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EUDO CITIZENSHIP OBSERVATORY

COUNTRY REPORT: UNITED KINGDOM

Caroline Sawyer, Helena Wray

Revised and updated in December 2014



<http://eudo-citizenship.eu>

European University Institute, Florence
Robert Schuman Centre for Advanced Studies
EUDO Citizenship Observatory

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EUDO Citizenship Observatory
Robert Schuman Centre for Advanced Studies
in collaboration with
Edinburgh University Law School
Country Report, RSCAS/EUDO-CIT-CR 2014/1
Badia Fiesolana, San Domenico di Fiesole (FI), Italy

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Published in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
www.eui.eu
cadmus.eui.eu

Research for the EUDO Citizenship Observatory Country Reports has been jointly supported, at various times,
by the European Commission grant agreements JLS/2007/IP/CA/009 EUCITAC and HOME/2010/EIFX/CA/1774 ACIT
and by the British Academy Research Project CITMODES (both projects co-directed by the EUI
and the University of Edinburgh). The financial support from these projects is gratefully acknowledged.

For information about the project please visit the project website at <http://eudo-citizenship.eu>

United Kingdom

By Caroline Sawyer and Helena Wray¹

1. Introduction

The citizenship regime of the UK is a mixture of *ius sanguinis* and *ius soli*, and is arguably relatively generous in its naturalisation schemes. This remains true even in the current political climate when the government is committed to severely curtailing ‘net migration’ and has enhanced and made increasing use of its powers to remove citizenship. The British regime for attributing citizenship at birth to those born in the UK fits well within the prevailing systems of Europe and accords with the European Convention on Nationality, although, in common with most other jurisdictions, the UK has not ratified that Convention. Naturalisation is possible through regular residence in any capacity but settled status must always be obtained first and must usually be held for at least one year and this will only be granted as a consequence of certain types of immigration leave.²

However, the implications of the partial loss of *ius soli* in 1983 and subsequent events have arguably entailed a fundamental shift in the meaning of being British. Historically, the system has been indistinct in ways that could be inclusive or exclusive but, as the entire immigration and nationality regime from initial entry through to deprivation of nationality has been toughened, the absence of unassailable rights, even for long-term residents or nationals, may be felt by some groups and individuals in particular. Just as the abandonment of responsibility towards non-UK British subjects in the later twentieth century demonstrated many ethical and legal problems, so the shift from residence as the basis for belonging to a stricter system of entitlement or exclusion raises many questions of principle and justice.

Perhaps the defining characteristic of British citizenship law historically has been its ambiguity which has been observable in respect of terminology and of rights; of legal boundaries; and of conceptual boundaries, with a particular blurring between citizenship and immigration statuses. Changes over the past decade have resolved some historical uncertainties and injustices but have also succeeded in creating new ones.

1.1 Ambiguity of terminology and of rights

Terms such as ‘nationality’ and ‘citizenship’, along with other forms of membership status, have not each represented a single identifiable set of rights. This confusion is closely linked to the UK’s history as a retreating imperial power. The scope of British nationality has shrunk from including everyone born in a vast empire at the end of the

¹ Caroline Sawyer was the author of the report published in 2009. Helena Wray updated and revised the report comprehensively in 2012 and in 2014. The present version covers citizenship-related legislative developments up to December 2014.

² Settled status requires ‘ordinary residence’ in the UK with no immigration restrictions on one’s stay i.e. indefinite leave to remain (s. 33 Immigration Act 1971).

nineteenth century to excluding even some people born in the territory of the UK itself. However, there has been reluctance to openly acknowledge the exclusionary implications of this withdrawal so that legal categories have not always reflected the paucity of rights to which they give effect. Within the overall category of ‘British nationality’, only the sub-category of ‘British citizen’ necessarily entails the right to live in the UK. The increasing scope for and use of deprivation of citizenship and new proposals to withdraw passports from those engaging in conflict outside the UK unless they submit to draconian in-country controls suggests that even this privileged status is now conditional and provisional and functions in ways previously associated with immigration control. Modern British citizenship stands in stark contrast to the previous inclusive conceptualisation founded only on birth in the territory of the British Empire.

This shrinkage of citizenship has been accompanied by the establishment of an exceptionally complex system regulating immigration status. The question of status has become practically important as more and more aspects of day-to-day life are governed by proof of entitlement through status rather than, as before, through residence. The last two decades have seen a torrent of legislation redefining the respective rights of citizens and non-citizens that is still continuing.³ Part of this has been oriented towards preventing unwanted admissions but a major and new theme has been to control access to services by those without immigration status and this has implications for citizens. The UK has no system of personal identity documents apart from (voluntarily acquired) passports, driving licences etc. so it can be difficult to ascertain a person’s citizenship or immigration status.⁴ Nonetheless, employers and educational establishments must now check all employees’ entitlement to work or study and monitor aspects of compliance. The Immigration Act 2014 requires checks on immigration status or nationality by landlords, banks and the driving licence authorities (not all of these had been fully implemented at the time of writing). While these are classified as forms of immigration control, and long term migrants now carry biometric residence permits, citizens must also demonstrate their eligibility in ways that were not previously necessary, even if plans for identity cards for citizens have been abandoned. In addition, it is not easy to ascertain exactly what rights follow from which status nor even what that status may be.⁵ This may be a problem for non-citizens but also for citizens or those who had always believed themselves to be citizens; it is still possible that a non-British person may have greater rights (for example, as an EU citizen, a settled person or a Commonwealth citizen with the right of abode) to live in the UK than an overseas-based British national, who may have no right to enter the UK at all. It is also possible that an individual who was born or has lived since childhood in the UK may discover that they are not a citizen only when they try to obtain a passport or have to prove their entitlement for another reason.

³ Asylum and Immigration Appeals Act 1993; Asylum and Immigration Act 1996; Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; Asylum (Treatment of Claimants, etc) Act 2004; Immigration, Asylum and Nationality Act 2006; Identity Cards Act 2006; UK Borders Act 2007; Borders, Citizenship and Immigration Act 2009. The cultural change in attitude to refugees and asylum seekers (the latter term being a contemporary new invention), who went from being heroes of their own lives to being “bogus” and outcasts is variously attributed to the arrival of non-Europeans in large numbers, or the end of the Cold War; it followed, however, rather than preceded the change in the attribution of citizenship to the children of foreign nationals.

⁴ Identity for formal working purposes such as the payment of tax and the attribution of social security contributions was assessed through the National Insurance Number system. It was very easy to obtain such a number, or several, or to use someone else’s, particularly until late 2005 when there was some media scandal about this method of establishing an official identity without any central checking of entitlement.

⁵ See for example the continuing ambiguity of the status of Temporary Admission (Sawyer and Turpin 2005).

1.2 Ambiguity of the law

Ascertaining legal rights in nationality law is not straightforward, although it is not the only opaque area of British law. While most important changes to nationality laws have been made by primary legislation, parliamentary scrutiny has varied from the intense to the relatively casual and the consequences of apparently simple changes may not be immediately apparent. For example, in 2004, seemingly by accident, the Parliament legislated to make orders for deprivation of citizenship effective instantly rather only after all rights of appeal against deprivation had been exhausted, with citizenship to be restored in the event that the appeal was successful. This apparently minor change has had a dramatic impact on those (the majority) whose citizenship is removed while they are outside the UK as, without British citizenship they are unable to enter the UK and therefore exercise their appeal rights effectively (Harvey 2014: 340; Ross 2014). In addition, statutes often permit important details to be decided with less scrutiny by regulation (secondary legislation made by Ministers, with or without the requirement that Parliament approve it overtly).

Even if an Act of Parliament has been passed, it may still not be in force. Some legislation, especially that passed in a hurry or amidst media flurry, never comes into force and may 'lie on the statute book' or be quietly repealed later. The changes to nationality law enacted in the ss. 39-41 Borders, Citizenship and Immigration Act 2009, for example, have not been implemented but remain valid law and still could be. The usual practice is for 'commencement orders', which are secondary legislation made under enabling powers in the Act itself, to be used to implement new legislation so that understanding the correct position requires access to all up to date primary and secondary legislation, which is only readily ascertainable on specialist subscription databases used by lawyers to which the general public does not usually have access.

Although most nationality law is now governed by statute, this often provides for discretion in decision-making. For example, s.6 of the British Nationality Act 1981 provides that, if certain conditions are met, the Home Secretary 'may, if he thinks fit', not 'shall', naturalise an individual. Laws on deprivation of citizenship due to conduct are expressed in terms of the 'opinion' of the Secretary of State as to the desirability of removing the individual's citizenship. In addition, aspects of nationality law (although not immigration law) are still governed by royal prerogative, in effect, residual executive discretion. For instance, the issue of passports is still a prerogative matter (although there are plans to legislate; see 3.3 below).

Immigration law, which often affects nationality entitlements, is mostly found in rules of practice which are published and subject to limited parliamentary scrutiny but which change frequently.⁶ In 2013, for example, the rules changed eight times. Individual officers have considerable discretion in the application of the law, and there is relatively little supervision of day to day implementation. Some of the guidance issued to decision-makers is now publicly available on government websites.⁷

Reasons for refusal of naturalisation are now given but that is a relatively recent development, implemented by statute in 2002 after the Court of Appeal found

⁶ The new rules come into effect on the date specified in them unless disapproved by parliamentary resolution within 40 days. If they are rejected (a rare occurrence), the old rules persist for 40 days while something more acceptable is found. Changes to the rules now published promptly on the relevant government website. Following the case of *Alvi* discussed elsewhere in this report, any rules which affect rights to enter or remain must be included in the immigration rules.
<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/>.

⁷ The nationality instructions are available at: <https://www.gov.uk/immigration-operational-guidance/nationality-instructions>.

that there was a duty to explain a refusal in at least some instances.⁸ Most nationality decisions do not carry a right of appeal (for difficulties in exercising those appeal rights that do exist, see 3.3 on deprivation of citizenship below) but the legality of a decision may be judicially reviewed. Compared to immigration and asylum law, there is relatively little jurisprudence on which to draw, and human rights and EU law have not made a mark in this area. The Home Office will often cede a claim shortly before a hearing if it fears an unfavourable precedent. In the absence of much legal aid provision, it takes a particularly determined and fortunate litigant even to begin proceedings, and cases that are settled will not change the apparent law on which others are entitled formally to base their own claims.

1.3 Ambiguity of conceptual boundaries

Historically, and in common with other common law countries, the UK operated on the basis of complete *ius soli*, a concept that, as discussed below, originated in ideas about allegiance that predate the modern concept of nationality. Elements of *ius sanguinis* have also been present, and nationality was overwhelmingly inclusive. This was congruent with British expansionism which, combined with a pragmatic attribution of various legal statuses, meant that the legal and physical boundaries of Empire were uncertain, with ramifications that are still felt.

