



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

**Clause 41 Descent through the female line
Amendment 90A**

Amendment 91 proposed new Clause after Clause 41

Clause 41 Descent through the female line.

ILPA supports amendment 90A in the names of the Lord Avebury and the Baroness Falkner of Margravine

Page 34, line 11 leave out lines 11 to 15

Purpose

To ensure that the scope of section 4C of the British Nationality Act 1981, as inserted by the Nationality, Immigration and Asylum Act 2002 is retained and that registration of those born to British mothers overseas is not restricted so as to exclude those who would have needed to make an application for registration. To ensure that applicants are not put in the impossible position of having to prove whether or not they would have succeeded in an application made many decades ago.

Briefing

Prior to 1 January 1983, when the British Nationality Act 1981 came into force, British citizen mothers, could not pass on their British citizenship to their British citizen children born overseas. British fathers could do so. The first attempt to address the present day effects of this historical discrimination took the form of a concession at the time of the coming into force of the 1981 Act, whereby those born to British citizen women outside the UK could register as British citizens while still children. Not all managed to do so. In 2002 the government was persuaded to use the Nationality Asylum and Immigration Act 2002 to amend the law so that those who had missed out (those born between 7 February 1961 and 1 January 1983 could do so.

It was argued forcibly at the time that those born before 7 February 1961 should be allowed to register. Not only individual examples of the human consequences of the clause, but also the legal consequences were put to Ministers: the most forcible argument being that the amendment would allow the government to rescind their reservation to the Convention on the Elimination of all forms of Discrimination against women¹.

¹ *Hansard* HL Report 7 February 2006, cols 628ff

That must be the acid test of whether Clause 41 is good enough. The 1979 Convention on the Elimination of All forms of Discrimination against Women² was ratified by the UK on 7 April 1986. Article 9 states

“1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

The UK entered reservations on ratification on behalf of the UK, and, in similar terms, on behalf of the Isle of Man, the British Virgin Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. In 1996 the UK withdrew a number of its reservations and declarations. If the first looks familiar, it is because it is in exactly the terms as the reservation to the UN Convention on the Rights of the Child, which the UK withdrew in 2008. Will the government now withdraw the reservation to the CEDAW?

“(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom.”

The UK also entered a reservation to Article 9, in the following terms:

‘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, how ever, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.’

In the event, the ‘temporary or transitional’ discrimination against women as far as passing on their nationality to their children is concerned, that led to this reservation being entered, has lasted twenty-eight years beyond parliament’s approval of the British Nationality Act 1981; twenty-one years beyond that Act’s coming into force and seventeen years since the UK’s ratification of CEDAW? Does the government consider that Clause 41 puts it in a position to withdraw the reservation to CEDAW? Will it now do so? If not, should it not notify the Secretary General of the United Nations that the terms of its reservation have not proven to be an accurate reflection of reality?

Clause 41 takes sixty-nine lines to remove the words ‘after 7 February 1961’. Simplification indeed. What are subclauses (3) and (4) doing? Why is the situation of a child born on 6 February 1961 so much more complicated than that of a child born after 8 February 1961? This is not because the British Nationality Act 1948 used different language to the British Nationality Act 1981, that of ‘Citizen of the UK and Colonies’ and British subject (which had a different meaning than it was given in the 1981 Act) instead of ‘British Citizen’. That much was as true of a child born after 7 February 1961.

² Signed 18 December 1979. United Nations 1249 UNTS 13. In force 3 September 1981.

The new subsections will make it more difficult for those born both before and after 7 February 1961 to register as British Citizens. What the Explanatory Notes describe as a ‘clarification in new subsection 4C(3C)(b) of the British Nationality Act 1981, that acquiring British citizenship cannot depend upon an application having been made for registration, is a restriction. Section 5(1) of the British Nationality Act 1948 provided:

‘5(1) Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at this time of his birth:

Provided that if the father of such a person is a citizen of the United Kingdom and Colonies by descent only, that person shall not be a Citizen of the United Kingdom and Colonies unless....

(b) that person’s birth having occurred in a place in a foreign country [...] the birth is registered at a United Kingdom consulate within one year of its occurrence, or, with the permission of the Secretary of State, later’

The British Nationality Act 1958 did not amend this provision. Nor did the Commonwealth Immigrants Act 1962. Nor did the British Nationality Act 1964, nor did the British Nationality (No.2) Act 1964, although in any event they postdate the 7 February 1961 cut –off date for which provision was made in 2002.

Under the 1948 Act, the child born to a British father could be registered. Under Section 4C of the British Nationality Act 1981 as inserted by the Nationality Immigration and Asylum Act 2002 a child born to a British mother could be put in the same position as that child. Now, under this clause, a child born to a British mother, whether before or after 7 February 1961, cannot be put in the same position. It is no use the government’s using words such as ‘clarify’. The British Nationality Act 1981, as amended by the Nationality, Immigration and Asylum Act 2002, is not ambiguous on its face. We recall the recent words of the House of Lords in its judicial capacity in the case of *RB (Algeria) (FC) and another (Appellants) v Secretary of State for the Home Department* [2009] UKHL 10 (the ‘torture’ case):

*“81. It was submitted that this undertaking was admissible as an aid to the construction of section 5 of the 1997 Act under the principle in *Pepper v Hart* [1993] AC 593. The House in that case approved recourse to *Hansard* as an aid to construction only where legislation is ambiguous. I have been unable to detect any ambiguity in the terms of section 5. The wording of subsections (3) and (6) is clear and contains no hint that rules providing for closed hearings can only be made insofar as this is necessary in the interests of national security. It was suggested that there is a conflict between subsection (6)(a) and (6)(b) but I can see no incompatibility between them.*

*82. [...] Neither the fact that the ECtHR in *Chahal* envisaged that it would only be necessary to use closed material where the interests of national security required this nor the assurance given to Parliament by the Junior Minister can have the effect of rendering Rule 4 ultra vires.*

83. This conclusion makes it unnecessary to consider the implications of the fact that the terms of section 97 of the 2002 Act, coupled with section 2(1) of the 1997 Act, appear to show a clear intention on the part of Parliament that SIAC’s procedures should be available to protect information that in the Secretary of State’s opinion should not be made public not merely in the interests of national security but “in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest”.

