be fulfilled, because the proposals would leave untouched the right of several million patrial Commonwealth citizens (mostly white people) to come here and settle [...]. In short, the proposals would create a disguised racial Immigration Act rather than a true Nationality Act. [The measure] demonstrates the increasingly racial loading of the concept of British citizenship'. (2-8 August 1980)

The main plan was to re-label existing categories in immigration law as types of British nationality thus:

Patrial CUKCs	British citizens
Patrial British subjects without citizenship	British citizens
Non-patrial Colonial CUKCs	British Dependent Territories Citizens

Non-patrial CUKCs in former colonies	British Overseas Citizens
Non-patrial BSWCs	British subjects
British Protected Persons	British Protected Persons

The last three were designed to die out, as there was virtually no provision for transfer to children.

There had been no formal consultations with other Commonwealth countries on the proposed changes. Even more surprisingly, the White Paper never mentioned the European Economic Community, although the UK was already a member, and the EEC rules on movement of persons were already in operation: the consequences for immigration as a whole were obvious.

The government yielded to a few objections, but only on minor points. The British Nationality Act 1981 remains the main basis for the present law.[24]

The only legislative change made before 1985 was the British Nationality (Falkland Islands) Act, which actually emphasised the racial character of the main scheme. Mrs. Thatcher had gone to war with Argentina in 1982 over the sovereignty of this British colony, which was very small, with fewer than 2,000 inhabitants, but which mattered greatly to Argentinean national feeling.[25] The inhabitants were all white, being mostly the descendants of Scottish shepherds. Dependent Territories' Citizens under the 1981 Act, they were made full British citizens in 1983 as a victorious gesture.

The British Nationality Act 1981 has been slightly amended with new provisions concerning Hong Kong, which was returned to China in 1997. The Regulations have also been changed on several occasions. Some major changes were made in the Nationality, Immigration and Asylum Act 2002,[26] but these are not yet all in force, and by the end of 2004, no dates had been set for commencement on some important points (see sect. 15.3.1.3).

The most controversial clause in the 1981 Bill was a limitation on the ancient ius soli rule. This was opposed by the churches, the Labour, Liberal and SDP parties in Parliament, and many NGOs. Only a child with a British citizen parent or settled parent would become a British citizen by birth in the UK. Other children would have to rely on a parent's non-British nationality or else be stateless. There were however complicated provisions for registration of children not born citizens. 'Settled' meant being ordinarily resident and not subject to any restrictions under immigration law, and a parent who became either a citizen or settled after the birth was entitled to register a child already born in

the UK. There was a separate provision for registration of stateless children. Until 1981 only a birth certificate in the UK had been needed to prove a child's citizenship; from commencement date onwards (1 January 1983) a new bureaucracy had to be satisfied. This reflected the government's aim of reducing future immigration. In future, some children born in the UK would be alien or stateless, and would lack right of abode.

The new system was a classic example of the Home Office's approach. The purpose of the new law was to limit immigration rather than to deal with nationality itself, and so the means chosen were a complicated collection of provisions to reduce the number of people eligible to pass on nationality and with it the right of abode to their descendants. Yet liberal objections must be met: hence the elaborate provisions for registration – for which many potential applicants would fail to apply. The same motives underlay the creation of two alternative 'citizenships': British Dependent Territories Citizenship (BDTC) and British Overseas Citizenship (BOC), both carrying the name of Britishness to satisfy liberals and traditionalists, but conferring no right of entry to Britain.

Before the 1981 Act came into force, there had been various statutory provisions enabling British people with a UK connection to pass on their citizenship to children born outside the UK. These were now replaced by rules intended to limit citizenship by descent mainly to the first generation born abroad. But again there had to be exceptions. The long-standing rule that children born to parents in Crown service abroad would be nationals was preserved: it was therefore possible that a 'citizen by descent', born abroad, could pass on citizenship to a child born abroad if he or she was a diplomat or serving in the armed forces. Again, when that child grew up, he or she would be able to pass on citizenship if in Crown service abroad at the time of the birth. The new rules on descent included mothers as well as fathers for the first time. British citizens in European Community service were added to Crown servants, provided they had been recruited in an EC country. Certain other groups were included under the heading of 'designated service' abroad: e.g., employees of the British Council and the Commonwealth War Graves Commission. Subsequently, new regulations made under Order (a procedure authorised in the main Act) have added other forms of designated service, including some commercial employment.[27] Thus, an elaborate system was set up which failed to satisfy everyone. There was no retrospective provision for children already born abroad to British mothers. The rules on designated service appeared arbitrary to some people.

