Nationality and Borders Act 2022—nationality provisions

Immigration analysis: The Nationality and Borders Act 2022 received Royal Assent on 28 April 2022. In addition to controversial provisions relating to deprivation of citizenship without notice and statelessness, the Act makes a wide range of more generous changes to British nationality law, including for the first time a general discretionary power to register adults as British citizens. The ambition is to deal conclusively with issues of historical legislative unfairness in British nationality law. In this analysis, Alexander Finch, solicitor and senior manager at Fragomen LLP, provides a comprehensive summary of the key changes in the Act relating to nationality law, and how they might pan out in practice.

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Background

Immigration bills are a regular event, but do not automatically include nationality law in scope. This was the first government bill to do so from first reading since 2006. In addition to the accumulation of issues over time, the immediate trigger for this appears to have been a series of Windrush cases in which applicants were refused naturalisation on the grounds that they could not satisfy (what the Home Office called) 'the unwaivable requirement', that is, the requirement to have been present in the UK on the day five years (or three years) before the date of application. The Home Secretary had written personally to one such applicant, Trevor Donald, stating, '[i]t is with deep regret that we are constrained by the parameters of the existing legislation'. His story was reported at the beginning of March 2021, shortly before the government launched the New Plan for Immigration consultation on 24 March 2021. This related mainly to a planned overhaul of the asylum system, but included a chapter entitled 'Ending Anomalies and Delivering Fairness in British Nationality Law'. The consultation made several British nationality law proposals, all of which were carried forward into the Act.

Arguably, the first-day requirement for naturalisation was not unwaivable at all (see Fransman's British Nationality Law (2011) para 16.7.3.1) but this was the consistent view taken by advisers to the Home Office, and the point is now academic.

Extension of s 4C (UKM) and ss 4E–4J (UKF) routes to applications to register as a British overseas territories citizen

Section 4C of the British Nationality Act 1981 (BNA 1981) creates an entitlement to register as a British citizen if the applicant was born before 1983 and would (broadly) have become a British citizen had their mother been able to pass on British nationality in the same way as a man. Sections 4E–4J create an entitlement to register as a British citizen if the applicant was born before 1 July 2006 and would have become a British citizen, or would have been able to register as a British citizen, if their natural father had been married to their mother at the time of the birth.

The new Act now extends these routes to applications for British overseas territories citizenship, by way of new provisions (s 17A for s 4C, and ss 17B–17G for ss 4E–4J). These new provisions largely mirror ss 4C and 4E–J, except that the decision of the Supreme Court in *Romein* is also incorporated (see below).

Good character

The British Nationality Act 1981 (Remedial) Order 2019, SI 2019/1164, made on 24 July 2019 (the last day of the Theresa May government) had already removed the routes in sections 4C and sections 4E–J from the good character requirement except in the cases under section 4F in which the underlying registration provision (BNA 1981, ss 1(3), 3(2) or 3(5)) would itself have been subject to a good character test, had the applicant been able to apply. This followed a finding by the Supreme Court in *Johnson v SSHD* [2016] UKSC 56, [2016] All ER (D) 116 (Oct) which implied that the imposition of a good character requirement in ss 4E-4J applications was incompatible with Article 14

read with Article 8 of the European Convention on Human Rights. There was later a similar declaration of incompatibility by consent in the case of *Fenton Bangs* (*R (on the application of David Fenton Bangs) v SSHD* (CO/1793/2017) (which related to applications under s 4C). This approach is carried over to the new registration provisions for British overseas territories citizens (BOTCs).

Chagossians

The government agreed to introduce a pathway to British nationality for Chagossians as an amendment in lieu following their defeat in the Lords. Section 5 of the new Act, inserting new section 17I into BNA 1981, provides that a person is entitled to register as a BOTC if they are a direct descendant of a person who was a citizen of the United Kingdom and Colonies (CUKC) by virtue of being born on the British Indian Ocean Territory (the Chagos Islands); in practice a qualifying ancestor would be anyone born on the islands before 1983. The intention here was to place Chagossians descended from those born on the islands in the same position, in British nationality law, as they would have been in had they and their ancestors been allowed to remain living on the islands.

A registration application must be made within five years of the date of commencement (of the provision) for those who are age 18 or over. Those under the age of 18 on the date of commencement, or born within five years of commencement, must register by their 23rd birthday.

The term 'direct descendant' is not defined. It would not require the birth to be within marriage. There is no good character requirement.

