



## **Borders, Citizenship and Immigration Bill**

### **House of Lords Committee**

#### **PART 2 CITIZENSHIP**

#### **NEW CLAUSE BEFORE CLAUSE 41**

**ILPA supports amendment 90, in the names of the Lord Avebury and the Lord Wallace of Saltaire**

#### **Before Clause 41**

Insert the following new Clause—

#### **"Certain persons without other citizenship**

In section 4B(1) of the British Nationality Act 1981 (c. 61) (acquisition by registration: certain persons without other citizenship) at the end of subsection (1) insert—

"(d) British National (Overseas)"."

#### **PURPOSE**

To ensure that a British National (Overseas) who has no other nationality or citizenship can register by entitlement as a British Citizen.

#### **BRIEFING**

Section 4B was inserted into the British Nationality Act 1981 by the Nationality, Immigration and Asylum Act 2002. It gives certain British nationals other than British citizens the right to register as British citizens if they have no other nationality or citizenship. The then Home Secretary, the Rt Hon David Blunkett MP, declared

*"We are talking here about righting an historic wrong.."*<sup>1</sup>

The historic wrong was not however righted for British Nationals (Overseas) with no other nationality or citizenship. They were not included.

Those who are today British Nationals (Overseas) or BN(O)s have a connection with Hong Kong. They became BN(O)s when Hong Kong was returned to Chinese sovereignty, when they automatically lost the status of British dependant territories citizens (see the British Nationality (Hong Kong) Act 1995). They were people who did not acquire British Citizen or any other form of British nationality. It has not been

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<sup>1</sup> *Hansard* HC Report 05 November 2002, col 147

possible to acquire BN(O) status since December 1997. It is not possible to pass BN(O) status onto one's children.

Those of Chinese ethnic origin from Hong Kong were always regarded as 'Chinese compatriots' by the Hong Kong authorities. They are Chinese nationals. The group of BN(O)s with no other nationality or citizenship are a group of those who are not of Chinese ethnic origin. They are not regarded as Chinese citizens by the Chinese authorities. Many had come to Hong Kong when it was ruled by the British and the British colonial authorities had encouraged them to come. Some have no other nationality or citizenship.

BN(O)s have no right to enter the UK, nor a right of abode. Their status carries no rights other than the use of a form of passport and exemption from certain visa requirements. They are *de facto* stateless.

The Lord Goldsmith in his February 2008 review of citizenship, *Citizenship our Common Bond* stated:

*'11. Finally, there is the question of British Nationals Overseas (BN(O)s) who have that status by virtue of their connection to Hong Kong and are not affected by the 2002 legislative changes. They hold the only extant and significant form of British citizenship which is not full citizenship and does not allow an unqualified right to enter and remain in the UK.12. From discussions that I have had in Hong Kong, it is clear to me that the demand for BN(O) status is dropping. Nonetheless to remove this status without putting something significant in its place would be seen as the British reneging on their promise to the people of Hong Kong. The only option which would be characterized as fair would be to offer existing BN(O) holders the right to gain full British citizenship. It is likely that many would not take this up as the prospects economic and fiscal of moving to the UK are not favourable to those well-established in Hong Kong. However, I am advised that this would be a breach of the commitments made between China and the UK in the 1984 Joint Declaration on the future of Hong Kong, an international treaty between the two countries; and that to secure Chinese agreement to vary the terms of that treaty would not be possible. On that basis, I see no alternative but to preserve this one anomalous category of citizenship.'*

This describes the 'political' argument against extending s 4B to BN(O)s. The Lord Goldsmith did not say by whom he is advised. Also it is vital to note that these comments address all BN(O)s. Stateless is an extra factor in the equation and the attitude of the Chinese government may well be different toward those it does not regard as its citizens and to whom it has not extended Chinese nationality.

Arguments that a foreign State would be distressed if the UK made better provision for its nationals have recently fallen apart in the 'Gurkha' case in the High Court<sup>2</sup> because those who proffered such arguments could not substantiate them. For many years the attitude of the government of Nepal had been pleaded as a reason for denying the Gurkhas fair treatment. When evidence of the attitude of the government

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<sup>2</sup> *R (Limbu et ors) v Secretary of State for the Home Office, Entry Clearance Officer Kathmandu, Entry Clearance Officer Hong Kong* [2008] EWHC 2261 (Admin)

of Nepal was obtained, for the litigation, it turned out that the Government of Nepal did not have, and had not had, any had no objection to better provision being made for the Gurkhas as proposed by the applicants. Mr Justice Blake said in his judgment:

*"10. ...Mr. Geoff Hoon, Secretary of State for Defence wrote on the 22<sup>nd</sup> September 2004 as follows:*

*".... Our initial soundings indicate that this approach would be acceptable to the Nepalese government, except that they would be very concerned about any extensive retrospection.."*

*25 ... I accept that there is strength in some of the Claimants' observations and submissions that the MOD continued to adopt a very rigid position to what the TPA required or what the Government of Nepal wanted by way of treatment of Gurkha troops during or after service, that was long out of date...*

*41 ...there is an absence of any information that would have been capable of supporting Geoff Hoon's reference to the Nepal Government being "very concerned" in his letter of the 22<sup>nd</sup> September....The Home Office, through no fault of its own or the responsible Minister, appears to have been misled as to the existence of such a factor in formulating its discretionary policy for Gurkha veterans discharged before 1997. "*

The suggestion that to allow stateless BN(O)s to register as British Citizens would upset China today in 2009 seems unlikely. Despite feeling unable to go beyond the advice (unsourced) that he was given, the Lord Goldsmith does observe

*"The only option which would be characterized as fair would be to offer existing BN(O) holders the right to gain full British citizenship."*<sup>3</sup>

How much more force this has in the case of the stateless.

