

SUPPLEMENTARY SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS PURSUANT TO SESSION OF 04.11.08

BRITISH NATIONALS AT RISK

About the Joint Council for the Welfare of Immigrants

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to eliminate discrimination in this sphere and to promote the rights of migrants within a human rights framework.

Introduction

This submission is a supplementary submission prepared in the light of the session of the 04.11.08. It deals exclusively with (i) the new risks the draft bill potentially creates for British citizens (ii) the position of British nationals other than British citizens.

1. The British Government's idea of citizenship and nationality appears to be at variance *with* the meaning assigned to it by other nations on the international plane. Elsewhere, the citizen/national belongs to a particular state, has rights and duties which derive from belonging, and has a protected, entrenched, constitutional status. However imperfectly this pattern is followed, in some places, the basic standard laid down in Article 12 of the 1966 International Covenant on Civil and Political Rights requiring that 'No one shall be arbitrarily deprived of the right to enter his own country' is widely respected. From 1962 onwards however British Governments have systematically denied the rights of certain groups of British nationals to enter or remain in the United Kingdom. **The present Government continues to do so, and it is possible that the Draft (Partial) Immigration and Citizenship Bill will extend exclusion to new groups of nationals.**

2. The origins of the above problem lie in the British Nationality Act (BNA) 1948, which called the existing status of British subjecthood the nationality of the empire, and then superimposed it on to a "Citizenship of the United Kingdom and Colonies" (CUKCs) which had no rights attached to it, outside its rules on transmission. Other countries, both inside and outside the Commonwealth, regarded the separate citizenships of independent Commonwealth countries as nationalities. But inside the UK, British subjecthood still had attached to it rights associated with nationality.

3. The BNA 1948 had made the terms 'British Subject' and Commonwealth citizens' interchangeable in law. Most people in the UK did not recognise this. When hostility to so called 'coloured migration' grew in the late 1950's that hostility was expressed as concerning 'Commonwealth citizens'. This confusion made it possible for the Government in 1962 to legislate for immigration controls over Commonwealth

citizens in a manner which placed some CUKC's under control while others (mainly in or from the UK) were not. Citizens of the independent Commonwealth countries were placed in the same controlled category as colonials; the Government openly used administrative means to facilitate entry from the old, white Dominions, while strictly limiting "coloureds". Thus began the process, continuous to this day of subordinating nationality/citizenship law to immigration law.

4. It is a striking feature of the Draft partial Immigration and Citizenship Bill 2008 that it deals almost exclusively with immigration matters concerning control after entry; detention, expulsion and offences. Moreover, the Bills opening clauses indicate a potential reduction in existing citizenship rights. The only citizenship right defined in the 1981 Act was the right of abode, and this was shared with certain citizens of other Commonwealth countries. But right of abode has disappeared, to be replaced by 'immigration permission.'

5. Immigration permission is not a right at all. It may be granted by the Secretary of State by order to groups of persons¹ or to individuals². The opening clauses of the Bill begin with 'A British citizen is free to enter and leave, and to stay in, the United Kingdom' but immediately qualify this with "That is subject to any requirements or restrictions imposed by or by virtue of this Act or any other enactment."³ The burden of proof is on an applicant who claims to be British citizen to prove the assertion by means of a valid UK passport describing him or her as a British citizen or by a valid identity card.

6. It should be evident from the above that there is room in these provisions for some bureaucratic manipulation. Also, given existing powers to deprive some persons of citizenship, there is a real risk that a new group of British nationals denied entry and stay here, will join the excluded groups created by earlier legislation.

7. The 1962 Commonwealth Immigrants Act had excluded colonial CUKCs from the UK but had left them a home each in his own colony. The 1968 Commonwealth Immigrants Act was far more alarming; It deprived CUKCs in independent Commonwealth countries of a right of entry and stay here unless they had acquired their status through birth, adoption, registration or naturalisation in the UK itself or had a parent or grandparent who so qualified. This effectively excluded CUKCs of Asian origin or descent from the UK, who had become CUKC's because of birth etc in a colony. The people particularly affected were the East African Asians who believed that they had been guaranteed UK entry if placed under any disabilities when their countries of residence became independent. Their numbers were variously estimated. They became effectively stateless and many suffered great hardship, for example through denial of employment and education for their children. Those who sought to enter the UK were turned back, only to be turned back again in East Africa. After being shuttled back and forth some were imprisoned on arrival in the UK but eventually released and allowed to stay as no other country was bound to accept them. Some were admitted by Canada, some went to India as a supposedly temporary expedient and waited for entry vouchers to the UK which seldom came; some

1. Clause 8

2. Clause 5

3. Clause 1(2)

wandered in European countries, sleeping on beaches or on park benches. Their case was ruled admissible by the European Commission on Human Rights, but never proceeded to the Court of Human Rights. There were no three classes of CUKC, each with different rights from the others.

8. The Immigration Act 1971, which united immigration controls over aliens and Commonwealth citizens/British subjects alike created the concept of the right of abode or partiality. Its definition was excessively complicated, but essentially it meant that CUKCs with a UK connection, together with several million citizens of Commonwealth countries with that connection were free from immigration control, but all other CUKCs and persons from other countries were subject to it. The existing groups of CUKCs were re-named in the subsequent 1981 British Nationality Act as British citizens (partial CUKCs), British Dependant Territories citizens (colonial CUKCs) and British Overseas Citizens (non-partial CUKCs no longer legally connected to any colony). All these continued to have the same rights, or lack of rights as before. All could still apply for British passports but these were of little use to BOCs.