BOTCs—subsequent registration as a British citizen

Those who register as BOTCs under the new provisions in s 17A and ss 17B–17I will also be entitled to register as British citizens without any further test. The government has stated that it will be possible to submit the registration applications simultaneously.

Romein

The Supreme Court judgment in *Advocate General for Scotland v Romein* [2018] UKSC 6 opened registration as a British citizen under BNA 1981, s 4C to applicants who would have been eligible for consular registration had their mother been a CUKC at the time of their birth (had women been permitted to register their children in this way), provided the applicant would then have had right of abode in the UK immediately before 1 January 1983. This dealt with what was otherwise an unfairness in the application of section 4C; women holding CUKC status who attempted consular registration for their children born in the period 1949–1982 in a foreign country would as a matter of policy have been refused. The solution of the Supreme Court was to rule that the condition that consular registration actually took place, could not be applied. In effect, in considering an application under section 4C, where the applicant was born in a foreign country, it is to be assumed that their birth was registered at a UK consulate as set out in section 5(1)(b) of the British Nationality Act 1948 (BNA 1948). This meant that an applicant could qualify for registration as a British citizen under section 4C if their maternal grandfather was born, registered, naturalised or adopted in the UK, and the applicant was born between 1949 and 1982 in a foreign country (subject to normal assumptions).

Section 5(2) of the new Act incorporates the *Romein* registration assumption, in dealing with births in foreign countries in the period 1949 to 1982, into applications under section 4C.

This creates an asymmetry (contemplated by Lord Sumption in paragraph 15 of his judgment) in which descent from a woman is more favourable than from a man. If the applicant was born in a non-Commonwealth country in the period 1949 to 1982, then they will have an entitlement to register as a British citizen under section 4C using the rule in *Romein* if their maternal grandfather was born in the UK, but not if their paternal grandfather was born in the UK, assuming no other special conditions arise. This occurs because in such a case, the applicant's father would have had an actual opportunity to register the applicant's birth with a local UK consulate under BNA 1948, s 5(1)(b).

BNA 1948, s 5(3) incorporates the same assumption into applications under section 4I (referred to above). This confirms a further route into British citizenship (and corresponding asymmetry) for children born outside of marriage—if P's paternal grandfather was born in the UK, and P was born in a foreign country in the period 1949 to 1982, then P could now use the statutory *Romein* assumption to register under section 4I, but only if P satisfied the general conditions in section 4E, including that P's mother and father were not married at the time of P's birth. If P's parents were married at the time of their birth, then their actual opportunity to acquire CUKC ceased when their father failed to apply for their consular registration.

Indefinite transmission of British nationality by consular registration was possible for births on or after 4 August 1922 under section 1(1)(b)(v) of the British Nationality and Status of Aliens Act 1914 (as amended), however the *Romein* registration assumption in the new Act deals explicitly with acquisition under BNA 1948.

Removal of 1 July 2006 cut-off date (implementation of K (a Child))

BNA 1981, ss 4E–4J required that the applicant is born before 1 July 2006. This is the date on which the modern provisions in BNA 1981, ss 50(9)–(9C) for defining a child's parents (as revised by section 9 of the Nationality, Immigration and Asylum Act 2002) were brought into force. There were cases in which children born after this date would have wished to derive a claim to British citizenship through their natural father where their mother had been married to another man at the time of the birth. In this scenario, the father of the child for nationality purposes was the man married to the mother, not their natural father. It was accepted that children of adulterous relationships ought not to be treated less favourably than children born within marriage. It was Home Office policy in such cases to accept a discretionary registration application under BNA 1981, s 3(1). However, this solution was unsatisfactory in several respects—the registration was discretionary, it required payment of a fee, and the application had to be made before the child turned 18. The discretionary element was declared by the Administrative Court to be incompatible with ECHR, Article 14, read together with Article 8, in the case of *K (a Child)* [2018] EWHC 1834 (Admin).

The Home Office had already introduced provisions (The Immigration and Nationality (Fees) (Amendment) (No. 2) Regulations 2020, SI 2020/294, coming into force 6 April 2020) waiving the application fee in such cases. However, the other issues required amendments to primary legislation. Section 6(2) of the new Act omits the requirement in BNA 1981, s 4E that the applicant is born before 1 July 2006. This means that the provisions in BNA 1981, ss 4E–4I are now a permanent feature of British nationality law, instead of (as originally contemplated) applying only to the cohort of people born before the modern definition of paternity was introduced.