Inclusivity was checked by the British Nationality Act 1948 where the UK recognised that independent Commonwealth countries would determine their own rules on nationality even if the unifying concept of ‘subject’ remained. Inclusivity was definitively reversed by the British Nationality Act 1981 although, in reality, the reversal was anticipated by the incursions into the free movement of citizens and subjects created by previous immigration legislation (Commonwealth Immigrants Acts 1962 and 1968 and Immigration Act 1971); it was already apparent that an open model did not suit new conditions.

The 1981 Act partially removed the right of *ius soli*, reserving it, in respect of those born after 1st January 1983, to the children of settled residents or British citizens. This was influenced by concern that British citizenship was being attributed to the children of transient parents, and this change predated the same move by other formerly British countries such as Ireland or New Zealand.⁹ Although mitigated by a relatively straightforward registration process for the stateless and for children whose future was later shown to lie in the UK, it represented a fundamental change to the underlying principle upon which membership was recognised. The effects of this are only now becoming fully apparent as a generation has grown up without the guarantee of nationality in their place of birth.

There is little in the way of a clear and unified national ethnic or cultural myth to justify the pragmatic mixture of *ius sanguinis* and *ius solis* which the 1981 Act initiated and later developments have only underscored the absence of a collective sense of what Britishness means. Nationality has long been treated as an extension of the immigration system despite attempts by the Labour government to make naturalisation into a more meaningful personal commitment through the introduction of integration tests and citizenship ceremonies in the mid-2000s. Even the integration requirements are, in practice, immigration tests as they apply also to most migrants seeking settlement and are not retaken for naturalisation.

This inverted relationship, by which immigration concerns have driven citizenship policy rather than the other way round, was evident in other ways in the 1981 Act. In particular, the creation of a hierarchy of citizenship statuses (discussed

⁸ s. 7 Nationality, Immigration and Asylum Act 2002 ; *R v SSHD (ex p. Al-Fayed) no. 1* [1998] 1 WLR 763

⁹ Ireland lost the *ius soli* after 2004 and New Zealand after 2005.

below), in which only British citizenship actually carried the right to live in the UK, institutionalised within citizenship law the immigration policy of the past two decades, which had been to withdraw rights of entry from non-white colonial subjects including those who were still citizens.

If there is no underpinning national narrative that sets nationality law aside from the instrumental concerns of immigration law, then nationality law is likely to evolve in harmony with these. While the worst injustices of the 1981 Act have been remedied, new forms of exclusion have emerged. The Labour government, which lost power in 2010, attempted a general ‘rationalisation’ of both immigration and citizenship rules to make them more rigorous, systematic and conditional. Having introduced a points-based system based on the Australian model into the immigration system in 2008, the government expressed the intention of extending it to settlement (permanent residence) and citizenship. Citizenship was to be earned through compliance, contribution and economic self-reliance, to be judged against objective and measurable criteria. These complex plans were abandoned by the Coalition government that came to power in 2010 who have focused their energies on reducing opportunities for initial entry and settlement and on increasing powers and use of deprivation of citizenship, creating new hierarchies so that many citizens’ right to reside in the UK is barely more secure than that of migrants (and much less secure than other EU citizens). There is still no clear consensus on what the rules of Britishness ought to be, and no political will to address the problems of those who fall outside new categories of exclusion. At the broader social and political level, the legislative changes reflect and drive a restructuring of the philosophy of belonging, foreignness and exclusion that is proving very uncomfortable for some.

1.4 The internal national and jurisdictional divisions of the UK

The UK is not generally a legal jurisdiction save for external international purposes. Its internal territory is divided into constituent countries which have different legal traditions and rules for many purposes other than nationality and citizenship, and the current trend is towards greater devolution of power to those countries, particularly Scotland. For most internal legal purposes, the three major constituent jurisdictions of England and Wales (a united jurisdiction), Scotland and Northern Ireland have separate legal systems. England, Wales and Scotland constitute Great Britain; the Kingdom that is united is that of Scotland with England and Wales, which occurred in 1701.¹⁰

The UK also includes numerous smaller islands such as the Isle of Wight, Lundy or the Scilly Isles, but not for most purposes the Channel Islands (the Bailiwicks of Jersey and Guernsey, the latter of which includes Sark and Alderney) or the Isle of Man. These are Crown dependencies but self-governing, even if, by virtue of s. 50 (1) British Nationality Act 1981, they are part of the UK for nationality purposes. ‘The British Islands’ is a legal term including the Channel Islands and the Isle of Man as well as Great Britain (Interpretation Act 1978, Sch 1) but excluding the Republic of Ireland; this term is however rarely used. The British Isles are a geographical concept, and include what is now the Republic of Ireland, whose citizens often have a privileged status in British law because of the historical union of England and Ireland which took effect in 1801 and persisted, sorely resented in Ireland, until the establishment of the Irish Free State in 1922 left only the northern part still united with mainland Britain.

¹⁰ The English conquest of Wales was promulgated in the Statute of Rhuddlan (also Statute of Wales) 1284, and later formal union in the early sixteenth century providing for Welsh representation at Westminster was or is seen by the Welsh as confirming the annexation of Wales by England, though the monarchical Tudor dynasty was of Welsh origin.

Small territories outside the UK but which still come under British jurisdiction and sovereignty are known as British Overseas Territories (formerly British Dependent Territories) and are listed in schedule 6 of the British Nationality Act 1981. They include Anguilla, Bermuda, British Antarctic Territory, Montserrat, the British Indian Ocean Territory and the Cayman Islands. Most of those who were British Dependent Territories Citizens became British citizens with the right of abode under the British Overseas Territories Act 2002 (see 2.5 below).

Larger territories which were once part of the Empire are now independent.¹¹ Some such territories were self-governing dominions.¹² Colonies were governed by the Crown via its appointed governor.¹³ The Channel Islands of Jersey and Guernsey and the Isle of Man are self-governing Crown dependencies but are within the UK for nationality purposes. These countries and their populations have close ties with the UK which are reflected in the provisions of British immigration and citizenship law and practice.

The Ireland Act 1949 stated that Ireland was not a foreign country and that Irish citizens are not aliens. They can vote whilst resident in the UK and the Common Travel Area means that the borders between the Republic of Ireland and the UK are open.¹⁴

Living in the UK are substantial numbers of people with both British and another nationality (where this is permitted by the other state), and many permanent British residents who are only citizens of the other country. For the latter, it historically made little difference to everyday life and entitlements whether one was 'settled' as a citizen or as a permanent resident. The difference became more relevant when there was a policy of releasing British citizens in the United States detention centre at Guantanamo Bay but not British residents.¹⁵ Enhanced powers of deportation of convicted criminals without citizenship have also emphasised the difference although powers of deprivation of citizenship are again closing the gap.

This report will consider first of all the historical constructions that have shaped the existing law, especially the implications of monarchy and the legacy of Empire. It will then explore the current citizenship regime. The concluding section provides an overview of the recent and current trajectory of British nationality and citizenship law.

¹¹ For lawyers these are generally identifiable as having a common law system, rather than a civil law system as is prevalent in most of Europe. This also applies to the United States of America, though it became independent somewhat earlier than most.

¹² Such as Canada, Australia, New Zealand, Newfoundland, South Africa, and the Irish Free State, as well as India, Pakistan and Ceylon (now Sri Lanka).

¹³ As for example the Colony of Virginia (subsequently part of the US); Australia, Canada, New Zealand and Ceylon / Sri Lanka before they became dominions; and a number of smaller territories such as Trinidad, British Guiana, Bermuda, Jamaica, Fiji, Belize, Sierra Leone, Granada, Lesotho, St Helena.

¹⁴ The Common Travel Area is a legacy of the historical union of mainland Britain and the island of Ireland; there are theoretically no border controls. Despite the publication of a consultation 'Strengthening the Common Travel Area' in July 2008 (ref 289423), its effective ending was proposed in the Borders, Citizenship and Immigration Bill in January 2009. The relevant provision was however removed from the Bill in April 2009, before it was enacted.

¹⁵ This was reversed, and the permanent residents were also released, when US policy changed. (*Al-Rawi and others vs Secretary of State for Foreign and Commonwealth Affairs* and another [2006] EWHC (Admin) 972, [2006] EWCA Civ 1279.

2. Historical background and changes

Historically, Britain has been a country of individual rather than national membership expressed through a vertical relationship with the Sovereign. There was substantial movement between different parts of the Empire and also substantial emigration from the United Kingdom, as well as the coming and going of expatriates generally, but – as one might expect in a system with largely imperceptible territorial boundaries – this is relatively little regulated or discussed in relation to citizenship rights.

2.1 *The link between immigration and citizenship in Britain*

Because of the historical lack in Britain of a concept of the nation as defined by blood and descent, nationality has always been seen as the logical consequence of immigration. Identifiable waves of immigrants could historically be identified with a push factor in the country of origin as well as, frequently, positive encouragement for them to come to Britain as traders or craftsmen. Immigration was also thus entwined with the idea of asylum, the UK being unusual in still considering the two together into the twenty-first century. A system of immigration control was first instituted only in 1905, as a response to unwanted immigration mostly of poor Jews from Eastern Europe and Russia but with an exemption for political and religious refugees.¹⁶

Although immigration was not restricted until the early twentieth century, aliens did not always have the same rights as subjects but the difference between those who belonged and those who did not was not always significant. The concept of denizenship, which operated from the late thirteenth to the early nineteenth centuries, is reflected even today in the remnants of the idea of settlement, rather than citizenship, as the fount of belonging. This is reinforced by the very high cost of naturalisation and recent legal changes that have made citizenship easier to lose; holding ‘indefinite leave to remain’ rather than citizenship suits many people who prefer not to naturalise but need to have a firm status of formal belonging in daily domestic life.

2.2 *Historical ideas of allegiance*

The establishment of a Church of England in the sixteenth century identified allegiance to the monarchy with adherence to religious practice, but was directed principally at anti-Catholicism, reflecting the political background and the break with the Roman church.¹⁷ In the absence of any developed sense of formal tribalism, while *ius soli* persisted, the British-born children of immigrants could be as British as anyone. But an ambiguous citizenship may also be unexpectedly fragile. Borders open to immigration and emigration may be easily overlooked as boundaries to exclusion as well as inclusion. The exclusion of subject populations is not new. There is a right not to be exiled in Clause 29 of Magna Carta (1225), but the expulsion of Jews who were born British subjects in 1292 is still reflected over 700 years later in the exile of

¹⁶ Aliens Act 1905. Notably, although it is often said that the 1905 Act was designed to prevent poor refugees from Eastern Europe from arriving in Britain, the Act contains an exemption for refugees, in recognition of the common law of asylum (sect. 1 (3)).