The system also provided that a parent who did not qualify to pass on citizenship by descent under the main scheme (e.g., a British jour-

nalist, a citizen by descent, with an alien wife, becoming a father while working abroad) was entitled to register a child as British if certain conditions were satisfied: if the parent in question had ever lived in the UK continuously for three years without more than 270 days' absence up to the time of the birth or was present in the UK three years before the application for the child's registration. The child would be a citizen by descent. No citizen by descent was entitled to become a citizen other than by descent.[28] The Home Secretary was given the power in sect. 3 (1) to register any minor child of any parentage and any birthplace at discretion.

The 1981 Act repeated earlier naturalisation rules: five years' residence, the last year being free of immigration control; good character; a language test in English, Welsh or Scottish Gaelic (the last two to appease Welsh and Scottish nationalism). The language test consisted of an interview with a police officer: if the applicant and the officer could understand each other's speech, all was well.

Registration was to become a process used mainly for minors. Its use as privileged access for Commonwealth citizens and for wives of British citizens was cut off by the 1981 Act after a transitional period.

The 1981 Act provided for renunciation and resumption (on one occasion only) by entitlement, with discretion for the Home Secretary to allow resumption more than once. Normally, renunciation occurs when a British citizen acquires another nationality in a country which does not permit dual nationality.

The 1981 Act provided for deprivation of nationality if a naturalised or registered citizen had obtained citizenship by fraud, misrepresentation or concealment of a material fact. The Act further provided that a naturalised or registered citizen could be deprived if he or she was disloyal to the Queen, or had assisted an enemy in time of war or had in the last five years been sentenced to at least twelve months' imprisonment in any country. There was a possibility for appeal to a committee appointed by the Home Secretary and including a person of judicial experience (sect. 40). Only about a dozen people were ever deprived under this particular rule.

15.3 Recent developments and current institutional arrangements

15.3.1 Regulations of acquisition and loss of nationality

15.3.1.1 British Overseas Territories Act 2002[29]

In 2002, the colonies, already renamed British Dependent Territories, were again renamed British Overseas Territories. These territories are very varied: the Cayman Islands are a tax haven for the rich, the British Antarctic Territory has no inhabitants except scientists and penguins,

while Diego Garcia in the Indian Ocean has become an American air-base, all its citizens forcibly removed to Mauritius and forbidden to return.[30] Most colonies have Governors appointed from the UK. After 1947, most colonies were granted independence in a series of Acts of Parliament and Orders in Council, and their new governments established various forms of citizenship, some generous and some restrictive.

There were three colonies which could not be granted independence: Gibraltar because by the Treaty of Utrecht 1713 it must be returned to Spain if Britain left; Hong Kong because by a series of treaties most of the colony (Kowloon and the New Territories, which were integrated into one with the Crown colony of Hong Kong) was on lease from China due to end in 1997; and the Falkland Islands because their sovereignty was disputed with Argentina.

A citizen from the United Kingdom had no right to enter any colony, nor had a citizen from one colony the right to enter any other. Only a 'belonger', differently defined in each colony, had the right to enter the territory concerned. Citizenship of the UK and Colonies was hardly ever mentioned in the dependencies' laws. The inhabitants who 'belonged' were universally described as 'British subjects' who fulfilled certain conditions unrelated to the citizenship established in the British Nationality Act 1948. A child born outside the colony to a belonger parent was usually considered a belonger only if he or she had parents domiciled or ordinarily resident there. Moreover, a colony's Governor often had powers to withdraw belonger status.

Under Community law Gibraltar, as a European territory for which a Member State was responsible, was included in EEC freedom-of-movement rules. Special provision for Gibraltarians was written into the British Nationality Act 1981, sect. 5, entitling them to be registered as British citizens on application. Colonial CUKCs there had been excluded from the right to enter the UK under the Commonwealth Immigration Acts, and in 1971 the government had had to consider how to reconcile their position with Community law. A unilateral Declaration was hurried out in December 1972 just before the 1971 Immigration Act came into force on 1 January 1973. It specified that British nationals for Community purposes would be patrial CUKCs, patrial BSWCs and persons who, or whose fathers, had been born, registered or naturalised in Gibraltar. Exactly the same groups were specified in a new Declaration late in 1982; only the names had been changed: British citizens, British Subjects one of whose parents had been born, adopted, registered or naturalised in the UK, and certain BDTCs connected with Gibraltar.