Currently, where a child is born to a married surrogate outside the UK and the natural father is a British citizen otherwise than by descent, with the surrogate and her husband having no UK connection, the child will not be a British citizen by operation of law, but they may register by discretion under section 3(1). The removal of the date requirement for applications under ss 4E–4J will allow such applications to be made as a matter of entitlement under these alternative provisions.

Adult registration—general route

Before the new Act, there was no general power to register any adult as a British citizen or BOTC. This gave rise to many potential cases of unfairness or missed opportunities. If a public authority could have secured British citizenship for a child in their care by making an application before their 18th birthday, but failed to do so, the Home Office could not accept a late application. Registration powers in section 4C could 're-run' history but only permitted counterfactual variation of the sex of the mother, not the grandmother. Registration powers in ss 4E–4I could counterfactually vary whether the applicant's parents were married, but not consider the position of the grandparents. Moreover, sections 4C and 4E–4I could not apply iteratively to deal with historic situations combining gender discrimination and illegitimacy rules.

The new Act inserts section 4L into BNA 1981 (and the mirroring provision section 7(3) inserts section 17H dealing with BOTCs). It is not entirely discretionary in the model of section 3(1), but still boldly creates discretionary powers of registration in attempt to deal with these types of issues conclusively. The Secretary of State may register an adult applicant as a British citizen if in her opinion, the applicant would have been, or would have been able to become, a British citizen but for historical legislative unfairness, an act or omission of a public authority, or exceptional circumstances relating to the applicant.

The term 'historical legislative unfairness' is not defined, but confirmed to include circumstances where the applicant would have become a British citizen if an Act of Parliament or subordinate legislation had for example treated males and females equally, or historic illegitimacy rules had not applied.

Like the discretionary child registration provisions in section 3(1), the scope of the new section 4L will depend crucially upon the guidance to be published by the Secretary of State stating how she will exercise her discretion. To what extent she is fettered in setting such guidance will be a crucial question for practitioners and the Home Office. The Secretary of State may register an applicant if she has formed the opinion that they would have become a British citizen had unfairness not occurred.

But what if an applicant identifies an unfairness not contemplated in the guidance; is the Secretary of State required to form an opinion on the matter, and how are such opinions to be formed consistently between different applications?

Although section 4L refers to 'historical legislative unfairness', there is nothing restricting the exercise of the power to situations of unfairness created by the new Act itself, or by future legislation.

Some applications of the new power seem likely, for example considering gender discrimination in the grandparental generation. Suppose P's paternal grandfather was born in the UK, and P's father was born before 1949 in a place that came within the Colonies from 1949, with P born in that Colony in the period 1949–1982 (ie before independence). In this scenario (making normal assumptions) P would have British citizenship today. However, if it were P's father's mother (only) who was born in the UK, then P's father would have lost CUKC status upon independence, and no claim would be possible under section 4C (which only allows variation of the sex of P's mother). This would seem an obvious potential application of section 4L.

Other claims might depend on what could have happened, rather than what would. Suppose P's maternal grandmother was born in the UK, and P's mother lived in the UK for at least three years before P's birth, with P is now an adult. Had there not been historical legislative unfairness, P's mother might already have been a British citizen when P was a minor, and P would have been entitled to register under section 3(2). Here, it might become relevant that section 4L refers to situations in which P 'would have been, or would have been able to become, a British citizen…', whereas section 4L(2) only directly confirms 'historical legislative unfairness' to include 'circumstances where P would have become, or would not have ceased to be… a British citizen'.

Another potential issue for the Home Office to navigate will be how equality could have been achieved, compared to the historically unfair legislation which actually existed. Is there to be levelling up or is it sometimes down, and how is this to be determined? If P was born in the UK before 1983 to a mother who had diplomatic immunity by virtue of her connection to a foreign consulate, and the father was unknown, P would be a British citizen today.

Naturalisation—the presence requirement

Section 8 of the new Act will permit the Secretary of State to waive the requirement to have been physically present in the UK (or a relevant territory) on the first day of a qualifying period in certain applications. These will include applications for naturalisation as a British citizen under section 6 (either the main or spousal provisions), and other British nationals (such as a British National (Overseas)) registering on the basis of section 4, as well as local naturalisation as a BOTC in a British Overseas Territory under section 18. This deals with the problem identified in Windrush cases, in which the Secretary of State was herself the cause of the applicant's absence from the UK at the start of the qualifying period.

