Nationality and Borders Bill 2021 : Nationality amendment (BIOT)

This briefing proposes an amendment to the Nationality and Borders Bill 2021 currently before Parliament and awaiting Committee Stage.

Background

In Fragomen's response to the Consultation (Consultation on the New Plan for Immigration, March-July 2021) in preparation for the Bill, we submitted as follows.

Proposal 1 - Descendants of those born on British Indian Ocean Territory

Where a British national born on British territory has a child born outside of British territory, they will usually transmit British nationality to the child. However, the grandchildren, if they are also born outside of British territory, will not usually have a claim to British nationality absent special circumstances indicating a continued link. This reflects a broad principle that, where successive descendants of a British-born person have voluntarily adopted a way of life in another country, their connection with British interests has diminished. The special circumstances that might lead to continued transmission are situations in which the pattern of a person's life show that they have not voluntarily severed their links or have voluntarily retained a connection.

By way of example, where a child is born overseas to a British citizen who is at the time of the birth in overseas Crown service, the child is automatically a British citizen. Similarly, if a British citizen has a child outside the UK and the child is not automatically British, the child may be able to register as a British citizen, for example if the parent has spent 3 years living in the UK before the birth, or if the parents now relocate to the UK with the child for 3 years. These situations indicate a voluntary continued link with and use of, the parent's British citizenship such that it would be appropriate to allow them to transmit it to the next generation.

But what if the absence from British territory is not voluntary but has been enforced by the person's own government? This is the situation of the Chagossians. The children (born within marriage) of those born on the British Indian Ocean Territory (BIOT) are today British overseas territories citizens as well as British citizens (from 1 May 2002 by way of the British Overseas Territories Act, section 3(1)). But the children in turn (i.e. the grandchildren of those born on BIOT) do not usually have any British nationality status, if they and their parents were born outside the UK. This would usually be the case; they and their parents would normally be born in Mauritius or Seychelles, so they would be nationals of those countries and not of the UK.

This is unfair; the reason that such a person was absent from British territory is due to their exclusion, and not a voluntary severing of links.

The government should introduce a new registration provision, providing that a person who is descended from a person born on BIOT before 1968, may be registered by entitlement as both a British citizen and a British overseas territories citizen. Such an application should be free of charge.

It might be objected that this would allow indefinite transmission of British citizenship by individuals outside the UK. However, the exclusion from BIOT is also indefinite. The past is done, and there is no sensible rule that will untangle who would have been born where had the exclusion not occurred.

The provision should be drafted to transmit the entitlement to register to children even where the parents were not married at the time of the birth.

The registration should be for both nationalities; British citizen and British overseas territories citizen. This is the status that those born on BIOT acquired on 1 May 2002, and the status their descendants would have had, were it not for the exclusion.

The route to British nationality should be through registration, so that those who do not wish to avail themselves of it, are not obliged to. Those descendants who are nationals of countries which do not permit dual citizenship would not be adversely impacted.

Finally, the registration should be free of charge; the Chagossians should not have to pay the UK government to grant them the status that they would have had by operation of law had they been allowed to remain. In the case of routes intended to remedy historical injustices (pre-1983 birth to British mothers and pre-2006 'illegitimate' births to British fathers) the government has waived the processing fee.

At the Second Reading of the Bill, Henry Smith MP said:

… I wish to mention an aspect of nationality that has not been properly addressed: the position of the descendants of the Chagos islanders who were forcibly removed from the British Indian ocean territory by Harold Wilson's Administration in the late 1960s and typically resettled in Mauritius, the Seychelles and some other locations. Many of those descendants are the grandchildren of people who were British subjects in the British Indian ocean territory and now find themselves with, in effect, no rights to British citizenship, despite the fact that it was no fault of their own that their grandparents and relatives were forcibly exiled from their home territory.

I would therefore be grateful if the Government considered including in the Bill a clause to rectify that anomaly, which affects a relatively small number of people. This injustice has existed for more than half a century. I plan to introduce an amendment on Report, but I hope that the Government can work with me to remedy this historical injustice once and for all.

Proposed Amendment

We suggest the following amendment as fulfilling these objectives.

Inability of Chagos Islanders to acquire British nationality

(1) Part 2 of the British Nationality Act 1981 (British overseas territories citizenship) is amended as follows.

(2) After section 17H (as inserted by section 7), insert-

"17I Acquisition by registration: Descendants of those born on British Indian Ocean Territory

(1) A person is entitled to be registered as a British overseas territories citizen on an application made under this section if they are a direct descendant of a person ("P") who was a citizen of the United Kingdom and Colonies by virtue of P's birth in the British Indian Ocean Territory or, prior to 8 November 1965, in those islands designated as the British Indian Ocean Territory on that date.

(2) A person who is being registered as a British overseas territories citizen under this section is also entitled to be registered as a British citizen.

(3) No charge or fee shall be imposed for registration under this section. "

Member's Explanatory Statement

This amendment would allow anyone who is descended from a person born before 1983 on the British Indian Ocean Territory to register as a British overseas territories citizen. They may also register as a British citizen at the same time. Both applications would be free of charge.