The 1981 Act established a British Dependent Territories Citizenship (BDTC) for all the colonies, with no effective change to the existing re-

gime of belonger status. Colonial citizens have never been represented in the Westminster Parliament, and so in the debates on the 1981 Bill they had to rely on the few members for British constituencies in the Commons, and few members of the Lords, who took a special interest in their affairs, to speak up for them. Lobbyists from Hong Kong tried hard to get their special problems recognised. The colony was of enormous economic and financial importance.

Bit by bit, the British government made a few concessions in the following years. In the 1985 agreement for the return of Hong Kong to China, it was agreed that Hong Kong BDTCs could apply for a new status called British National (Overseas) – BNO, available on application up to 1 July 1997. This was not a citizenship but a name to put on a travel document, to facilitate business travel. BNOs have to naturalise in order to become BCs. Then the Hong Kong Act 1990 provided that British citizenship could be granted to 50,000 people in certain specified categories who were considered necessary to Hong Kong's future.[31] (This was to persuade them not to abandon Hong Kong for other countries.) The Hong Kong (War Wives and Widows) Act 1996 entitled Hong Kong women whose husbands had fought in the Second World War to register as BCs.[32] The British Nationality (Hong Kong) Act 1997 belatedly entitled those Hong Kong citizens not eligible for any other nationality after the handover in July 1997 to register as BCs.[33] Most of these people were of Indian ethnic origin: their families had often lived in Hong Kong for generations.

All the inhabitants of Chinese ethnic origin were already Chinese citizens under the law of the People's Republic. Those who had been BDTCs numbered barely half the territory's population, the rest of the Chinese ethnic population having been immigrants from the People's Republic.

Once Hong Kong had reverted to China, the British government could consider the situation of other BDTCs, who totalled fewer than 200,000 persons. Action was not swift, but eventually the British Overseas Territories Act was passed in 2002.[34] It provided that all BDTCs alive on commencement day (1 April 2003) were to be British citizens and also British Overseas Territories citizens. This 'domestic double nationality' allowed the persons concerned right of entry to the UK itself as well as to the overseas territory of residence; as before, it conferred no rights in the other dependencies. Persons connected with the sovereign military bases of Akrotiri and Dhekelia in Cyprus would not become BCs unless they had a connection with some other dependency. But BCs from the UK still had no right of entry to any overseas territory.

After commencement of the BOTA 2002, acquisition of British citizenship in the overseas territories was brought into line with the rules

for the United Kingdom concerning birthplace, adoption, descent etc.[35] But to be 'settled' is a status very hard to obtain in the overseas territories: and their children can therefore seldom benefit from the ius soli rule and acquire local citizenship.

15.3.1.2 The Nationality, Immigration and Asylum Act 2002[36]

Nationality may come first in the title of this measure, but 89 per cent of the text is on immigration and asylum. The main purpose of the Bill was to deal with these two issues. In Parliament, the debates rarely touched upon the nationality provisions, which are an odd mixture. Some of them can be summarised as tidying up the existing law. Sects. 5 to 15 are broadly in this category: some provide a measure of sex equality (on resumption, rights for fathers of illegitimate children, and children born to British mothers abroad between 1961 and 1983), while sect. 11 defines unlawful residence, sect. 14 makes minor changes concerning Hong Kong, sect. 8 removes an age limit for registering stateless children born in the UK and sect. 10 provides for regulations on the 'right of abode', which still exists for Commonwealth-country citizens who held it before 1983. Sect. 12 provides that BOCs, BSs and BPPs are entitled to registration as British citizens wherever in the world they are living, not only in the UK as under the 1981 Act. But the provision is not quite as liberal as it seems: many people in the categories affected have died off; the applicant must have no other nationality, the citizenship acquired is 'by descent' (i.e., not usually transferable), a fee must be paid, and many possible beneficiaries have no means of learning about the new rule.