¹⁷ Thus, for example, early domestic legislation as to the recognition of religious-based personal laws of marriage included Quaker and Jewish ceremonies as well as those of the Church of England, but excluded Catholics, whose allegiance to Rome engendered specific political fears (Lord Hardwicke’s Act 1753). The monarch, who of course is defined by a different *ius sanguinis* from the ordinary citizen, still may not be, or marry, a Catholic (Act of Settlement 1701), though this is currently under review. Because the monarch is also Head of the Church of England, resolution of this does present difficulties.

British citizens, usually from a visible ethnic minority, through deprivation of citizenship and exclusion orders. There is also the inglorious expulsion of the Chagos Islanders from their homes in the British Indian Ocean Territory (discussed in 3.5 below and attempts to expel the parents of citizen children even when this means the exile of the child, partially checked by the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4 (discussed below).

2.3 Establishment of *ius soli*

The earliest confirmation of *ius soli* is Calvin's Case, decided in 1608 just after King James VI of Scotland's became also King James I of England.¹⁸ It was found that a person born in Scotland after the Union of the two countries was a subject of the King of England (and therefore entitled to hold land in England). *Ius soli* continued to thrive in a country embarking on a strong imperialist phase, gathering in territories and their peoples. It was not until the later twentieth century that Britain preferred to shed people as it shed territories, and the process is not yet completed. Britain has also always been a country of emigration as well as transit. Many families leaving central and Eastern Europe in the nineteenth century ended up staying permanently in the UK although they had intended to use it only as a transit to America. In the late twentieth century, the similar phenomenon of apparent transit passengers disembarking at, for example, Heathrow to claim asylum led to the instigation of transit visas, which are now routine. Emigration however has never excited legislative concern other than as to the money that people might take with them; exchange controls are within living memory.

Common law *ius soli* was first codified in the British Nationality and Status of Aliens Act 1914, which was passed along with the Aliens Restriction Act 1914 of the same year, as a response to the outbreak of the First World War.¹⁹ After the Second World War, and as decolonisation accelerated, nationality legislation was codified in the British Nationality Act 1948. Under the 1948 Act, British people were designated 'Citizens of the United Kingdom and Colonies', also known as 'CUKCs', the first use of citizen as the primary status, while citizens of independent states were known as Commonwealth citizens. Previously, 'British subject' had been the main status; it was retained in the 1948 Act along for both CUKCs and Commonwealth citizens. Subjecthood carried rights of movement throughout the Commonwealth but, as these rights were progressively diminished through consecutive immigration statutes, its significance dwindled. After the BNA 1981, it denoted the lowest level of connection, describing a person with no citizenship or right of abode.

2.4 Nationality, race and citizenship

After the Second World War, race and immigration control became more explicitly intertwined in the UK. Extra labour was needed for post-war rebuilding, particularly in sectors such as health, hospitality, transport and manufacturing. There was a preference for European labour whose stay as aliens could be controlled and, in principle anyway, made temporary. In the event, however, major employers recruited labour from the Commonwealth, initially the Caribbean then South Asia. There was much official disquiet, public concern and even conflict but there was also hesitation in legislating; there was no desire to prevent the entry of white Commonwealth citizens, to disrupt Commonwealth links or to impose an obvious race bar. (Dummett & Nicol 1990: 177 ff; Paul 1997: chapters 5 and 6; Hansen 2000; chapters 3 and 4). Finally, the Commonwealth Immigrants Act 1962 was passed, imposing controls

¹⁸ 7 Coke Report 1a, 77 ER 377.

¹⁹ Sect.1 (1) provided that '... any person born within His Majesty's dominions and allegiance ...' was a 'natural-born British subject'.

which, although not apparent on the face of the legislation, would primarily affect subjects, both CUKCs and independent Commonwealth citizens, from non-white countries.

Decolonisation created other new forms of immigration and new forms of discrimination. The population of South Asian descent living in the former East African colonies such as Kenya, Uganda and Tanganyika (Tanzania) were permitted to keep their CUKC status after independence as an insurance against policies of Africanisation, an anticipated reaction to former white British rule. Much of the substantial population of mostly middle-class Asian families therefore retained their CUKC, citizenship and did not take up citizenship of the new countries. In due course, their fears were realised and they began to arrive in the UK, where, however, they faced resistance to their admission which translated directly into legislation. The Commonwealth Immigrants Act 1968 imposed entry controls on CUKCs who did not have a parent or grandparent born, naturalised, adopted or registered in the UK, thereby excluding the East African Asians.²⁰

The 1968 Act anticipated the Immigration Act 1971 which unified controls over aliens and Commonwealth citizens and retained the model used in the 1968 Act. The 1971 Act granted the right of abode to ‘patrials’ i.e. those who could show an ancestral connection with the UK (including some non-nationals), Commonwealth citizens who had been resident in the UK for five years and female Commonwealth citizens married to a man with the right of abode. Everyone else, including non-white British citizens in the remaining colonies, was subject to immigration control. ‘Patriality’ says Dummett ‘had become a quasi-nationality’ (2005: 568). The term was later abandoned when the distinctions it embodied were reflected in nationality law in the British Nationality Act 1981 which designated CUKC patrials as British citizens, the only category of citizen with the right to live in the UK. The East African Asian CUKCs who had been made subject to controls in 1968 became British Overseas Citizens. The CUKCs who lived in the UK’s remaining dependencies became British Dependent Territories Citizens. Neither of the two latter groups had the right of abode in the UK, a position that was not remedied until early in the twenty-first century. Commonwealth citizens who were patrials when the 1981 Act came into effect retained their right of abode and form a dwindling but still extant group of non-citizens entitled to live in the UK.

The modern face of the historically changing definition of Britishness was examined in the case of *Elias*. This concerned the unhappy resolution of the sorry tale of the civilians interned in Japanese camps during the Second World War. Diana Elias, whose British family originated from Iraq and India, had been one of those handed over to the Japanese by the British Consul in Shanghai. Decades later, the British Government decided to try to end still-continuing calls for the Japanese to apologise and make reparations, which were souring political relations, by making its own ex gratia payment of £10,000 to each British former internee. After the scheme was announced, and some payments had been made, the eligibility criteria were changed to include only those who were, or whose parent or grandparent was, born in the UK. This excluded Mrs Elias, who by then had lived in the UK for decades as a British citizen herself. She took a case and won on the grounds of race discrimination, the Government inter alia not having noticed the relevant part of the Race Relations legislation coming into force.²¹

²⁰ The circumstances in which the Act was passed are a good example of how even basic constitutional rights are made fragile by the absence of entrenchment in the English legal system so that they are not more difficult to amend, than ordinary legislation. The 1968 Act was passed in a climate of high political and racial tension, in a matter of days. An MP, Enoch Powell, made a near-contemporary speech on immigration, referred to as “the Rivers of Blood speech”, which remains a widely-known and frequently-referred-to icon of establishment racism.

²¹ Secretary of State for Defence vs Mrs Diana Elias [2006] EWCA Civ 1293.

2.5 Nationality and racism: the East African Asians case

The impact of the apparent ‘immigration’ changes contained in the Commonwealth Immigrants Act 1968 on the construction and operation of the law of British nationality cannot be overstated, as their restatement in subsequent legislation including the British Nationality Act 1981 underlines. British people had historically been defined essentially by geography rather than descent, and that geography had been defined by the extent of political sovereignty under the Empire. After the Second World War, the boundaries of political sovereignty withdrew to the islands of the UK, but it was not easy to abandon responsibility for the British people outside those islands. In particular, the ‘patriality’ rule effectively meant that people from expatriate British communities, and their descendants, were still treated as British, whereas others were not, and the dividing line was effectively that of race. Broadly, white British Africans could come to the UK; black and Asian British Africans could not.²² The European Commission of Human Rights found that the British policies were racist and thus in breach of the ECHR, but, by dealing separately with the particular people who had brought the claim, the UK was able to avoid the risk of adverse findings in the European Court proper.²³

The UK Government never accepted the implication that British nationality law was racist, (Department of Constitutional Affairs 2004: 208) although reforms in the mid-2000s recognised and partially remedied the historical injustices. Amendments to the British Nationality Act 1981 in the Nationality, Immigration and Asylum Act 2002 permitted those British Overseas Citizens, British subjects and British Protected Persons who do not have an alternative citizenship and who have not voluntarily relinquished another nationality to register as British citizens. The British Overseas Territories Act 2002 converted most of those who were British Dependent Territories Citizens as at May 21st 2002 (the date of commencement of the Act) into British citizens. The exception was those claiming a connection through the British sovereign bases of Akrotiri and Dhekelia in Cyprus. It has been suggested that this is in accordance with the UK’s promise not to use the bases for civilian purposes, or because of fears that asylum seekers and other migrants in the Mediterranean area would be encouraged to use the bases to establish rights to come to the UK.

Changes to nationality are always the likely consequence of decolonisation. The criticisms of the UK are firstly, that it abandoned overseas communities to whom commitments had been made or who were still governed from Britain and who had no alternative substantive nationality; secondly, that decisions about whom to accept and whom to reject were made on the basis of race; and, thirdly, that this was not openly acknowledged but achieved indirectly through immigration measures that cut across rather than complemented nationality laws and which then informed new hierarchical nationality laws which awarded unwanted citizens a nationality that did not fulfil a basic functional criterion, i.e. access to the territory. This was exacerbated by the loss of *ius solis* for some of those born on the territory. The worst injustices have now been remedied although their consequences continue to reverberate with disputes occasionally arising, for example, as to the entitlement to register.

²² Commenting on the provisions for resumption of British citizenship in the British Nationality Act 1964, which sought satisfaction of a ‘qualifying condition of connection with the United Kingdom’ or its colonies or protectorates, the European Commission of Human Rights (the then admissibility stage) remarked that ‘this condition would normally be fulfilled by the so-called ‘white settlers’, but not by the members of the Asian communities in East Africa’. *East African Asians vs. UK* (1973) [1981] 3 EHRR 76, para 202. On the ‘hidden agenda’ of the 1964 Act, see further Dummett (2005:566).

²³ Case ref

3. Current British nationality and citizenship regime

3.1 Citizenship by birth

Under the current law, one may be born a British citizen through birth in the UK to at least one parent who is either a British citizen or settled in the UK or a member of the armed forces. ‘Settled’ is a technical term, meaning resident in the UK without restrictions and applies to those with indefinite leave to remain or permanent residence under EU law. It no longer matters whether the parent is the mother or father or whether or not they are married.²⁴

Ius solis was removed from temporary or irregular migrants by the British Nationality Act 1981. Those born after that time must produce evidence of their parents’ immigration status at the time of birth in order to obtain or renew a passport. It has also interacted with law in other areas to create new excluded groups. For example, before August 2005 a refugee received indefinite leave to remain immediately and thus was settled in the UK and able to give British citizenship at birth to any child subsequently born in the UK. Now, however, they receive five years’ limited leave before receiving indefinite leave and their children will not necessarily be born British although there are later opportunities to register as British once the parent is settled.²⁵ These slower consequential changes suggest that the impact of the loss of *ius soli* in 1983 is only now being properly felt.