Comments

1. **Requirement to apply**

This is a registration provision, meaning that applicants would need to submit a valid application and have it processed by the Home Office, in order to benefit. Applicants would have the burden of proof on the normal standard (the balance of probabilities) in showing that they were descended from a person born on the British Indian Ocean Territory. Having been approved they would need to attend a citizenship ceremony and give an oath / affirmation of allegiance in order to complete their registration. They could then apply for a British passport.

2. **Citizenship "by descent" and good character**

The Clause as drafted would result in acquisition of the relevant nationality status otherwise than by descent, meaning it could be passed on to the next generation born outside of British territory.

The Clause as drafted would not impose a good character requirement on applicants.

3. **Alternative : Undertaking in relation to Clause 7**

Clause 7 of the Bill, inserting section 4L of the Act, already creates a discretionary power to register an adult as a British citizen if they were unable to become a British citizen but for historical legislative unfairness, an act or omission of a public authority, or exceptional circumstances. A parallel provision (Clause 7 inserting section 4L) creates the same discretionary power to register an adult as a British overseas territories citizen.

An alternative to the insertion of the new Clause above would be a clear undertaking by the government that they will accept an application to register a person as a British citizen (and if required as a British overseas territories citizen) under the new sections 4L and 17H, if they are descended from a person born in the British Indian Ocean Territory.

The provisions relating to *"an act or omission of a public authority"* could be relied upon by the Home Office under ss 4L / 17H, for example the act or omission could be the continued exclusion of the Chagossians from British Indian Ocean Territory at the relevant time. In exercising such a power, the Home Office would not need to make any finding as to legality or morality of the acts or omissions in question. The statutory power to register would arise simply because, as a matter of fact, were it not for the relevant acts or omissions, the person would have become a British citizen (and/or a British overseas territories citizen).

4. **Double registration & costs**

As introduced at first reading, the Bill creates a new route (Clause 2 inserting sections 17B to 17F) by which a person who would have become a British overseas territories citizen, had their

natural father been married to their mother at the time of their birth, is entitled to register as a British overseas territories citizen. Clause 3 inserting section 4K provides that a person who is so registered as a British overseas territories citizen may also be registered as a British citizen.

These new provisions will benefit Chagossians who were unable to acquire British nationality because they would need to derive their claim through an unmarried father. (For births before 1 July 2006, a person could only claim British nationality through their father if they were regarded as born legitimate, or if they were legitimated by the subsequent marriage of their parents.)

However these existing Clauses 2 and 3 will require two separate registration events in order for the person to acquire both citizenships. It is not clear whether this will require two consecutive registration applications, and payment of two sets of application fees.

Registration as a British citizen, which gives the right of abode in the UK, is only possible if registration as a British overseas territories citizen takes place. Clause 3 inserting section 4K(3) provides that:

> *(3) The Secretary of State may not register a person as a British citizen under this section unless the person is also registered as a British overseas territories citizen.*

Where a person was alive immediately before 21 May 2002 and held British overseas territories citizenship, they would have acquired British citizenship automatically on that date, by operation of law and without requirement of an application process or payment of a fee (British Overseas Territories Act 2002, section 3(1)). It does not therefore make sense to charge for either registration application, where the reason to open a registration route is to correct an historical injustice.

The current relevant costs for registration are as follows. The second column is the UKVI fee, the third is the cost of processing based on figures as at 1 July 2021.

Application Type	**UKVI Charge**	**Unit Cost**
Nationality registration - British overseas territory citizen, British overseas citizens, British Subjects, British protected persons - adult	£901	£372
Nationality registration as a British citizen - adult	£1,206	£372
Nationality registration - British overseas territory citizen, British overseas citizens, British Subjects, British protected persons - child	£810	£372
Nationality registration as a British citizen - child	£1,012	£372

In the case of registration provisions to deal with historical gender discrimination (women unable to transmit British nationality before 1983), and provisions to deal with the historical effects of illegitimacy rules, the Home Office only charges the ceremony fee of £80.

5. Open-ended transmission

As drafted, the proposed Clause is open-ended, meaning that it would indefinitely permit transmission of British nationality to eligible descendants. It would be straightforward as an

alternative to add a time limit beyond which new registrants would not be permitted. There would be precedent in nationality law for this, for example between 1987 and 1997 there was a time-limited opportunity for British Dependent Territories citizens connected with Hong Kong to register as British National (Overseas) in the runup to handover. Similarly, a Spanish law in 2015 to allow descendants of Sephardic Jews to register as Spanish citizens, was subject to an initial 4-year time limit.

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Nationality and Borders Bill 2021 : Spouse visas amendment (BIOT)

This is prepared with reference to the briefing document from Chagossian Voices, September 2021. The briefing raises the important separate issue (Generic problem D - Spouses) of how the UK should respect family life created by British nationals living outside the UK at a time when they were unlawfully excluded from British territory. Is it right in these circumstances to impose the same conditions for relocation of the spouse to join the British national in the UK as applies in other cases?