The main changes in the 2002 Act concern naturalisation and deprivation of citizenship.[37] There is a new emphasis on the value and importance of British citizenship: A citizenship ceremony becomes obligatory; applicants must show 'sufficient knowledge' of life in Britain, and the oath is altered to require a commitment to democratic values and fulfilment of a citizen's duties. The new ceremony, organised at County Council level under Home Office guidelines, has proved popular. But the barriers to naturalisation have been made much higher, especially for spouses, who must now take a language test and a test of 'knowledge of life in the UK'. Arrangements for these tests have been chaotic and in early 2005 were still not finalised. The standard required in English must be equivalent to ESOL (English for Speakers of Other Languages) Entry Three, a very much higher standard than the old police interview test. This can be waived for reasons of age or disability or at discretion, but otherwise is certain to affect many adversely. The 'life' test will eventually be merged with the language test. Attendance at a 'life in the UK' course is to be made compulsory. Tests, courses and ceremonies must all be paid for, adding significantly to

the cost of naturalisation. The total cost to an applicant can be over 400 British Pounds.[38]

The avowed aim is 'to develop among migrants and the settled population a stronger sense of social participation and shared values' (Home Office, 'Controlling our Borders', February 2005). This is in line with the Blair government's drive for conformity to values laid down from above, seen in many aspects of social policy. It must be said that the values in naturalisation policy include celebration of Britain's ethnic diversity.

Sect. 8 provides that, although the Home Secretary may still discriminate on grounds of ethnic or national origin in immigration policy, he may no longer do so in his nationality functions.

The most important change in 2002 concerns deprivation of citizenship. Added to the 1981 clause is a long and confusing section (sect. 4) providing that the Home Secretary can deprive *any* citizen if he is satisfied that the person has done anything seriously prejudicial to the vital interests of the UK or an overseas territory, provided the person would not thereby become stateless. There is an appeal to an immigration adjudicator, unless the Home Secretary says his decision was taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security, of the UK's relations with another country, or otherwise in the public interest. There may then be an appeal to the Special Immigration Appeals Commission.

Undoubtedly, the political motivation behind the 2002 Act's provisions making naturalisation harder and deprivation easier was anxiety following the attack on New York's twin towers in September 2001.

15.3.1.3 Party politics and nationality

The two major parties in Britain, Labour and Conservative, have held power alternately since 1945 as follows:

1945-1951	Labour	BNA 1948
1951-1964	Conservative	Commonwealth Immigrants Act 1962; BNA 1964
1964-1970	Labour	BNA (No. 2) 1964; BNA 1965; Commonwealth Immigrants Act 1968
1970-1974	Conservative	Immigration Act 1971
1974-1979	Labour	
1979-1997	Conservative	BNA 1981; Hong Kong Acts 1985 to 1997
1997-2004	Labour	British Overseas Territories Act 2002; Nationality, Immigration and Asylum Act 2002

Policy on nationality has followed a more or less continuous line regardless of which party has been in power. Both main parties have since 1962 seen nationality as *instrumental* in achieving the ends of immigration policy. Immigration has been the primary concern, nationality only secondary. As explained above, there has never been a clear political theory of the nation of the kind taken for granted in continental Europe nor is there a fundamental, constitutional law to satisfy. This has meant that nationality policy can easily be manipulated to serve ends outside itself. Public opinion has always taken nationality for granted, and frequently has no idea what rights it does or does not confer.

The Labour Party Green Paper (discussion document) issued in 1975 was in almost every respect similar to the Conservative proposals on nationality in 1972: both proposed cutting off existing nationals with an 'overseas' status and denying entry to the UK, and ignored the question of substantive rights attached to citizenship (Dummett & Nicol 1990: 241-242 and notes). Both parties have had very similar attitudes to immigration when in power. The similarity has been somewhat obscured in the public eye by divisions of opinion *within* political parties; part (though not all) of the Labour left being more liberal and one wing of the Conservatives very restrictive. These internal differences have largely disappeared under the influence of power and, probably, under that of the permanent officials in the Home Office.

In theory, civil servants do not advance their own opinions and simply serve whatever government is in power. In practice, the officials are far more knowledgeable in their respective fields of policy than their temporary political masters. In such a highly complicated area as nationality, therefore, they play a decisive role in providing ministers with information and suggestions and in formulating legislation and the rules under which it is administered. Highly important here is the very large discretion written into British nationality law: legislation is so designed that the Home Office officials can take their own decisions on a large range of cases, seldom reviewed by the courts.

A second strand of policy has been a series of small, liberal adjustments yielding to outside non-party lobbying: some advances in sex equality (1981 and 2002), concessions on Hong Kong in the 1990s, improved rights for colonial citizens (British Overseas Territories Act 2002). It often takes some time for these amendments to be introduced: there was already active lobbying for all of these causes in 1981, but only sex equality had some recognition (and that only partial) then. The right for the three least privileged groups of British nationals (BSs, BOCs and BPPs) to register as British citizens was called for in 1981 but not introduced until a significant number in all categories had either died off or managed to acquire some other nationality.

