

## Nationality provisions



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## Structure of talk

- Context: Introduction to nationality statuses
- Provisions dealing with British Overseas Citizens and historic issues
- Deprivation of nationality
- Other provisions

## Introduction: a basic timeline of nationality statuses

- Before 1 January 1949: principal form of nationality was **British subject** status, obtained by connection with a place within the Crown's dominions
- 1 January 1949 onwards: **citizenship of the UK and Colonies** (now excluding those parts of HM's dominions which became independent states & Ireland), obtained by virtue of a connection with a place within the UK and Colonies. British subjects with certain connections to a territory within UK and Colonies became CUKC by s.12 of BNA 1949
- Between 1955 and 1981, various parts of the UK and Colonies became independent states. By BNA 1981, on 1 January 1983, remaining colonies reclassified as **British dependent territories** and status of **BDTC** created
- By sections 1 and 2 British Overseas Territories Act 2002, British dependent territories and corresponding status terms **British Overseas Territories** and **BOTC**

## Current nationality statuses

- Current statuses:
  - British citizen
  - BOTC
- BOTC means:
  - You hold a British passport
  - Can get consular assistance and protection
  - But (unlike British citizen) no right of abode or right to work in the UK, still subject to immigration controls

## Nationality and Borders Act 2002: Sections 1 & 2

- Sections 1 to 2 introduce new provisions into Part 2 of the British Nationality Act 1981 which create a right to register for persons who would have satisfied the relevant requirements for registration as a BOTC but for:
  - the fact that their mother could not transmit citizenship; or
  - the fact that their mother was not married to their natural father at the time of their birth;

who now are to be taken to satisfy the relevant requirement and to be entitled to be registered as BOTCs

## Section 3 - Chagossians

- Section 3 makes special provisions for persons connected to the Chagos Islands/British Indian Ocean Territory (BIOT)



- Until 1965 administered as part of Mauritian colony, then (controversially) detached into separate colony (BIOT) along with islands from Seychelles
- Entire population expelled to make way for US naval base on largest island and their return prohibited by immigration ordinances
- Widely litigated: in domestic courts, ECtHR and ICJ

## Section 3 - Chagossians

- Section 3 inserts new s.17H providing for a right to register as a BOTC for:
  - A person who is a direct descendant of P who was a CUKC by virtue of P's birth in the BIOT or prior to 8 November 1965 in those islands designated as the BIOT on that date
  - Have never been a BOTC or BDTC

## Section 3 - Chagossians

- NB international law/status issues:
  - Lease of Diego Garcia to US stands to continue until 30 Dec 2036
  - On 25 February 2019, ICJ gave Advisory Opinion concluding that the UK’s administration of the Chagos Archipelago was “*an unlawful act of a continuing character*” and that the UK “*has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible*”
  - UK has publicly given commitment to Mauritius that when the UK no longer requires the BIOT for defence purposes, it will cede the territory to Mauritius
  - CoA has queried whether UK Govt could decide to resettle the Chagos Islands in light of ICJ opinion: ***R (Hoareau) v SSFCA*** [2020] EWCA Civ 1010 at [130]



## Section 10 - Deprivation of citizenship status

- Section 10 introduces new subsections into s.40 of BNA 1981, which deals with deprivation of citizenship
  - Section 40(2): *“The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”*
  - Section 40(3): *“The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of (a) fraud, (b) false representation, or (c) concealment of a material fact.”*

## Deprivation of citizenship status

- Section 40(5) imposes notice requirements that must be met before SSHD can make an order: notice of order, reasons and right of appeal

- In ***R (Begum) v SSHD*** [2021] UKSC 7 Supreme Court held at [135]:

*“the Court of Appeal mistakenly believed that, when an individual's right to have a fair hearing of an appeal came into conflict with the requirements of national security, her right to a fair hearing must prevail. As I have explained, if a vital public interest—in this case, the safety of the public—makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it.”*

## Deprivation of citizenship status

- Regulation 10(4) of the British Nationality (General) Regulations 2003 provided that notice would be deemed to have been given if it had been placed on individual's Home Office file
- In ***R (D4) v SSHD*** [2022] EWCA Civ 33, the Court of Appeal held that provision was ultra vires s.40(5) and regulation-making power in s.41(1) (on appeal). Further, *“to dispense with service is inconsistent with the constitutional principle recognised in Anufrijeva ...it would be possible for Parliament to legislate contrary to that principle, either expressly or by necessary implication in the statute, but there is nothing in section 40(5) to suggest that notice should be given “so far as is possible” or similar”*

## Deprivation of citizenship status

- New provisions:
  - Section 10(2) inserts new s.40(5A) into BNA 1981: S.40(5) does not apply if SSHD *“does not have the information needed to be able to give notice under that subsection”* (and/or?) *“reasonably considers it necessary, in the interests of national security, investigation or (ii) the investigation or prosecution of organised or serious crime, (iii) preventing or reducing a risk to the safety of any person, or (iv) the relationship between the United Kingdom and another country, that notice under that subsection should not be given.”*

## Deprivation of citizenship status

- Duty will arise.... Where person makes contact with the Home Office
- S.10(6): Failure to comply with s.40(5) does not affect and is treated as having never affected the validity of the deprivation order – this provision comes into force on passing of the new Act
- Provisions appear to raise rule of law/Article 6 issues

## Other provisions

- Other provisions:
  - Section 4 provides for a right for persons entitled to be registered as BOTCs under new provisions to be registered as British citizens (excluding BOTCs who acquired status through sovereign base areas)
  - Section 5 amends s.17(2) of the BNA 1981 so that the period within which a child must apply to be registered as a BOTC is while the child is a minor rather than 12 months from birth; thus bringing regime for BOTC in line with parallel provision for British citizenship (s.3(2) and also brings in good character requirement

## Other provisions

- Section 7 amends BNA 1981 to provide an entitlement to British citizenship for individuals who were previously unable to acquire it because their mother was married to someone other than their biological British citizen father at the time of their birth. This situation found to be contrary to Article 14 read with Article 8 in *R (K) v SSHD* [2018] EWHC 1834 (Admin)
- Section 8 provides for a discretionary power to register adults – current power in s.3(1) BNA 1981 only for minors. Where in SSHD’s opinion, P would have been or would have become a British citizen and/or a BOTC had it not been for (i) “historical legislative unfairness”; (ii) “an act or omission of a public authority”; or “exceptional circumstances relating to P”

## Other provisions

- Section 9 and Schedule 1 introduce amendments to BNA 1981 to give SSHD power to waive certain requirements in considering applications for naturalisation
- Section 11 deals with stateless minors – introduces a requirement that a child aged 5 to 17 will not qualify for registration if they could reasonably acquire another nationality
  - “(2) A person is able to acquire a nationality in accordance with this sub-paragraph if—*
    - (a) the nationality is the same as that of one of the person's parents,*
    - (b) the person has been entitled to acquire the nationality since birth, and*
    - (c) in all the circumstances, it is reasonable to expect the person (or someone acting on their behalf) to take the steps which would enable the person to acquire the nationality in question.”*



# Thank you for listening

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