Until 2002, a parent exercising free movement rights in EU law was regarded as sufficiently settled to pass British citizenship to a child at birth. In 2006, the position changed: regulations now provide that if the parent has a permanent right of residence, the condition is satisfied, but not if the parent is a ‘qualified person’, meaning a worker or job-seeker, a self-sufficient or self-employed person or a student. The condition is also not satisfied if the parent is resident as a family member of a resident or qualified person. However, after five years as a lawful resident under the free movement rules, a parent gains the status of permanent resident and can then pass British citizenship to a child born in the UK.²⁶

A person may be born a British citizen by descent, if born outside the UK to a British citizen otherwise than by descent. This form of citizenship, by descent, generally lasts only one generation. Thus for a child to obtain British citizenship from a parent who is a British citizen by descent, the child must either be born in the UK or other requirements met that show a continuing connection with the UK. There is however provision to register a child when the British parent’s own parent was a citizen other than by descent and either the child’s British parent lived in the UK for three years prior to birth or the family unit, after birth, lives in the UK for three years. However, if when the child is born outside the UK one parent is a member of the armed forces or diplomatic staff or working in some official European institution, the child will be a British citizen otherwise than by descent and able to pass British

²⁴ The child of a mother who is neither British nor settled only has to show proof of paternity to claim British citizenship through a British or settled father; this is satisfied by the father’s being married to the mother, or on the child’s birth certificate, or by blood or DNA tests, or otherwise (British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1496)). This is however comparatively recent; until July 2006 an unmarried father could not automatically pass British nationality to a child, although registration would usually be permitted where the child would have been born British had the parents been married (SI 2006 1498).

²⁵ There are however generous practices for those children who are born stateless as a result of the parent’s country of origin’s not granting citizenship by descent for those born outside the territory, and there are also generous provisions and practices for the registration for children who are born and grow up in the UK.

²⁶ A child born before the parent achieves the five years’ residence may subsequently be registered.

citizenship to children born abroad. British citizens, whether by descent or otherwise, have the right of abode in the UK.

It is rare that individuals are born into one of the other categories of British citizen. Most British Overseas Territories Citizens and British Overseas Citizens without another nationality are now British citizens. Some individuals may still wish to naturalise as British Overseas Territories Citizens and thus transmit their citizenship but British Overseas Citizens is a declining category as it cannot be transmitted to children or acquired in other ways.

There are a few residual groups. British Nationals (Overseas) are people from Hong Kong who applied for this status before Hong Kong passed back to China in 1997.²⁷ The term 'British subjects' now applies to two residual categories of people, and then only if and for so long as they have no other nationality: firstly, certain people who were formerly connected through British India, and secondly people who were connected with the Republic of Ireland and made a declaration in 1949 of retention of British nationality in 1949. These British subjects may find it relatively easy to naturalise as British citizens. British Protected Persons were connected with parts of the British Empire that were not directly ruled colonies but protectorates, such as Iraq, where the local ruler was at least nominally independent. People in this last category are not really considered to be British at all – they were not British subjects in the previous sense and they are not Commonwealth citizens now, but they are also not aliens.

3.2 *Becoming British after birth*

There are two routes to naturalisation: marriage or residence. Naturalisation through marriage is easier; applicants must be over eighteen years old, of sound mind and good character, have passed tests of English (or Welsh or Scottish Gaelic) language and of knowledge of life in the UK, have indefinite leave to remain and to have lived in the UK for three years (subject to permitted absences) without being in breach of the immigration rules; the spouses or civil partners of those on Crown and designated service may apply from abroad.²⁸ While only three years' residence is required by statute, since July 2012, spouses must live with their partner for five years before obtaining indefinite leave so that the minimum period is now, *de facto*, five years.

Those applying through residence must meet the above conditions except that the residence period is five years, of which one has been spent free of immigration restrictions (i.e. as settled residents), again unless a person is on Crown service.²⁹ In addition, they must show that they intend to make their home in the UK. A person once naturalised is treated as a British citizen otherwise than by descent, and so can pass British citizenship to a child born outside the UK (see above).

A particular and increasing barrier to naturalisation – as well as other applications - is the high cost of the fee, and the lack of any formal appeals process. The deterrent effect of the high fees is mentioned not only by Dummett in her earlier Report for this project (2005: 564, 575), but also by organisations active in the field (e.g. Refugee Council 2007) and those commissioned by Peter Goldsmith to research the background for his paper on *Citizenship: Our Common Bond*, discussed further below. By 2014, an application cost £826.

²⁷ Hong Kong Act 1985 and the British Nationality (Hong Kong) Order 1986.

²⁸ While the minimum residence period remains three years under statute, under changes to the immigration rules, all spouses must live in the UK and meet the conditions of their visa before being eligible for settlement, so that is now the *de facto* minimum.

²⁹ As with spouses, most migrants must wait for five years to obtain settlement and must then live for one year without being subject to restrictions before being eligible to naturalise so that the minimum period will, in reality, be at least six years for most.

Language tests have become more formal and more difficult over the years and a knowledge test was introduced in 2005.³⁰ In practice, most of those naturalising took the language and knowledge tests at the settlement (permanent residence) stage (where they became obligatory in 2007) and are not required to retake them to naturalise. Only those who settled prior to 2 April 2007 or who were exempted from the requirement after that date have to meet the integration requirements at the naturalisation stage (unless they are again exempt, although the exemptions are narrower for naturalisation than at settlement).

Until recently, migrants could meet the condition either by taking the ‘Life in the UK’ test or by taking and progressing satisfactorily on a specially designed English language with citizenship course. From October 2013, all migrants have been required both to take the citizenship test and pass a separate language test at B1 CEFR (unless they are a national of one of a list of English speaking countries or took a degree taught or researched in English).³¹

The Home Office must state its reasons for refusing naturalisation.³² The decision is discretionary; British Nationality Act 1981, s. 6 says that the Secretary of State ‘may, if he sees fit’ grant naturalisation if conditions are met. However, refusals are, in practice, always founded on failure to meet the requirements. Some of these, however, such as the good character criterion, involve an element of subjectivity. There is evidence that, while the number of refusals is falling overall, the proportion of refusals on good character grounds is rising and, in 2012, was the reason for 37% of refusals compared to about 10% previously (Migration Observatory 2014).

There is no appeal against refusal of naturalisation. UKBA will review the decision on request and for a fee but are likely to reverse a refusal only if they have made an error, for example, in calculating the residence period, not on the discretionary grounds such as ‘good character’. Otherwise, the only way to obtain judicial oversight is to apply for judicial review of the decision by the High Court on the grounds of illegality, irrationality, procedural impropriety or breach of human rights and/or proportionality. Judicial review is heard in the Administrative Division of the High Court and is a highly formal and legally focused process for which specialist legal representation is required. It will therefore be very expensive unless the applicant qualifies for and is granted legal aid, an increasingly unlikely prospect. In practice, few applications succeed because, leaving aside cost, the discretionary nature of the decision, particularly where refusal is on ‘good character’ grounds, means that it will rarely be unlawful.

Some individuals may register as a British citizen. This is similar to naturalisation but is a simpler process, with lesser elements of discretion although a good character requirement usually applies to those aged over 10. Those with a nationality connection to the UK but who are not British citizens may register as British Citizens subject sometimes to a residence condition. Registration is the method for formerly British people who renounced their citizenship and wish to take it up again, for certain residual categories of people from Hong Kong such as war widows, and for those born to British mothers outside the UK before 1983, after which citizenship in these circumstances became automatic. People who become British by registration are sometimes British by descent and sometimes British otherwise than by descent, depending on the relevant provision.

There are also provisions for the registration of children, including where a child is born in the UK to a foreign parent who subsequently becomes settled, children who are born in the UK and not entitled to citizenship but live here until they

³⁰ The official languages are Welsh and Scottish Gaelic as well as English, though the importance of English is generally given as a reason for having language tests at all.

³¹ <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/june/13-family-migration>.

³² *R v SSHD ex p Mohammed Fayed* [1996] EWCA Civ 946.

are ten years old, children born in the UK before July 2006 whose mother is foreign and whose unmarried father is British (after that date citizenship is automatic),³³ and children born stateless in the UK. Registration may also be a route to citizenship for a child born outside the UK to a British citizen by descent, who normally cannot pass citizenship outside the UK for a further generation. While these rights appear quite extensive on paper, they can be difficult to exercise. The cost of an application for registration (currently £669) can be difficult or impossible to raise and those caring for non-British children may not realise the importance of ensuring registration occurs while the child is still a minor. This includes social services who may have parental responsibility for the child. The good character requirement has been used to refuse registration to those with very minor criminal records such as a caution; it should be remembered that the individuals concerned are amongst the most vulnerable in our society yet even peripheral involvement in crime as a young person can have devastating consequences for their future. The subsequent exclusion from opportunities for higher study, work and a settled life causes huge emotional distress to the youngsters involved (Ealing Law Centre 2014).

A child can also become British by adoption if at least one adoptive parent is a British citizen at the date of adoption, and the adoption order is made by a relevant court,³⁴ or after May 2003 if the order is made under the 1993 Hague Convention on Intercountry Adoption and the adopters are habitually resident in the UK at the date of adoption. If the adoption is not within these categories (for example, where the parents are resident overseas), an application for registration can still be made before the child is 18, and, if the child would have been British if it were the adopters' biological child, that is likely to succeed. An adopted person does not cease to be British for reason of the annulment of an adoption order, and nor does a British person adopted abroad cease to be British for that reason, even if it leads to their gaining another nationality.

For many years there was a route to settlement (and in due course naturalisation) after ten years residence for regular migrants and fourteen years for irregular migrants, subject to conditions. The period before settlement has now been extended to thirty years for irregular migrants.³⁵ Unlawful residence includes any time before removal directions are made, so this is a possible route for someone who disappeared into the social fabric when the approach to physical immigration was *laissez-faire*, but who is now discovered to be present without formal status and therefore in difficulties as to paperwork although the extended qualification period means that fewer people will now qualify. By definition it is not known how many such people live in the UK,³⁶ but many are long-established residents with houses, jobs and families.

³³ SI 1498/2006, bringing into force sect. 9 Nationality, Immigration and Asylum Act 2002.

³⁴ One in the UK, Channel Islands, Isle of Man or Falkland Islands after 1982, or after 21st May 2002 in another British Overseas Territory.

³⁵ Paras 276 ADE-DE HC395.