15.3.2 Institutional arrangements

15.3.2.1 The legislative process

The United Kingdom has no single-document constitution serving as a fundamental law which ordinary legislation has to satisfy. Parliament can therefore do what it likes in legislating on nationality/citizenship.

The process is as for other legislation: a bill is prepared by a government department (always the Home Office in this matter), 'read' three times in the House of Commons and three times in the House of Lords, and then submitted for royal assent, which is a mere formality and never withheld.

The first reading in each House is a simple announcement, a bill having been published. At second reading, there is a debate in the relevant House. The House will then go into committee for detailed scrutiny, clause by clause, of the bill. It then returns to the House concerned for third reading. Amendments are generally made at committee stage, and others may be added for discussion at third reading. At every stage, decisions are made by a simple majority of votes.

By convention, a bill with constitutional implications normally has its committee stage in the whole House of Commons, but the government has control of business; the government of the time decided that the highly important 1981 British Nationality Bill should go to a small committee instead. On these small committees, the political parties are represented in proportion to their strength in the whole House. In the case of a tied vote, the Chairman of the committee must give his or her casting vote to the government side. (In the full House of Commons, the Speaker is under the same obligation to support the government.)

Some bills are initiated in the House of Lords: there are then three readings in that House, followed by three in the Commons. A bill returns after three readings in both places to the House where it was initiated if there have been changes to it in the most recent stage. Usually, the House of origin accepts these changes, but if the Commons have the final say they may undo some of the Lords' amendments. The guiding principle is that the Commons, being elected, has a superior right to that of the unelected Lords to take decisions.

The composition of the House of Lords is peculiar. It still includes the descendants of hereditary peers, some of whose titles go back many centuries. It also includes two Church of England archbishops and 24 bishops, whose right to be there goes back to the middle ages. But many members now are 'life peers', appointed for public service and unable to transmit their titles to heirs. Many life peers are former members of the Commons.

Members of Parliament almost invariably vote as the party Whips tell them to do. The party in power has usually an absolute majority in the Commons (and therefore on its committees) and unless the government decides to accept an amendment that amendment can rarely succeed. Outside pressure sometimes persuades the government to accept some concessions, which are then presented in government wording and usually have only limited effect. In 1981, the churches objected to many parts of the British Nationality Bill, but succeeded in wringing only minor concessions from the government.

Voting in the House of Lords is less dependent on party affiliation than in the Commons. There are some 'crossbench' peers who vote independently, and even the party members will sometimes go against their own Whips. However, the Lords' powers have been limited by a series of Parliament Acts since 1910. If their amendments are not to the government's taste, they can be voted down when a Bill makes its final return, after the Lords' consideration of the measure, to the full House of Commons.

The timing of the whole process is in the hands of the government. Clearly there is little hope of substantial change to the main principles of a government Bill, once it has been introduced, and even less hope of total rejection.

There is no constitutional court to carry out judicial review of a bill. The process of judicial review is, however, often used for individual cases concerning application of the law once it has been passed.

15.3.2.2 The process of implementation

The Home Office, a central government bureaucracy, implements nationality law. No local or regional body has the power to make decisions. In the Overseas Territories the Governor has the power, but applications in foreign countries go through the British embassies to the Home Office in London. The Home Office also has the responsibility for issuing passports, and for immigration law and its administration, also for the police and part of the intelligence services.

Decisions on nationality 'by grant', that is by naturalisation and registration, are routinely made by officials. If nationality is refused, an appeal can be made to the Home Office itself, when senior officials will reconsider applications. Otherwise, like all administrative decisions, they can be judicially reviewed. The Home Office says it has no record of how many judicial reviews there have been in recent years, though some have been successful. Before 1997, the Home Office did not have to give reasons for refusal, though in fact it would tell an applicant if failure to meet the residence requirements was a reason. In 1997, Mohammed al Fayed succeeded in persuading the Court of Appeal that the Home Office must behave reasonably and fairly, inform-

ing an applicant of reasons so that he would know what to do to re-apply.[39] The NIAA 2002 provided that reasons must be given, reversing the position in the BNA 1981.