New subsection 4C(3D) is a further restriction, again described in the Explanatory Notes as a ‘clarification’. Despite new proposed subsection 4C(3C)(b), with its refusal to consider parallels with children of men who registered, the government has found it necessary to state

that it is not to assumed that any registration or other requirements for naturalisation were met. This leaves a person, in 2009, in the position of having to prove that they would have succeeded in an application at the time of their birth or in the first few months of life. This is not a period of which many people have any great recollection, and in many cases the parent will be deceased. Are we to see people rushing to take affidavits from aged parents before they die, in the hope of proving that had their mother been a man in the middle of the last century, they would have become a British Citizen?

In the debates on his proposal to remove the 7 February 1961 provision in 2006, the Lord Avebury said:

*'This Minister went a little further than the noble Lord, Lord Filkin, when she explained in a discussion that we had that—I am paraphrasing what she said—although it is agreed that very few children born abroad to British mothers and foreign fathers would benefit from the removal of the cut-off date and therefore it would have no implications for immigration policy, there could be repercussions in the drafting rules that apply to all statutes.'*³

The exchange continued as follows:

***The Baroness Ashton of Upholland** '...we cannot simply move policy around on the grounds that it affects only a few people...[...]'*

***The Lord Avebury** 'My Lords, I cannot help observing, as my noble friend Lord Dholakia just reminded me, that when it comes to disadvantaging a group of people, however small it may be, there is no problem with the Government finding room for them in the Bill. It is not a question of numbers; it is a question of fairness.'*⁴

Here we have the illustration of the Lord Avebury's point: the government has bothered to propose to amend s(4C) with all these lines of drafting, to disadvantage a group of people, however small it may be. It is not a question of numbers, it is a question of fairness.

ILPA supports Amendment 91 in the names of the Lord Avebury and the Baroness Falkner of Margravine:

After section 4C of the British Nationality Act 1981 (c. 61) insert—

"4D Acquisition by registration: certain persons born after 1983

A person is entitled to be registered as a British citizen if—

- (a) he applies for registration under this section and
- (b) he satisfies each of the following conditions:
 - (i) the applicant is not a British citizen on the date on which this section comes into force;
 - (ii) the applicant's mother or father would have been entitled to register as a British citizen under section 4C of this Act but for their death; and
 - (iii) the applicant was born in the United Kingdom or a qualifying territory."

Purpose

To complement the amendments being made to s 4C of the British Nationality Act 1981 by Clause 41 (Descent through the female line) and ameliorate the current day effects of historical discrimination on the grounds of sex. Clause 41 provides for the registration of

³ *Hansard* HL Report 7 February 2006

⁴ *Hansard* 7 February 2006 cols 630-631

those born at any to a British mother in circumstances where a father could pass on his nationality to a child born abroad but a mother could not. However, there will be cases where the person who would have been entitled to register is now dead. What of their children? They may have missed out because since 1 January 1983 it has been the case that a person born in the UK or a qualifying territory is only born British if their mother or father is British or settled in the UK. The amendment gives them an entitlement to register as British.

Briefing

Clause 41 amends section 4C of the British Nationality Act 1981 to remove the cut-off date before which restricted the registration as British citizens of those born to a British mother overseas in circumstances where a father could pass on his nationality to a child born abroad but a mother could not (see briefing above).

Before 1983, a person born in the UK was born British. After 1983 only those born to a parent who is British or settled then are born British citizens. As to birth in the qualifying territories, a child born in the qualifying territories on or after the ‘appointed day’ (26 February 2002) to a parent who is a British citizen or settled in the territory is born British.

There are exceptions to this, for example a child born before 1 July 2006 to a British citizen father not married to the child’s mother will not be a British citizen if the mother is neither a British citizen nor settled.

Consider the implications of these rules for the provisions on descent through the female line. Let us assume that a person born overseas to a British citizen mother before 7 February 1961 is now dead. That person would never have been British. But let us assume that that person had a child who was born in the UK after 1 January 1983. Although born in the UK the child would have been born to a foreigner and if the child’s parent was not settled, the child would not have been born a British citizen. The effects of historical discrimination thus live on for this group. One can vary the scenario and add in complications including birth in a qualifying territory, or that the father of the child was a British citizen but not married to the ‘foreign’ (because unable to inherit her mother’s nationality) mother.

The amendment provides a simple solution; it allows these people to register as British citizens. Their links with the UK or a qualifying territory are close; they were born in the UK or a qualifying territory. Their grandmothers were British citizens. Their mothers, had they lived, would have been entitled to register as British citizens.

Given that it is only since 1983 that those born in the UK have not been born British citizens by virtue of their place of birth, none of those born in the UK who would benefit from the amendment will be over 26 years old.

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