³⁶ In May 2006 Dave Roberts, the Home Office Director in the Enforcement and Removals Directorate within the then Immigration and Nationality Department of the Home Office, was widely reported as telling the House of Commons Select Committee on Home Affairs that he had 'not the faintest idea' how many people were in the UK 'illegally' (a term deprecated by lawyers and others in the context of immigration) (Response to Q 815, Minutes of Evidence, Tuesday 16 May 2006; Fifth Report printed 13 July 2006). The figure was however generally estimated, including by Mr. Roberts, at about 400-500,000, or up to 1% of the population, with adjustments for those from the new accession states. This approximate figure seems to have been confirmed by independent researchers (Gordon et al 2009).

3.3 Losing British citizenship

A person who renounces British citizenship in order to take up nationality in a country that does not permit dual nationality is entitled to register so as to become a British citizen again, but only once (s. 13 British Nationality Act 1981). After that, it is discretionary only. There are no current suggestions that citizenship should be withdrawn for those residing permanently or long-term abroad, although non-citizens with indefinite leave to remain can lose their right to return to the UK after two years absence.

Deprivation of citizenship by the government has emerged as a critical issue in recent years. The original s. 40 of the British Nationality Act 1981, reproducing existing powers but extending them to registered citizens, allowed deprivation of naturalised and registered citizens on the grounds of fraud, false representation or concealment of a material fact. There was also power to deprive on the grounds of disaffection, disloyalty, engaging with the enemy during wartime or imprisonment for more than twelve months within five years of acquiring nationality, but only if this would not leave the person concerned stateless. Powers of deprivation were barely used at that time; the last denaturalisation had occurred eight years before the 1981 Act was passed and none occurred in the decade afterwards (Gibney 2014: 329-330).

However, the events of September 2001 caused new anxieties about terrorism. S. 4 of the Nationality, Immigration and Asylum Act 2002 replaced the disaffection etc. grounds in the 1981 Act with a single clause allowing deprivation of citizenship if the person had done something seriously prejudicial to the vital interests of the UK or a British overseas territory. This applied to all citizens irrespective of how citizenship had been acquired so included those who were British by birth but could not be used if the result would be statelessness. There was also a right of appeal. The background included general concern about security and widespread media coverage of the Home Secretary's inability to deport Abu Hamza al-Masri, an objectionable Muslim preacher originally from Egypt who had naturalised following his marriage to a British woman. However, in the event, he could not have his citizenship removed under this new provision because he no longer possessed Egyptian nationality.

Two years later, s. 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 made appeals against deprivation orders non-suspensive so that individuals did not retain their citizenship during the appeal process with drastic consequences discussed below. A further 'war on terror' case, *Hicks*,³⁷ was the apparent catalyst for still further change although, as Majid (2008) suggests, the July 2005 bombings of public transport in London were also in the background. David Hicks, an Australian national interned by the US at Guantanamo, applied to register as a British citizen by descent - his mother was British, entitling him to do so - in order to obtain release along with the other British citizens. The Home Secretary initially refused to register him but, after this was found to be unlawful, proposed to withdraw his citizenship immediately thereafter. This was prevented by the Court of Appeal after careful consideration of the legislative provisions which, it was found, did not permit deprivation in respect of conduct that occurred before nationality had been acquired. At the material time, which was prior to the registration he now sought, he owed no allegiance and so by definition could not have been disloyal (see Sawyer 2013 for a discussion).

The new measure, s.56 Immigration, Asylum and Nationality Act 2006, allows the Secretary of State to make an order of deprivation of citizenship if she considers it to be conducive to the public good. There was considerable concern expressed at the breadth of the power (see Sawyer 2013 for a discussion). The provision came into force immediately and is mirrored in s.57, which allows for the deprivation of the right of abode for the same reason. The 'conducive to the public good' terminology

³⁷ [2006] EWCA Civ 400.

was present in earlier deprivation of citizenship laws, where it acted as a restraint: deprivation on other grounds could only go ahead if it was also ‘conducive to the public good’. It is also used as a ground for deportation, where it has been expansively interpreted, and its use in this way in deprivation cases reflects the increasing tendency to treat naturalisation as an issue of immigration control and national security rather than of citizenship policy.

Numbers of deprivation orders began to increase from 2010. For many years, no such orders were made. In 2009, two people were deprived of their citizenship and, in 2010, five (Fransman 2011: 609). A Freedom of Information request in July 2011 revealed that thirteen orders had been made under the ‘conducive to public good’ provision.³⁸ By 2014, that number had increased to at least 25, and that may be an underestimate. At least five of those deprived under this law were born in the UK. The number of deprivations on fraud grounds also appears to be increasing: there was one case in 2012 and 12 in 2013 (Ross 2014). A recently adopted tactic is to issue the order while the individual is outside the UK; 15 of the 17 ‘conducive’ deprivation cases examined by the Bureau of Investigative Journalism were made in this way (Ross 2014). Notice of deprivation is sent to the home address in the UK and the individual may only discover their predicament when attempting to return to the UK by which time appeal rights may have expired.

Enabling its (former) citizens to be exiled in this way means that the British state avoids the difficulties it has faced in expelling non-nationals, both legal obstacles, such as human rights-based objections, and practical ones, such as identifying a state willing to take the person, and which would apply to an even greater extent to those who had only just stopped being British citizens. The Court of Appeal has upheld the government’s refusal of admission for the purposes of attending an appeal, finding that deprivation of citizenship was an exercise of the Crown’s prerogative powers and, in the absence of a statutory suspensive right of appeal, the common law did not require a person to be present in person at his own appeal.³⁹ This makes it much more difficult for rights of appeal and for human and other legal rights (for example, in EU law) to be exercised. There is the difficulty involved in finding and instructing lawyers from remote regions with poor communications but it may also be a question of physical security; at least one person deprived of their citizenship was killed by a drone strike after using skype (not in connection with an appeal) and some of those affected by deprivation orders have decided against giving evidence in their appeal, citing reasons of personal safety (Ross 2014).

UK consular assistance is not available to these individuals, who are treated as non-citizens from the moment of deprivation. Two individuals (including the instance mentioned above) have been killed in drone strikes and another has been rendered to the US, raising suspicions of collaboration between US and UK security services. One of those killed was misleadingly reported to be a ‘very senior Egyptian’ commander in Al Qaeda even though he was born in the UK and had never asserted his Egyptian citizenship (Ross 2014).

The current provisions are, in practice, indistinguishable from a right of arbitrary deprivation, although they are in accordance with the law. The sole substantive bar is that the person must not be left stateless when an order is made on ‘conducive to public good’ grounds (there is no prohibition on leaving a person stateless if their British nationality is found to have been obtained by fraud). Given the breadth of discretion granted to the Secretary of State and the lack of clear (or any) rights in EU and human rights law, that an order will leave someone stateless is the only ground of appeal likely to succeed. However, establishing statelessness is often difficult and requires the British courts to decide on complex issues of foreign

³⁸ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50411501.ashx

³⁹ *GI v SSHD* [2012] EWCA Civ 867.

citizenship laws. This can result in lengthy and repeated hearings as succeeding decisions are challenged and overturned. The Special Immigration Appeals Commission in *Abu Hamza* found that statelessness must be *de jure* to be unlawful.⁴⁰ In *B2*, the Court of Appeal overturned a SIAC judgment to find that the failure by a state, here Vietnam, to apply its own laws (as understood by the British court) made an individual *de facto* stateless and therefore was permitted.⁴¹ The case had been heard in the Supreme Court and judgment was awaited at the time of writing⁴² but reports suggest that the critical arguments turned on whether Vietnam had effectively removed B2's citizenship before or after the UK order, raising the alarming prospect of states racing to be the first to denationalise its unwanted dual citizens, and whether EU law applied.

Another Supreme Court case, *Al-Jedda*, prompted yet another tightening of the law, in this instance enabling deprivation to take place in some circumstances even if statelessness follows. Mr al-Jedda appealed in 2010 against a deprivation order on the basis that it left him stateless. A series of decisions followed until, in 2012, the Supreme Court found that the reasons for statelessness or the possible availability of an alternative nationality were immaterial: if Mr al-Jedda became stateless at the moment of deprivation, it was prohibited.⁴³ In response, the government brought forward an amendment of the Immigration Bill, now s.66 Immigration Act 2014, which allowed the government to remove citizenship from naturalised citizens, even if this resulted in statelessness, where the Secretary of State was satisfied that deprivation was conducive to the public good because the person had conducted him or herself in a manner which is seriously prejudicial to the vital interests of the UK. This revived a declaration made in 1966, at the time of ratification, under art.8(3) of the 1961 Convention on the Reduction of Statelessness, which allowed the UK to continue to exercise its existing powers to remove citizenship on limited grounds even though these would otherwise have breached the prohibition on statelessness in the Convention. In fact, the statutory power that it possessed at the time of ratification lapsed when the British Nationality Act 1981 was amended by the Nationality, Immigration and Asylum Act 2002 but the UK appears to be within its rights to resurrect it.

The proposal that the UK should act to make people stateless shocked many. The compliance of the new provision with international law seemed dubious, notwithstanding the declaration to the 1961 Convention.⁴⁴ The House of Lords rejected the changes and substituted clauses requiring the need for such a drastic power to be determined by a committee of parliamentarians and for new legislation to be introduced if the government then decided to proceed. These were, in turn, reversed when the Immigration Bill returned to the House of Commons but the government conceded that the power would only be exercisable if it was reasonably believed that another nationality could be obtained. There is also an obligation to report on the use of the powers of deprivation resulting in statelessness (Harvey 2014).

Thus, as amended, s.40 British Nationality Act 1981 now contains an array of powers of deprivation, all in the discretion of the Secretary of State and subject to a non-suspensive right of appeal which will, in all cases involving national security, be heard in semi-secret by the Special Immigration Appeals Commission. These powers

⁴⁰ *Abu Hamza v Secretary of State for the Home Department* [2010] UKSIAC 23/2005

⁴¹ *B2 v SSHD* [2013] EWCA Civ 616.

⁴² Case ID: UKSC 2013/0150

⁴³ *Al-Jedda v SSHD* [2013] UKSC 62.

⁴⁴ See, for example, the submission of Professor Guy Goodwin-Gill to the Joint Committee on Human Rights: <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>.

may be exercised in respect of all types of British national; not only British citizens but British overseas territories citizens, British overseas citizens, British Nationals (Overseas), British protected persons, and British subjects. Deprivation may now take place where the Secretary of State is satisfied:

- That registration or naturalisation was obtained by concealment of a material fact (applies only to naturalised or registered citizens but may be used even if it causes statelessness);
- Where the Secretary of State is satisfied that deprivation is conducive to the public good (applies however nationality was obtained but may not be used if the result is statelessness);
- Where the Secretary of State is satisfied that the deprivation is conducive to the public good because the person has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom or its territories (applies only to naturalised citizens but the order may be made even if it causes statelessness).