In 2003, 44 per cent of applications were granted on the basis of residence, 30 per cent to spouses, and almost 24 per cent to minor children. Grants totalled 124,315, the highest figure ever recorded. Applications from the European Economic Area (including Gibraltar) were only one per cent of the total, with the rest of Europe accounting for 14 per cent. The largest group of applicants were from India, Pakistan and various African countries. Total applications have risen steadily year-by-year since 1993 from just under 50,000 to 124,315 in 2003. In 2003, the largest number of refusals (3,005) were on the ground that residence requirements had not been fulfilled, the second largest (1,280) because of delays by the applicant in replying to enquiries. 740 refusals were on the ground that good character requirements had not been met. The Home Office says that this figure includes refusals of persons considered a threat to national security, but we cannot know how many were refused on this ground, nor whether the evidence in any case was of a kind which would satisfy a court.

The Home Office does not keep stock statistics of resident foreign nationals. Its estimate that 61 per cent of foreign-born people who had been in the UK for six years or more in 2002 were British citizens is admittedly only approximate; it presumably includes those foreign-born people who are British at birth. The Organisation for Economic Co-operation and Development estimated in 2003 that the total UK population was 59.3 million, with the stock of foreign nationals at 2,865 million or about 4.8 per cent of the total. This estimate was based on the Labour Force Survey (a sample survey which omits anyone not in work), UNHCR, the International Passenger Survey, the Home Office statistical bulletin and the Control of Immigration statistics (which record inward flows). Immigration to the UK comes from every continent; the main source countries since 1999 have been India and the USA.

Despite the quantity of information put out by the Home Office on the process, policy remains in many respects secret. However, advisers agree that there is no evidence of discrimination for or against any particular group.

There is no public outreach program to encourage naturalisation. Government policy appears to encourage it by stressing, since 2002, the positive value of being a citizen, but in practice over the same period it appears that procedures have been tightened. Alarm over terrorism, after July 2005, will probably increase scrutiny, especially as one of the London bomber suspects had been naturalised after lying about his former nationality.

15.4 Conclusions

Why is British nationality law so different from the laws of other states? First, the UK does not have the same theory of the nation that has taken hold elsewhere since 1789. England had its revolution too early and too inconclusively for it to have any lasting effect. The views expressed in the mid-seventeenth century by Levellers and others were thoroughly modern and democratic, claiming that governments derived their powers from the consent of the governed and that all men were equal as sons of Adam. But there was no theory of the nation as an organic whole of which nationals were members, no identification between a 'nation' in the sense of a particular people and the 'state' which gave form to their organisation. English demands for freedom and representation were highly individualistic. Later on, in the eighteenth and nineteenth centuries, British radicals were never asking for a new type of nation, but for new laws and forms of representation in the nation they already had and took for granted.

This nation was then and still is a somewhat vague concept. It has moved from being 'England' to 'Britain' to 'the United Kingdom' to the empire (sometimes described a hundred years ago as 'Greater Britain beyond the seas') and then more uncertainly to a United Kingdom as one member of the Commonwealth of Nations. The UK itself consists of three and a half *historic* nations; England, Wales and Scotland have separate national consciousnesses, while Northern Ireland is regarded as British by its Protestant inhabitants and Irish by Catholics.

Secondly, to understand British nationality law today, one must bear in mind:

– its ancient roots in English common law,
– the persistence of backward-looking habits of mind in its making up to and including the twentieth century,
– the UK's lack of a modern, single-document constitution comparable to those of other countries,
– the uncertainty and confusion of the law in the former British empire,
– the failure to deal clearly with legal change when the empire came to an end,
– British governments' obsession with immigration since 1945,
– the modern dominance of the Home Office over legislation, administration and nationality policy generally, to the exclusion of other government departments and, for the most part, of the judiciary.

These characteristics are evident in the preceding sections of this report.

The system is now on a statutory basis, with legislation followed by frequent statutory instruments and general regulations made under the legislation's powers. Very small details are defined: for example, the number of women entitled to register as British citizens under the Hong Kong War Wives and Widows Act 1996 was probably not more than 50, and one adviser mentioned it to me as 'half a dozen'. Within the main Acts there are numerous exceptions, qualifications and references back to other legislation. The structure as a whole, with its division into five types of nationality, two of which overlap, plus the peculiar status of British (Overseas) National, is excessively complicated. It rests on ambiguous policy aims. One aim has been to curtail non-white immigration from the old empire through the means of nationality law rather than immigration law itself. This was the main purpose in 1981. But there has also been a desire to appear in a good light, to seem at least to be alive to old obligations and at the same time to be modern, for example by providing measures of sex equality. The bureaucratic habits of the officials in the Home Office who prepare new laws for the parliamentary draughtsmen make for close attention to every possible detail and the stopping of every possible loophole, however small. And they always begin from the existing structure of the moment, which for centuries has been over-complicated, and try to incorporate the general requirements of their political masters in the scheme (often adding, it should be said, some ideas of their own). The underlying policy appears to be a desire to restrict the number of British nationals in the world. The close limitation on citizenship by descent for children born abroad, and the unprecedented limitations on ius soli in the 1981 Act, confirm this view of policy. It is the exact reverse of the policy in the first half of the twentieth century, which was expansive.