Naturalisation—breach of immigration laws

In October 2017 and in response to long-standing concerns raised by Parliamentarians and practitioners, Prime Minister Theresa May confirmed in an open letter that EEA nationals applying to the EU Settlement Scheme (EUSS) would not be required to demonstrate that they held comprehensive sickness insurance, in order to rely upon a historic period of residence. This was duly reflected in the Immigration Rules, Appendix EU. However, in considering applications for naturalisation as a British citizen from those same EEA nationals and their family members, Home Office caseworkers were instructed to consider whether their historic residence in the UK had been in breach of immigration laws. In cases where the applicant had been in the UK as a student or self-sufficient person before receiving status under the EUSS, this meant considering whether they had held comprehensive sickness insurance. It was therefore possible and contemplated within the guidance that an EEA national could apply for and receive indefinite leave to remain (ILR) under Appendix EU on the basis of periods of UK residence during which they did not hold sickness insurance, but then find their naturalisation application refused for a period of five years, or possibly ten years, after the date of their grant of settled status.

Guidance instructed caseworkers to 'consider whether it is appropriate' to exercise discretion to overlook a lack of sickness insurance. During the passage of the bill and in response to backbench amendments, ministers stated that no applications had in fact been refused on this basis (ie the discretion had always been exercised, when requested). However, this would not prevent applicants being dissuaded from applying for fear of refusal (and some were). A request for an exercise of such discretion might moreover require the submission of additional supporting evidence.

A government amendment in lieu in the Lords introduced section 8(1A), which now provides that the Secretary of State may treat an applicant for naturalisation (or registration under section 4) as fulfilling the requirement not to have been in the UK in breach of immigration laws *without enquiry*. By way of comparison under the old law the Secretary of State may overlook a breach of this requirement 'in the special circumstances of any particular case'. In introducing the amendment in a debate on 28 February 2022, Baroness Williams of Trafford for the government stated (Hansard, Column 572) that in most cases, where a person holds ILR, any concerns about their immigration history will have been considered and addressed prior to any grant of ILR, and it would be 'in only an exceptional case' that the Home Office would not want to follow that approach again in considering naturalisation. When pressed, the minister confirmed that exceptional cases were likely to include cases of serious criminality. In essence, it seems likely that the government's intended strategy is to cite lack of comprehensive sickness insurance as an additional ground of refusal, in applications for naturalisation where the intention is anyway to refuse on lack of good character.

Notice of deprivation of citizenship

BNA 1981, s 40(2) already provided that the Secretary of State could deprive a person of their citizenship. Since 2006 the test has been that the Secretary of State is satisfied that the deprivation is conducive to the public good. The government introduced a new clause at committee stage in the Commons to specify circumstances in which the Secretary of State may deprive a person of their British citizenship without giving them notice. This new clause generated unprecedented public interest. It was resisted by the Lords and subject to 'ping pong', with the Commons insisting on a revised version.

Section 9 provides that the Secretary of State may deprive a person of their British citizenship without giving them notice, if she does not have the information needed to give notice, or she reasonably considers it necessary not to give notice, in the interests of national security, relations with another country, or otherwise in the public interest.

In this case, the Secretary of State must apply to the Special Immigration Appeals Commission, which must determine, applying judicial review principles, whether the view of the Secretary of State is 'obviously flawed'. Once such a deprivation order is made, the Secretary of State must for a period of time continue to review the order, and whether to give notice to the individual.

Statelessness

BNA 1981, Schedule 2, para 3, currently provides that if a person is born in the UK, then they are entitled to be registered if they are and always have been stateless, are under 22 years old, and were in the UK over the preceding five years.

Section 10 limits this previous rule to those who are between the ages of 18 and 22, and introduces a new provision for minors between the ages of 5 and 17. This includes an additional requirement that the Secretary of State is satisfied that the person is not able to acquire another nationality.

The government stated in the consultation that increasing numbers of foreign national parents with children born in the UK were choosing not to make applications for their child to acquire their nationality, and instead registering them as British citizens under statelessness provisions. There were said to be ten applications for registration based on statelessness in 2015, compared to more than 1,000 a year now. This data was unpublished however, and the Minister was unable to confirm during debates in how many cases the Home Office believed that the provisions were being used in the way they described.

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