It will be some time before it is known whether and how the power to make a person stateless has been exercised. It will be of doubtful utility if the person is still in the UK, as, leaving aside the human rights and other obstacles to expulsion, it will not be possible, in most cases, to find another country to accept them (although the Home Office has previously issued directions to remove a person to a country of which he is not a citizen).⁴⁵ To the extent that all deprivation decisions must be proportionate to be lawful, any such decision which results in statelessness must be subjected to particular scrutiny given the horror with which statelessness is generally regarded.

The UK's current law and practice on deprivation of citizenship has four major and disturbing implications. The first is that, by removing citizenship when an individual is outside the UK, the government is forcing other states to take responsibility for managing the danger that this person supposedly represents. The desire to dump undesirable citizens as if, in the words of Shami Chakrabarti (Director of Liberty), they are 'toxic waste'⁴⁶ is even more apparent in plans announced shortly before this report was updated in November 2014. The Counter-Terrorism and Security Bill, introduced to the House of Commons on 26th November 2014, contains powers to seize the passports of those who, it is suspected, are intending to leave the UK to participate in terrorism related activity. It also has powers to prevent British citizens (presumably those who, as sole nationals by birth, cannot be denationalised) from re-entering the UK except under onerous conditions. Both deprivation to prevent re-admission and the proposed exclusion orders raise significant questions of international law under which states have obligations in respect of their citizens (or former citizens).⁴⁷

Secondly, it is not at all clear that this strategy will make the world a safer place overall; deprivation outside the UK has gone ahead even where the security services have advised that the risk could be better managed within the UK (Ross 2014). Thirdly, citizenship law once again reflects the modern political obsession with protecting the populace from external threat, whether through immigration or terrorism, rather than with any recognisable conception of citizenship as a political and legal bond. Finally, citizenship status is now highly variable in terms of the

⁴⁵ See e.g. *Revenko v SSHD* [2000] EWCA Civ 500, *MA v SSHD* [2005] UKAIT 00161; *KA (statelessness: meaning and relevance)* [2008] UKAIT 00042, MM and FH (Stateless Palestinians, KK, IH, HE reaffirmed) Lebanon CG [2008] UKAIT 00014

⁴⁶ <http://www.theguardian.com/uk-news/2014/nov/14/uk-jihadists-citizenship-laws-human-rights>

⁴⁷ See the submission of Professor Guy Goodwin-Gill to the Joint Committee on Human Rights: <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>

degree of security and permanence which it provides. Only British born citizens without an alternative nationality are immune from deprivation (although they could be made subject to exclusion orders). Those with a dual nationality and those who have naturalised may see their citizenship removed. It is probable that a greater proportion of these latter groups will belong to the UK's ethnic minorities. While many of the former injustices associated with British citizenship were moved in the early years of the twenty-first century, recent years have thus seen new axes of exclusion and discrimination emerge.

3.4 Nationality, immigration and the Commonwealth

The Commonwealth of Nations is the shadow of the old Empire but still has considerable emotional power. Almost all of its member states are previous countries of the Empire, but not all former British territories are members.⁴⁸ In a striking reversal of the previous position, a person from a Commonwealth country does not for that reason have any particular advantage in relation to British citizenship rights, though many people do have rights rooted in the historical connection with the UK.

Some citizens of Commonwealth countries still have the right of abode in the UK granted to them by the Immigration Act 1971 and others are citizens by descent (although this ends after one generation unless a connection with the UK is maintained through residence). Others may be able to use a provision in the immigration rules that allows those with a grandparent born in the UK to work and, after five years, settle in the UK without having to meet the usual criteria for a work visa. The remaining British Overseas Citizens and British Dependent Territories Citizens are subject to immigration control (the only concession is access to the youth mobility scheme which replaced the working holidaymaker scheme) but have rights to register instead of naturalising as British citizens if they meet the conditions. Otherwise, particularly since the abolition of the working holidaymaker visa in 2008, the position of Commonwealth citizens who are not British citizens is indistinguishable from other non-nationals.

3.5 British nationality and citizenship law and its external relationships

Britain's citizenship laws are not apparently much directly affected by formal relations or agreements with foreign states.⁴⁹ In relation to the European Community, the UK decided that only British citizens, and not other British nationals, would be European citizens, and this was upheld by the Luxembourg court in *Kaur*.⁵⁰ However policy towards certain categories of British nationals is clearly affected by international politics. Gibraltarians were British citizens from the inception of the

⁴⁸ The Irish Free State became the Republic of Ireland and left; Malaya became part of Malaysia, and Newfoundland became part of Canada. Tanganyika and Zanzibar merged as Tanzania; Zimbabwe was suspended and then withdrew. In 1961, South Africa withdrew from the Commonwealth because of pressure against its then apartheid policies, and the Commonwealth also participated in sanctions against the regime (Commonwealth Accord on South Africa October 1985), before the ending of apartheid and the rejoining of South Africa in 1994. Applications to join the Commonwealth have been made by Sudan, Algeria, Madagascar, Yemen and the Palestinian National Authority; Mozambique and Rwanda have joined.

⁴⁹ More obvious in this area are expulsion policies, where the UK has been anxious to expel foreign nationals to countries which have a reputation for ill-treatment of their citizens that would make such expulsions amount to a breach of Art 3 ECHR. Britain has obtained 'readmission' agreements, effectively agreements by the home country not to torture those returned. These agreements were always controversial.

⁵⁰ Case C-192/99 *Kaur* [2001] ECR I-1237, confirming the Declaration made in 1972 and appended to the Treaty of Accession to the European Community.

British Nationality Act 1981 that created the status: Gibraltar is a British territory physically in southern Spain and over which Spain has a claim. The inhabitants of the Falkland Islands in the South Atlantic Ocean, which are claimed by Argentina, were British Dependent Territories Citizens until the armed conflict of 1983, after which by the British Nationality (Falkland Islands) Act 1983 they became British citizens (they are also entitled to Argentinean nationality but the white-European settler population does not generally claim this). They would have been reclassified as British citizens under the British Overseas Territories Act 2002 in any event.

A particular example of poor treatment of British nationals is that of the British inhabitants of the Chagos Islands, whose fate expresses a great deal about the constitutional meaning – or lack of it – of British nationality and citizenship. The inhabitants of the British Indian Ocean Territories were deliberately evicted by the British Government in the late 1960s so that the largest island, Diego Garcia, could be leased to the United States for use as an air base. Most went to live in Mauritius where they underwent much privation. In 2000, the High Court declared the prohibition on their return unlawful, and compensation was paid.⁵¹ A further decision favourable to the Islanders was made in 2006.⁵² Orders in Council made under the Royal Prerogative to prevent further action by the islanders were declared unlawful by the Court of Appeal in 2006,⁵³ but the Government successfully appealed to the House of Lords in 2008.⁵⁴ The Chagossians are still unable to return to their previous home although they were granted British citizenship under the British Overseas Territories Act 2002.

3.6 ‘Foreigners within’?: British people who may also be nationals of other countries

Within the UK, substantial populations possess or are entitled to the citizenship of other states. Although the attribution of British nationality was until the 1980s based on the mediaeval idea of allegiance to the monarch, British law has generally been accommodating of dual nationality. Britain is a mixed society in which, for example, emigration to the former colonies and return from them, or families spread across countries, have long been relatively common. There are therefore substantial numbers of people who have, or are eligible for, the nationality of another country, some but not all of whom may be perceptible as ‘ethnic minorities’. The decision to retain another nationality will depend on several considerations. A person might choose to be British in order to secure a useful European passport. On the other hand, countries which forbid dual nationality might deprive non-citizens of desirable rights, such as the right to retain ownership of land in that country, and, as the lack of formal citizenship has historically⁵⁵ been unimportant in Britain, a person might choose not to naturalise for that reason.

By removing total *ius solis*, the British Nationality Act 1981 introduced the idea that even UK-born people might be legal foreigners. The ‘time immemorial’ before which questions need not be asked has gradually receded, as more and more

⁵¹ *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2000] EWHC (Admin) 413.

⁵² *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2006] EWHC (Admin) 1038.

⁵³ *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2006] EWCA Civ 498.

⁵⁴ *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2008] UKHL 61.

⁵⁵ For example, in the case of the Guantanamo detainee Bisher Al-Rawi, he was said not to have been naturalised because he was the one ‘chosen’ to maintain the family’s claim on land in Iraq.

individuals have to establish the status of their parents at the time of their birth. However, anyone born in the UK before 1983 would have been born British, so the cut-off date falls after the immigration of a substantial community from the Caribbean and the Indian subcontinent. Those most affected by the loss of *ius solis* have typically been the children of asylum seekers, failed asylum seekers and irregular migrants for whom return to their country of nationality is extremely problematic. Some of these children may eventually be entitled to register as British citizens if they avoid removal for the first ten years of their life.⁵⁶ Meanwhile, as discussed, changes to the law of deprivation of citizenship have affected dual nationals and naturalised citizens, drawing a greater distinction between those whose ancestral roots are outside or inside the UK. Attempts to deport more foreign nationals convicted of criminal offences have also resulted in the removal of substantial numbers of long-term foreign residents, including those who have been resident since childhood and know no other life.

3.7 Citizenship and human rights

The UK has had several cases on nationality heard in the European Court of Human Rights. The *East African Asians* case, already discussed, came close to succeeding but the government succeeded in settling the case before it was fully heard. *Abdulaziz, Cabrales and Balkandali*, in 1985, while it established that article 8 may be engaged by immigration controls and that discrimination on grounds of sex was not permitted, found that discrimination between nationals on the basis of their place of birth was justified. *Sorabjee* and *Jaramillo* confirmed in 1995 that rights incidental to citizenship, such as the right of a person to live in their own country, would not be protected by the Strasbourg court, at least so far as this concerned British children expelled with their foreign parents.⁵⁷ Although this was consistent with previous cases, the expectation had been that the partial move away from *ius soli* would make a difference, not least because part of the ratio of earlier decisions had been a view that the acquisition of British nationality by children whose foreign parents were passing through the UK at the time of their birth was somehow less valid than if the British nationality system had required the parents to be citizens or at least long-term residents.⁵⁸ The position of citizen children however has improved after the decision in *ZH (Tanzania) v SSHD* [2011] UKSC 4, which found that a child's best interests included the right to grow up in its country of nationality and that this must be a primary consideration when making immigration decisions about their parents. The case was made possible by the removal of the UK's immigration exemption to the Convention on the Rights of the Child and the creation of a statutory duty to make children's interests a primary consideration in immigration decisions (although Lady Hale's lead judgment suggested that this added little to existing article 8 obligations). While there is no absolute prohibition, it is now unlikely that a parent will be removed if the result is that a citizen child will also have to leave the UK.