On the other hand, naturalisation for people already in the UK is in fact increasing; recent sex equality provisions in 2002 will have a slightly expansive effect on transmission, and the granting of British citizenship to BOTCs in the overseas territories has increased the number of British citizens in the world by about 200,000. These measures have a very small effect on overall numbers: the two last-named are political gestures to satisfy lobbyists while the new procedures in naturalisation are part of the government's policy to encourage 'integration' and a more definite idea of citizenship than has been common up to now. Citizenship has never had the strong meaning that it has in most other countries. It has been regarded as a personal quality: being law-abiding, a good neighbour and a participant in community affairs. It has not been related to a concept of legal nationality; indeed, the Citizens' Advice Bureaux found all over the country advise aliens (including asylum seekers) and nationals alike. The government's present pol-

icy is intended to make all residents identify with the UK and its interests.

Very few people in the UK think of themselves as European citizens. The general impression conveyed by the media, and not corrected by most politicians, is that the European Union is something outside the UK and which keeps interfering with the UK's freedom of action. 'Brussels' is often mentioned as a hostile power. Although some 30 per cent of voters vote for the European Parliament, the character of European institutions is hardly known to the majority of the population. People who have travelled in other European countries have a more positive though not always better-informed view. There are pro-Europeans and anti-Europeans in both major political parties: only the Liberal Democrats are consistently pro-European.

Thus the UK's sense of nationhood is inward-turned. No longer imperial and not yet fully European, it still looks to the past for a belief in national greatness. But there are of course many conflicting attitudes among politicians, journalists and the population at large. Opinion-forming is centred in London, which in some ways is like a small, separate country, and which is now thoroughly multi-racial and proud of this fact. It contains highly successful people whose ancestry derives from the old empire as well as from a wide variety of foreign countries, European and non-European. Throughout the country, ethnic minorities are highly visible in public services at every level (e.g., senior and junior doctors, nurses, technicians and cleaners in the Health Service; teachers including school Heads; transport workers) and in private industry and services. While some parts of London and many other cities contain very poor people of immigrant descent and experience racist attacks, abuse and discrimination, it is generally accepted these days that racism is unBritish. Much hypocrisy of course results. There is still racism in fact. There would undoubtedly be more if we had not had strong legislation against racial discrimination since 1976.

Hostility to muslims has become a serious matter in recent years. But – perhaps because of widespread British indifference to religion and suspicion of talking about a national culture – muslims can be British; girls can wear the headscarf at school and at work. Perhaps the vagueness and oddity of the British sense of nationhood can be an advantage in social life if not in law. We must hope that reaction to the London bombings will not destroy the positive achievements of recent decades.

Chronological table of major reforms in British nationality law since 1945

Date[40]	Document	Content of change
1948	British Nationality Act	UK-and-Colonies citizenship created within imperial British subjecthood.
1949	Ireland Act	Irish citizens to be treated as if British subjects.
1962	Commonwealth Immigrants Act	Colonial CUKCs and Commonwealth-country citizens subjected to UK entry control.
1964	British Nationality Act	Facilitated renunciation and resumption for some CUKCs.
1964	British nationality Act (No. 2)	Entitled stateless children of a British parent to register.
1968	Commonwealth Immigrants Act	CUKCs of colonial origin in independent countries subjected to entry control.
1971	Immigration Act	Creation of patriality (right of abode) as test for entry.
1972	Unilateral Declaration attached to the British Treaty of Accession to the EC	Defined which British nationals had freedom-of-movement rights: patrial CUKCs, patrial BSWCs and persons born or with fathers born in Gibraltar.
1981	British Nationality Act	Creation of British citizenship and three other 'citizenships'.
1981	East African Asians Case, 3 EHRR 76	A group of East African CUKCs complained to the European Commission on Human Rights in Strasbourg of degrading treatment by the British government. They were unable to use the Fourth Protocol of the ECHR as the UK had refused to ratify it. The Commission declared their case admissible, but it never proceeded to the Court.
1982	Unilateral Declaration revising the terms but not the content of the earlier Declaration attached to the British Treaty of Accession to the EC	British citizens, Dependent Territories' Citizens from Gibraltar and BSWCs with right of abode in the UK.
1985	International agreement between UK and People's Republic of China	Creation of British Nationals (Overseas).
1990	Hong Kong Act	50,000 Hong Kong residents to be registered as British citizens.
1997	British Nationality (Hong Kong) Act	Entitled non-Chinese Hong Kong citizens to register.
1997	R. v. Secretary of State for Home Department *ex parte Fayed*	Home Secretary must give reasons for refusal of naturalisation. Incorporated in NIAA 2002.
2000	Race Relations (Amendment) Act (RRA 2000)	Permitted Home Secretary to discriminate on grounds of ethnic or national origin in naturalisation.
2001	R. v. Secretary of State for Home Department ex parte Ullah	In principle, citizen by descent cannot upgrade status.