Background

The spouses of Chagossians, typically nationals of Mauritius or Seychelles, have formed family life with Chagossians (who are now British citizens, or will under the amendment become eligible to register as British citizens) at a time when Chagossians were excluded both from the Chagos and from the UK.

Today, in order for a British citizen to sponsor a spouse to join them in the UK, they must meet a Minimum Income Requirement (MIR), meaning that they must show an available income of at least £18,600 a year. This requirement is made difficult to meet in several respects.[1]

This was not always the position. Until 1949, if a woman married a British man she became a British subject on the date of the marriage. From 1949 until 1983, if a woman was married to a man who was a UK citizen she could register upon application as a UK citizen herself. This involved no financial, knowledge or any other test. From 1983 to 2012, relocation to the UK as the spouse of a British citizen was subject to a more relaxed financial test and led to settlement after 2 years.

This changed with effect from 9 July 2012, when the current MIR was imposed. The UK government stated in its *Statement of Intent* in introducing the MIR that *"those who choose to establish their family life in the UK … should have the financial wherewithal to be able to support themselves and their partner without being a burden on the taxpayer."* But this justification falls flat in the case of the Chagossians, for two main reasons.

Firstly, those who have come to the UK since 2002 are British nationals who were previously prevented from residing in *any* British territory since they were unlawfully excluded from the Chagos some 30+ years previously. They were never voluntarily absent from British territory, and the family relationships they entered into with local nationals were not entered in the expectation that they would have to meet a financial or other test.

Nor was the movement of Chagossians to the UK since 2002 a normal relocation of choice; it was the product of a (partial) restoration of a right to reside in British territory that should never have been taken away at all. As the Chagossian Voices Briefing document states,

> *"As the only BOT citizens banned from their own territory, most Chagossians saw right of abode in the UK as … something which should have been granted at the time of enforced exile."*

[1] Undertakings of financial support from third parties cannot be accepted no matter how the promise is made, or the financial resources of the promising party. The prospective employment income of the spouse cannot be taken into account, even if there is a written job offer and regardless of the prospective salary. Savings can only be taken into account according to a formula which makes this option inaccessible for all but the very wealthy: GBP 62,500 of cash savings held for at least 6 months would be needed to make up for the lack of income.

The MIR is intended to normally apply to: (i) British citizens residing in the UK who marry foreign nationals residing abroad and wish to sponsor them, or (ii) British citizens who voluntarily reside abroad, form family life there and now wish to return to the UK. But neither such case is applicable to the Chagossians if their family life was formed before 21 May 2002, and they have since relocated to the UK. The fact that a (second) cross-border movement is taking place at all is a product of the exile and not a 'choice' to which it would be appropriate to apply financial and linguistic tests.

Secondly, the poor financial condition of some members of the Chagossian community is itself the causal result of an exile that was imposed by the British government. It is perverse for the same government to then rely upon that financial condition as a reason for refusing the right of family reunion.

There is no published Home Office policy with respect to the Chagossians. The Home Office categorises and treats individuals primarily by reference to their nationality as described in their passport. From their point of view, the Chagossians are simply British, Mauritian and Seychelles nationals, not as a special class in their own right. The position of the Chagossians was not considered or referred to at any time in the process of introducing the MIR, neither during the 2011 prepatory Migration Advisory Committee report,[2] the 2012 Statement of Intent[3] or in the case of *MM (Lebanon)*[4] in which the Home Office defended a legal challenge to the rules creating the MIR. But this does not recognise their particular circumstances.

The Home Office should recognise the Chagossians as a particular class, so that it can develop a policy to treat cases involving them and their family members in a way that is consistent and sympathetic to the unique history. In particular it should develop an exception to the normal Minimum Income Requirement for a spouse visa application where the sponsoring British citizen is a Chagossian.

Additional Amendment

We propose an additional amendment to deal with the issue of family reunion. The Nationality and Borders Bill deals primarily with nationality and asylum (protection) issues. There are however provisions relating to immigration in Part 5.

In Part 5, after Clause 65, add:

66 Minimum Income Requirement : Family members of British citizens with a connection to British Indian Ocean Territory

(1) This section applies where:
- *a) the Secretary of State makes a decision on whether to grant entry clearance, leave to remain or indefinite leave to remain on the basis of family reunion under Appendix FM to a person, and*
- *b) the sponsor of the person is a British citizen who was born on, or descended from a person born on, British Indian Ocean Territory, and*

(2) In a decision to which this section applies, the Secretary of State shall not require the person to meet:
- *a) a minimum income requirement, or*
- *b) an English language requirement.*

Member's Explanatory Statement

[2] Migration Advisory Committee: income for family migration route, 16 November 2011
[3] UK Visas and Immigration: Family migration: statement of intent, 11 June 2012
[4] *R (oao MM (Lebanon)) v SSHD* [2017] UKSC 10

This amendment would allow a person who is applying to join or remain in the UK on the basis of family life with a Chagossian to be granted a visa without having to meet a minimum income requirement or knowledge of English requirement.