As to the argument that it would be a breach of the Treaty, this cannot be substantiated when one looks at the documents. The 1984 Sino-British Joint Declaration<sup>4</sup> Treaty does not deal with the retention of British nationality. It is important that to recall that as far as China was concerned, ethnic Chinese in Hong Kong had always been Chinese, they were not gaining a nationality when Hong Kong reverted to China, they had always had it. In the accompanying Exchange of Memoranda the Chinese Memorandum said only

*'Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether or not they are holders of 'British Dependant Territories citizens' Passport' or not, are Chinese nationals.*

*Taking account of the historical background of Hong Kong and its realities, the [..Chinese Government] ...will, with effect from 1 July 1997 permit Chinese nationals in Hong Kong who were previously called 'British Dependent Territories citizens' to use travel document issued by the Government of the United Kingdom for the purpose of travelling to other States and regions.*

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<sup>3</sup> Chapter 4.1 paragraph 12.

<sup>4</sup> The Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong, Cmnd 9352

*The above Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned travel documents'*

The overall impression one gains from the Chinese memorandum is that British Dependant Territories Citizenship, in its inverted commas throughout, was regarded as an irrelevancy, save insofar as attempts might be made to exercise the 'consular protection' on China's own soil. It is the UK memorandum that is keen to state that the new status will not confer a right of abode. One must also bear in mind that the memoranda were exchanged in 1984, seven years after Hong Kong had reverted to China, three years after the enactment of the British Nationality Act 1981 and a year after that Act came into force. The notion that there would be any breach of Treaty obligations is unproven.

What then of the other ostensible reasons for refusing to allow this group of what are *de facto* stateless persons who hold only a British passport, and have no right of abode in any country, to register as British Citizens? The arguments proffered to date fail to convince.

In 2006, when inclusion of the BN(O)s in section 4B was proposed again, the Baroness Ashton of Upholland stated:

*"...applicants under the 1997 Act are required to have been "ordinarily resident" there on particular dates—a concept which, while not necessarily equating to possession of a right of permanent residence there, at least implies lawful and, for the time being, stable residence in Hong Kong."* (Hansard HL Report, 14 March 2006, col. 1197)

Watch the sleight of hand. The words 'for the time being' relate to the situation in 1997, before Hong Kong reverted to China but are used to imply that they answer a question about the status of people there now and not regarded as Chinese citizens. The Baroness Ashton continued:

*"In 1997, those with only British nationality were told that they would be admitted to the UK if conditions deteriorated in Hong Kong, not that they would be given British citizenship. I do not believe that we have reneged on the agreement that we reached..., the right of many of those eligible for registration under Section 4B of the 1981 Act to remain in their countries of current residence is at best precarious. ..."* (Hansard HL Report, 14 March 2006, col 1200-1201)

The purported distinction does not hold. A person with no citizenship that gives them a right to enter any country in the world is in a precarious situation. That is why international human rights instruments protect the rights attendant on a nationality.

The Baroness Ashton of Upholland also said:

*'We do not accept ...obligations towards stateless persons going beyond those we have accepted by ratifying the 1961 convention'* (Hansard HL Report 14 March 2006, col. 1201)

This is a reference to the 1961 United Nations Convention on the Reduction of Statelessness. The reference is disingenuous. That Convention deals with the

obligation to grant a ‘nationality’ to those who are stateless. The right to enter and remain in the country of one’s nationality, what UK calls ‘the right of abode’ is the fundamental element of a nationality. Without it, a nationality cannot be said to be a nationality at all. What the UK has given the BN(O)s is not a nationality within the terms of the Convention.

The UK has signed but not ratified Protocol Four to the European Convention on Human Rights because of its position toward British nationals who are not British citizens, including BN(O)s. Article 3 of Protocol Four states:

**Article 3**

1. *No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
2. *No one shall be deprived of the right to enter the territory of the State of which he is a national.”*

Protocol 4 to the ECHR has been ratified by 42 of the 46 Council of Europe member States<sup>5</sup>. Three, including the UK, have signed but not ratified Protocol 4. The UK is thus falling behind. As a signatory to the Protocol the UK should be taking steps to bring its legislation into conformity with the Protocol so that it can ratify.

The Joint Committee on Human Rights in its Seventeenth Report of session 2004-2005<sup>6</sup>, evaluated the government’s review of its international human rights obligations, which reported in July 2004, although the full findings were not published. The Joint Committee on Human Rights said:

*“37...The Report of the Review cites—*

*continuing concerns over Articles 2 and 3 of Protocol 4 which could be taken, respectively, to confer rights in relation to passports and a right of abode on categories of British nationals who do not currently have that right....*

38. *We note that the UK is one of only a small number of Council of Europe Member States that have not ratified Protocol 4. We recommend that, at a minimum, consideration should be given to ratification with appropriate reservations to overcome the specific issues identified by the Government.”*

The situation of BN(O)s with no other nationality or citizenship cannot be explained away as not mattering. Such a person holds only their British passport; no other. They cannot use this passport to enter or to stay in the UK. A BN(O) with no other nationality or Citizenship is, in the words of Article 3(2) of Protocol Four to the European Convention on Human Rights, ‘deprived of the right to enter the territory

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<sup>5</sup> CETS 046

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=2/24/2009&CL=ENG>, accessed 24 February 2009

<sup>6</sup> *Review of International Human Rights Instruments*, 31 March 2005, HL 99, HC 264

*of the State of which he [or she] is a national'* and indeed is deprived of the right to enter the only State of which s/he is a national.

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