2002	British Overseas Territories Act (BOTA 2002)	BDTCs renamed BOTCs and given British citizenship also.
2002	Nationality Immigration and Asylum Act (NIAA 2002)	Withdrew permission accorded to Home Secretary under RRA 2000.

Notes

1 See Parliamentary Debates, House of Lords, 13 October 1981 for all the foregoing quotations.
2 25 Edw. 3, St. 1 (St. 2).
3 1608, 7 co. Rep, 1.
4 1708, 7 Anne c. 5.
5 1536, 28 Hen. 8. c. 3 (Wales); 1542, 34 and 35 Hen. 8. c. 26 (Laws in Wales).
6 6 Anne c. 14.
7 1669, Vaugh. 274, 124 ER 1072.
8 12, 13 and 14 Geo. 6, c. 41 (Ireland).
9 7 and 6 Vict, c. 66 (Aliens).
10 33 and 34 Vict. C. 14 (Naturalisation).
11 1669, Vaugh. 274, 124 ER 1072.
12 6 and 7 Geo. 6, c. 14.
13 4 and 5 Geo. 5, c. 17.
14 8 and 9 Geo. 5, c. 38 and 12 and 13 Geo. 5, c. 42.
15 11 and 12 Geo. 6, c. 56 (British nationality).
16 An Act extending this period for registration was passed in 1958, see 6 and 7 Eliz. 2, c. 10 (British Nationality) s. 3(1)(B).
17 10 and 11 Eliz. 2, c. 21.
18 Eliz. 2, c. 22.
19 Eliz. 2, c. 54.
20 Eliz. 2, c. 34.
21 Eliz. 2, c. 9.
22 A group of East African CUKCs complained to the European Commission on Human Rights in Strasbourg of degrading treatment by the British government (*East African Asians Case*, 1981, 3 EHRR 76). They were unable to use the Fourth Protocol of the ECHR as the UK had refused to ratify it. The Commission declared their case admissible, but it never proceeded to the Court.
23 Eliz. 2, c. 77.
24 Eliz. 2, c. 61.
25 1983, Eliz. 2, c. 6.
26 Eliz. 2, c. 41.
27 British citizenship (Designated service) (Amendment) Order 1987, No. 611.
28 *R. v. Sec. of State for Home Department ex parte Ullah* (2001).
29 See also British Overseas Territories (Amendment) Regulations S.I. no. 539 2003.
30 There is some minor provision for their nationality problems in the BOTA 2002, sect. 6.
31 1990 Hong Kong selection scheme Order S.I. 1990 no. 2292.
32 Eliz. 2, c. 41.
33 Eliz. 2, c. 20.
34 Eliz. 2, c.8.

35 2003 Adoption (Intercountry Aspects) Act 1999, (Commencement No. 9) Order 2003 No. 362 (c. 22).
36 See the NIAA (Commencement no. 9) Order, S.I. no. 2298, 2004 (c. 124), giving commencement dates for different sections of the Act.
37 2003 British Nationality (General) Regulations, S.I. No. 548, 2003.
38 Full details of the procedure are excessively complicated (they can be found at www.ind.homeoffice.gov.uk).
39 *R. v. Sec. of State for Home Department ex parte Fayed.*
40 The dates given for these Acts follow standard British usage, but do not indicate on what day their provisions, separately or as a whole, came into force. Some NIAA provisions, for example, are not yet in force at the time of writing. For more information concerning commencement dates on specific provisions see the detailed answers on selected modes of acquisition of nationality for the EU-15 at www.imiscoe.org/natac.

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