Also at the domestic level, it was confirmed by the Court of Appeal in *Harrison* that citizenship and immigration are not matters that attract the protection of Article 6 ECHR (the right to a fair trial in the determination of civil rights).⁵⁹

⁵⁶ S.00 BNA 1981.

⁵⁷ See note 16 above.

⁵⁸ For closer discussion of these cases see Mole 1995.

⁵⁹ *Harrison vs Secretary of State for the Home Department* [2003] EWCA Civ 432

3.8 Gender inequality in British nationality law

Historically there was considerable discrimination against women, both as regards the status of women on marriage, and mothers' ability to pass British nationality to their children, but these have largely disappeared. Following the Naturalisation Act 1870, women lost their British nationality on marrying an alien but this was eventually remedied by the British Nationality Act 1948 (for a discussion, see Wray 2011: chapter 2).

Recent moves have led to gender equality in the ability to obtain British citizenship through both parents equally. Mothers gained the right to pass citizenship to their children as could fathers as from 1983, under the British Nationality Act 1981, and such children born before 1983 but after 1960 could subsequently register as British. Under the Borders, Citizenship and Immigration Act 2009, the children of British mothers will be able to register as British even if they were born outside the UK before 1961. Unmarried fathers were unable to pass British citizenship to their children, even if they were born in the UK, until in July 2006 sect. 9 of the Nationality, Immigration and Asylum Act 2002 at last came into force. Regulations were also made governing the meaning of 'father', including, as well as the husband of the mother, men recognised as legal fathers under the relevant legislation and those whose biological paternity was proved by, inter alia, DNA tests or court order.⁶⁰ This did, however, still apply only to children born after June 2006; however, the Home Office has discretion to register those born earlier, as well as those whose parents subsequently become settled in the UK (see above) and the position has recently remedied by legislation (s.65 Immigration Act 2014 which is not in force at the time of writing).

3.9 Institutional arrangements peculiar to the UK

The UK constitution does not have any entrenched status and British nationality and citizenship law can be changed through ordinary legislation. The principle of parliamentary supremacy, which was one outcome of the Civil War, means that Parliament may legislate as it chooses and may not bind its successors.⁶¹ Accordingly rights may change almost overnight, especially in a political response to media pressure.⁶² Nationality is governed by statute law but this often permits secondary legislation of which there is little scrutiny.⁶³ There is a widespread tendency, in nationality and immigration as elsewhere in government, to pass 'enabling legislation' which gives Ministers broad powers to change the law through secondary legislation. Entry and stay in the UK is governed by rules made under the Immigration Act 1971. The Immigration Rules are also subject to only minimal parliamentary scrutiny, but the Supreme Court has found that rules governing entry and stay must be made through the Immigration Rules and cannot be contained in 'policy guidance' or

⁶⁰ See note 70 and the British Nationality (Proof of Paternity) Regulations 2006 (SI 1496/2006).

⁶¹ This principle is now of doubtful applicability in EU law where only full repeal of the European Communities Act 1972 would enable subsequent legislation to be applied in contravention of EU law.

⁶² Media pressure led to the Commonwealth Immigrants Act 1968, for example, being passed in a few days; in a heady post-Twin Towers atmosphere, the Nationality, Immigration and Asylum Act 2002 came into force before it was published (R (L and another) vs *Secretary of State for the Home Department*; Lord Chancellor's Department, interested party T.L.R. 30 January 2003), and publicity led by a well-known actress led to Gurkha soldiers who had fought for the UK being given leave to remain in the UK in April 2009 (as Nepalese nationals they had previously been refused such leave).

⁶³ Secondary legislation may be subject to positive or negative resolution. In the former case (which is more unusual) they must be approved by Parliament. More often, they are subject to negative resolution which means they are laid before Parliament and become law unless a resolution is passed against them.

similar.⁶⁴ It is therefore not, in practice, difficult for governments to change aspects of nationality law or of those parts of the immigration rules which affect eligibility for naturalisation (such as qualification for settlement) in line with political priorities.

As already mentioned, the grant of naturalisation is always discretionary and may, in theory, be refused even if the applicant meets all the criteria although in practice, refusal is always on one of the statutory grounds, particularly good character, and an explanation is always given and, indeed, may be required on the grounds of fairness. As mentioned above, refusals may be challenged through judicial review and there is a tendency to cede doubtful cases to avoid them becoming judicial precedents binding on subsequent courts under the UK's doctrine of precedent. The Secretary of State does not have power to exercise discretion in favour of applicants except to the extent permitted by statute.

⁶⁴ *R (on the application of Munir and another) v Secretary of State for the Home Department* [2012] UKSC 32; *R (on the application of Alvi) v SSHD* [2012] UKSC 33. The immigration rules are subject to negative.

4. Current political debates and reforms

Although the current changes to citizenship and related laws mentioned above are the subject of formal political debates and legislation, these have often been overshadowed and obscured in the media by a broader debate over the meaning of ‘belonging’ and ‘citizenship’ in a modern diverse and, as the Scottish referendum demonstrated, fractured nation. At the same time, the departure of some young people to fight in Syria has recently triggered a much more specific debate about the circumstances in which the rights associated with citizenship, notably the right to enter one’s own country, may be abrogated. Unfortunately, this debate has been conducted with little regard to the responsibilities of states towards their own citizens and towards other nations where these supposedly dangerous individuals may be stranded.

4.1 Political parties and citizenship policy

The major parties in Britain are the Labour and Conservative Parties, with the Liberal Democrats as a smaller third party. After the 2010 election, in which neither of the two major parties achieved an overall majority, the Liberal Democrats formed a Coalition government with the Conservatives. However, both the home affairs and immigration ministerial posts are held by Conservatives and Conservative policy has been dominant on these issues. There are also smaller parties who, under the UK’s first-past-the-post voting system do not have significant parliamentary representation. These include the Green Party, who have a single MP, and, more recently, the United Kingdom Independence Party (UKIP) who have recently won two by-elections caused by the defection of Conservative MPs to UKIP and whose anti-European and anti-immigration policies are beginning to wield considerable influence on the policies of the mainstream parties, particularly but not only the Conservatives.

There has been considerable devolution of power from the central UK at Westminster to Scottish and Welsh authorities, especially the former; although at present citizenship policy is not devolved, In 2005, the Scottish National Party campaigned in the General Election for a return to *ius soli* in Scotland as part of a new Scottish constitution on independence (SNP 2005: 29) but this commitment did not appear in the guide to an independent Scotland published by the Scottish government for the independence referendum published in 2013 (see Ryan 2014 for a discussion). The referendum, which was held in September 2014, resulted in rejection of independence by a narrow margin. As a result, Scotland has been promised the devolution of more power but not, so far, over immigration and citizenship

Leaving aside the current Coalition government, power in Britain overall has been held by either Labour or Conservative governments for many decades and, as Dummett points out: ‘Policy on nationality has followed a more or less continuous line regardless of which party has been in power’ (Dummett 2005: 576). The end of Empire led to a shedding not only of political power in the colonies and overseas territories (complicated by a desire to retain economically useful links)⁶⁵ but also of responsibility for their people. The major structural changes in British citizenship law were implemented by Conservative governments: the creation of the quasi-nationality status of ‘patrial’ in the Immigration Act 1971 and the loss of *ius soli* and the creation of a hierarchy of citizenship statuses in which only the most privileged had the right to live in the UK in the British Nationality Act 1981. However, the Labour government laid the way through the Commonwealth

⁶⁵ Hong Kong remains an important seat of international trade; the Falkland Islands may prove to be important in laying claim to oil or minerals in the Antarctic region.

Immigrants Act 1962 which disguised changes to nationality law as an immigration measure.

In general, immigration issues have overshadowed questions about citizenship whether Labour or the Conservatives have been in power. The removal of the Labour government and the establishment of a Conservative-led coalition government did not lead immediately to any significant change of direction although immigration policy became even more restrictive. Broadly speaking, policy has focused on curbing immigration, the enforcement of the social and economic exclusion of those without immigration status, naturalisation, and removing the unentitled physically from the country.

In response to the growth in support for UKIP and to pressure from within the Conservative Party itself, there has been increasing emphasis on the need to restrict 'EU migration' without linking it in any coherent way to the privileged movement that UK citizens themselves enjoy throughout Europe. The Conservative Party is pledged to a referendum on EU membership if it wins the 2015 election and the Prime Minister David Cameron, who is not personally committed to leaving the EU, appears to have decreasing room for manoeuvre in his efforts to draw the heat from the issue. At the time of writing, the focus is increasingly on access to welfare by EU citizens rather than the principle of free movement itself where it is clear that there will be no concessions from the EU.

Nationality has recently come back into focus following, as already discussed, changes to the law on deprivation and increased confiscation of passports but is still far from being a mainstream issue. Citizenship is rarely discussed except in the context of immigration or, increasingly, security and there are only limited and, to the general public, abstruse differences amongst the political parties. To an extent, this apparent vacuum of policy on citizenship is filled by the policies on immigration, current citizenship debates being viewable as relating to naturalisation policies which do, of course, deal with current immigrants. The 1997-2010 Labour government is widely regarded, even by its own leaders, as having allowed too much immigration and the Coalition government adopted the Conservative's manifesto pledge to reduce 'net migration' to the tens of thousands, a target which it has little chance of meeting by the 2015 election.

The smaller parties, which have no realistic hope of governing alone, can perhaps afford to be more equivocal, generous or extreme. Liberal Democrat policy, prior to entering into Coalition, was more nuanced and moderate than Conservative and even Labour electoral policy (Symonds 2012). The Green Party has no clearly stated policy on immigration at all, let alone citizenship, though it has issued a statement of principles. The United Kingdom Independence Party, whose dominant characteristic is its hostility to the EU, has no stated policy on citizenship other than a minimum five year waiting period (which is already effectively in place) although it is generally opposed to immigration whether from inside or outside the EU. It campaigned in the 2010 General Election on a policy of 'freezing' immigration for five years with only very limited entry thereafter, and ensuring greater compliance from those migrants already in the UK. Notable in very recent years is the rise of the British National Party and its entry into mainstream political life. It has had some limited and usually temporary success over several years in local council and European elections in more economically deprived areas such as east London and the north of England. However, this did not translate into gains in the 2010 General Election and, since then, the party appears to have lost votes to UKIP and currently has little impact. The BNP is broadly the current manifestation of previous far-right nationalistic parties such as the National Front, which flourished in the 1970s but did not go so far into the mainstream of achieving formal political power. It campaigned in 2010 on a policy of a complete end to immigration and, unusually for a political party, has a citizenship policy, vowing to review all recent grants of citizenship and

residence to check that they are ‘appropriate’. They also support the ‘voluntary’ repatriation of immigrants aided by ‘generous financial incentives’.⁶⁶

4.2 *The trajectory of recent reform proposals*

In 2006, the Labour Government announced a review of the immigration system with the aim of consolidating legislation, including on citizenship. During the summer of 2007, it consulted on *Simplifying Immigration Law*, and the Green Paper (formal Parliamentary document proposing legislative reform) *The Path to Citizenship*, was published for consultation in the spring of 2008. The background was concern at the apparent failure of some communities of immigrant descent to integrate satisfactorily into mainstream society and the emergence of apparently ‘segregated communities’. Anxiety was heightened after the London bombings of 2005 perpetrated by British citizens, all educated and three out of four born in the UK. Nonetheless, critics widely challenged the presumptions upon which policy was based (see, for example, Finney and Simpson 2008).