9. The numbers of BOCs in the world (in African countries, Malaysia and elsewhere) could never be determined with accuracy. The Government's estimates have been consistently higher than those of independent varied observers- not only for BOCs but for other British nationals excluded from the UK: British Protected Persons, non-partial British Subjects without citizenship of any Commonwealth country, and British Nationals (Overseas). The British subjects concerned were people in India, Pakistan and Sri Lanka who failed to obtain those countries' citizenships at independence. Transmission of the status was very limited. (Partial BSs are mostly Irish descent or else people of UK descent from the sub-continent.) BPPs, very numerous in the early twentieth century, originated from the protectorates, protected states, mandated and trust territories: these have almost all disappeared.

10. As to who these people are, their numbers and their whereabouts, we can be sure that most, but not all, BOCs are of non- European descent. There must be some of UK descent too remote to qualify for the right of abode in Latin America, some from families of Syrian traders who settled in West Africa, and a variety of others scattered widely. But of these many have dual citizenship, having gained nationalities in their countries of residence. The latter are not vulnerable like those who are BOCs only, and *they do not have the right to register* as British citizens which was granted to all other BOCs everywhere by 2002 by the Nationality, Immigration and Asylum Act 2002. (BPPs and BSs were given a right to register in the same Act) But much damage had already been done and some remains. Many holders of these forms of nationality (mainly of Indian descent) may not know of their BOC status and therefore obviously do not apply. The total numbers have dwindled as British policy intended then to do because of close limits on transmission. There are probably a few thousand altogether.

11. So far, there had been a continuing policy line whether the British Government had been Labour or Conservative: the emphasis had always been on restriction of British nationality in order to reduce the number of British nationals outside the UK and thus to reduce future sources of immigration. By far the most populous and economically important British colony was Hong Kong, which was due to return to

China in 1997. All ethnic Chinese there were already Chinese nationals under Chinese law, but there were tens of thousands of others who, or whose ancestors, had been admitted under British rule, and to whom China saw no obligation. In agreement with the Chinese Government, the UK abolished the BDTC status for everyone in Hong Kong with effect in 1997. Some became BOCs. The non-Chinese, whether British citizens or aliens, became BOCs. At the same time the status of British National (Overseas) was created: holders resident in Hong Kong could apply for British passports but these would not give them UK right of abode. They could be used to apply for British consular services and protection when in third countries. This provision was intended to facilitate business travel. BN(O)s were not given the right to register as British Citizens at the same time as the excluded groups in 2002. Those who were physically outside Hong Kong in 1997 have no right to live in the Hong Kong Special Administrative Region under Chinese rule.

12. Under the Draft Bill, EEA nationals possess more rights than the excluded groups. They can enter, stay and work in the UK, and are eligible for many benefits here. Moreover, the excluded groups have none of the rights of British citizens to movement and employment in other EEA countries. The contrast is stark.

13. Clearly, the series of laws on nationality and immigration in the second half of the twentieth century had a racially discriminatory effect. During recent years there have been some liberalising changes to correct sex discrimination and the disadvantages of birth outside of wedlock, but the only correction to racial differences has been the British Overseas Territories Act 2002 (apart, that is, from some minor measures of limited effect dealing with Hong Kong).

14. The British Overseas Territories Act 2002 (BOTA) transformed BDTCs into British Overseas Territories Citizens and gave them all British citizenship as well. This domestic double nationality applies to the remaining colonies as they were in 2002: all small islands or island groups except for Gibraltar. Gibraltarians were already either British citizens or possessed or effective right of abode, and held EEA movement rights under a Declaration to the EEC which the UK had been made in 1982. Falkland Islanders had been made British citizens in 1981 by an Act of Parliament passed after the Falklands War with Argentina.

15. The BOTA did not, however correct the situation of yet another excluded group which has received little attention. Persons born in colonial territories have, since 1983, depended for their British nationality (BDTC status and then BOTC status) on having parents who were themselves either British or, more commonly, settled under local immigration law at the time of the birth. The immigration laws of these territories vary widely, some being very restrictive indeed. It is thus possible for a person born in such a territory not to have been born a BDTC or a British citizen: the child must either have the nationality of a foreign parent or be stateless.

16. The same problem has affected UK born children since 1983 under the British Nationality Act 1981. Before then, the simple *ius soli* rule had ensured that every child born (or found in infancy) in the UK was automatically fully British. Since 1983 the child must have one parent who is a British citizen or 'settled' under immigration law: otherwise the child takes the nationality of a parent when the parent's country provides for this or is born stateless within a territory. There have

been at least a few hundred stateless deaths a year, but numbers are not accurately known, since only those applying for registration are recorded.

17. Perhaps one of the most worrying features of the Draft Bill is the abolition of the right of abode in favour of 'immigration permission'. There could surely be no more striking instance of the primacy of immigration law over nationality law. A British citizen is to be free to enter and leave, and stay in the UK subject to 'any requirements or restrictions imposed or by virtue of this Act or any other enactment'. Given the existing provisions on expulsion intended chiefly to deal with suspected terrorists who have been convicted of no offence, and likely future extensions of executive powers, this provision- which removes the only statutory right of citizenship defined in nationality legislation opens up frightening possibilities.

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