The White Paper was foreshadowed when Prime Minister Gordon Brown commissioned the former Attorney General Peter Goldsmith to write a paper on ‘citizenship’. The result, *Citizenship: our Common Bond*, was published in February 2008, together with the academic work commissioned by him for the paper. The scope of both the paper itself and the work commissioned for it tended to elide the two main political questions surrounding ‘citizenship’, namely to whom citizenship should be attributed – who is or should be British – and the issue of the meaning of Britishness.⁶⁷ It may be for this reason that it does not give an impression of being a full or satisfactorily rigorous examination of any the issues, though it was widely reported in the media, with emphasis on his enthusiasm for citizenship ceremonies and civic participation.

The Government Green Paper *The Path to Citizenship* proposed radical changes to both settlement and naturalisation.⁶⁸ The subsequent Borders, Citizenship and Immigration Act 2009 created a framework for reform including the novel concept of ‘active citizenship’ which would require those seeking naturalisation to undertake some form of community service outside the home. Indefinite leave to remain was to be replaced with ‘permanent residence’, which would generally take longer to acquire than citizenship, and ‘probationary citizenship’, which was not a form of citizenship but another immigration status. It appeared that the children of those on probationary citizenship would not be born British citizens in the UK and the number of children born either stateless or without British nationality despite their parents’ lengthy residence would have increased.

The ethos behind *The Path to Citizenship* and the 2009 Act was an odd mixture in which naturalisation as an extension of immigration control competed with a desire to strengthen the bonds of citizenship. The result was a complex structure of doubtful legality and practicality. While the Act was passed, the sections relating to naturalisation were not implemented and were abandoned by the Coalition government who have, as earlier mentioned, focused their energies principally on blocking routes of entry and settlement. The underlying narrative and aims have

⁶⁶ <http://www.bnp.org.uk/policies/immigration>

⁶⁷ Although this does appear to take a very wide view of the remit put forward by Gordon Brown (at Appendix A of the paper), it is clear from his comments in a national newspaper (Goldsmith 2007) that Lord Goldsmith considered this appropriate and important: ‘We seem to take for granted what citizenship stands for. Our shared history may have held us together in the past but our society has changed a great deal. ...’

⁶⁸ A government document issued as the first stage of formal consultation on proposed reforms. A White Paper generally follows, with a more formal statement of government policy.

remained the same but the Conservatives, who lead on immigration and nationality within the Coalition, appear more ruthless and direct in how they are achieved. They do not need euphemisms such as probationary citizenship to explain exclusionary policies nor are they embarrassed to raise the bar for settlement, with consequences for naturalisation and to denaturalise British citizens either officially or *de facto*.

Nonetheless, the fact of having had a discussion on the meaning of citizenship beyond it being an accident of birth or the natural consequence of residence marks a new departure in British thinking on the subject, even if it is one that reflects wider concerns, shared with many European neighbours. These relate to the challenge of maintaining a cohesive national society which contains substantial minorities of a different ethnic descent and cultural background whose transnational bonds remain strong in a globalised and insecure world. The reflex seems to have been towards an assimilationist rather than a more open pluralistic perspective and this is a trend that is currently continuing, characterised by a new ruthlessness in which those citizens who are judged to have failed in adopting liberal values may find themselves excluded as easily as immigrants have always been.

5. Conclusion

Although the territorial borders of the UK appear stable, in citizenship terms they are only now being consolidated. After a long historical period of gathering in people from all over the world from whom the British monarch claimed allegiance, citizenship law in the UK has developed since the mid-twentieth century largely to exclude those based abroad and to limit those who may come to or remain in the UK itself. Citizenship law has always been a tool of immigration policy and it is being used to define a nationality to which people may belong when previously belonging was a matter of geography and practice. At the beginning of the twentieth century, Britain had no clear or real boundaries – *ius soli* operated throughout the Empire, so that many people were British subjects who would never expect to go to the UK at all, and the borders were in practice open to immigrants. This meant in practice that anyone could come to the UK and be British in a single generation. Yet by the end of the century, legislation was already well developed that would confine both territory and population to the UK.⁶⁹ The partial loss of *ius soli* in 1983 was a fundamental cultural change, the implications of which are only now working through. The provisions for being born British and becoming British might now look more like the situation in other European countries, but reaching that result has entailed a radical transformation.

The abandonment of parts of the old Empire has often been painful and controversial. It was accomplished largely through redefining many British nationals as non-citizens and potential immigrants. Legislation towards this began in the 1960s when the concept of ‘patriality’ was first developed, before being consolidated in the Immigration Act 1971: British subjects who were not born in the UK, and did not have a parent or grandparent who was born there, were made subject to immigration control should they try to enter the UK. A variety of forms of British nationality was set up under the British Nationality Act 1981, of which only one, British citizenship, carries the automatic right of abode in the UK. The other British national categories are gradually being reduced, either because those in the categories cannot pass the nationality on, so they die out, or because some of the categories are transferred to British citizenship.

The effective closing of the borders to non-European immigrants has likewise largely been accomplished legally if not actually. There is a significant section of the UK-resident population that has a dubious immigration status or no such status at all. As the culture changes from one of belonging by residence and participation to one of belonging by entitlement and descent, those present in the country, as well as those wishing to enter, have to be checked for legal compliance and this is becoming a more extensive feature of British life. Given the ambiguity that characterises British nationality law, some people who lack status do not realise it; sometimes queries are raised only on an application to renew a British passport, when it is said that it should not have been issued. Unlawful residents (first defined in 2002) are being separated out, and much political effort, public expense and media attention is devoted to their physical expulsion, although this often proves a problematic process for legal or practical reasons. Debate around the expulsion of irregular or even regular migrants who have been convicted of offences has become a primary conduit for the expression of hostility to the Human Rights Act. After many years of adding complexity, the previous Labour government’s last task before leaving office was a project of legal reform that aimed to ‘simplify’ both citizenship and immigration law, making them clearer and easier to operate while making naturalisation more difficult. Little was achieved however despite some popular resonance.

⁶⁹ It is true that some overseas populations are now British citizens (Gibraltarians and Falkland Islanders), but this assists in the project of reducing the scope of non-citizen nationals and, more importantly, retains and strengthens valuable land claims for the UK.

The trend towards increasing complexity has continued under the Coalition government with the accretion of new layers of immigration rules piled on top of the existing structure, resulting in a byzantine edifice in which the true legal position is difficult even for experts to discover. This may not be entirely undesired. If the government wishes to reduce net migration to the tens of thousands, one way is to make the rules of entry inaccessible. While the process of naturalisation has largely escaped this recent new complexity, the requirement of establishing lawful stay through the qualifying period of residence, combined with exorbitant fees at every stage of the process, can only increase barriers to naturalisation. Meanwhile, the position of those who do become citizens is becoming more precarious particularly for those who are naturalised citizens or who have maintained links through citizenship to another country.

The problem of making functional legislation is proving more difficult, the problem being exacerbated by the lack of any established and informed academic or professional debate about immigration and citizenship law. Despite recent attempts to raise the profile of the subject and make it more central to legal education, it is still often considered to be mainly a political or sociological issue, rather than a legal one where legal expertise might be central to explaining the current position or assessing potential reforms. The current story of confining the British to within the boundaries of the UK will also have to encompass treating Ireland as a properly foreign country. Though currently this may appear already to be largely the case,⁷⁰ in practice the persistence of the Common Travel Area, by which the borders between the countries are open, had blurred the point, and many people also hold both Irish and British citizenships. There have been proposals, not adopted, to abolish the Common Travel Area,⁷¹ overturning centuries of historical connection. Something on which no change appears to be proposed is the power of Parliament to alter or withdraw what in most countries would be basic constitutional rights: this power is most graphically expressed in the fate of the Chagos Islanders, who many years after being expelled from their homes by subterfuge were told by the House of Lords that it was properly within Parliament's power to remove their right of abode. Indeed, the trend under the current government is away from strengthened protection for individuals under the norms of international or European law.

The broad political trajectory of UK citizenship law is relatively easy to see; historically-based anomalies are being removed and the system is being brought into line with a more classic mixed system of partial *ius solis* and *ius sanguinis*. Ambiguity as to status is being removed, with more migrants being either refused entry or treated as temporary visitors or guest workers. It remains to be seen however how easily the political impetus can be translated into legal provisions that work as intended, and what the side-effects may be. It may not be easy to limit interim and safety-net categories, or to limit human rights challenges to the deprivation of residence and other rights, especially where these are enjoyed by longer-term residents whose circumstances have changed unexpectedly. It may also be difficult to ensure that checks on the status of apparent foreigners do not affect settled and settling communities, to the detriment of British society as a whole.

It was always likely that the dismantling of an empire would lead to profound changes in citizenship status and immigration laws. Many have argued however that this was achieved through the use of overt and covert racial categorisations and that immigration policy drove nationality law rather than the converse, which would seem both more logical and more principled. Stark race discrimination is now unacceptable, legally, socially and politically, and some of the worst excesses in nationality law have been ameliorated. However, new distinctions have emerged which are still

⁷⁰ There have been separate citizenships since the declaration of Eire as an independent republic and the Ireland Act 1949 in the UK.

⁷¹ See Goldsmith 2008 and the original draft of the Borders, Citizenship and Immigration Bill.

largely based on considerations of immigration control which, in its turn, draws on global inequalities that often coincide with the old racial categories. The process of achieving a secure status, which once involved little more than entry, has become a prolonged and complex process which does not end even with the acquisition of citizenship as the growth in use of deprivation orders shows.

This is perhaps a reaction less to decolonisation than to globalisation. Many of the new migrants are not from colonial territories or, at least, not from those who were most involved in the immigration of the 1950s and 1960s. There is also the fear that an easy route to citizenship has been exploited by those who might wish to harm the UK through terrorism. This must not be dismissed but such instances, and the publicity they attract, can provide useful cover for policies that principally affect the least secure and powerful of the UK's residents. The pool of insecure irregular or temporary migrants, and their children is a growing if under-reported feature of modern life in Britain that the turn towards restriction whether at entry, settlement or citizenship does nothing to address.

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