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## *COUNTRY REPORT: UNITED KINGDOM*

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***Report on United Kingdom***

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# United Kingdom

Caroline Sawyer

## 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. 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, though, in common with most other jurisdictions, the UK has not ratified that Convention. Current routes to naturalisation vary, including permitted residence for work purposes, or even a substantial period of unlawful residence, provided there have been no formal attempts at removal. There are reasonably wide provisions for family reunion, including for resident non-citizens. In other cases, Home Office officials will often use their wide discretionary provisions to allow entry and, eventually, settlement<sup>1</sup> and naturalisation. However, the implications of the loss of *ius soli* are beginning to be appreciated, in that they entail a fundamental cultural shift in the idea of being British even within the UK, and the system of naturalisation is entering a period of rapid and profound change. Where the system was historically characterised by a general indistinctness that was as likely to be benign as difficult in its effects, as the system is deliberately being clarified and toughened, that indistinctness and lack of clear rights even for longterm residents or nationals may become oppressive to various individuals. 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 could prove not only complex but also very controversial.

There are perhaps three striking structural elements to British citizenship law: the ambiguity of the terminology as to territory and immigration and citizenship statuses; the ambiguity of the rights involved in the statuses even if it ascertainable which applies, and especially the shading of citizenship rights into immigration statuses; and the lack of current firmness or consensus in the basis on which people should be considered or allowed to be citizens.

### 1.1 Ambiguity of terminology of rights

There is ambiguity in both the territory covered by the terms 'UK' and 'British' and also the meaning of the terms 'nationality' and 'citizenship' themselves, along with other forms of membership status which are not necessarily less useful in practice. The scope of British nationality has shrunk from including everyone born in a vast empire at the end of the nineteenth century to excluding even some people born in the territory of the UK itself. The term 'British nationality' is still legally meaningful, but only the sub-category of 'British citizen' necessarily entails the right to enter the UK. Who should have membership of the British citizen category is the subject of political debate, but has excited only narrow legal interest. The issue is becoming practically important as more and more aspects of day-to-day life are governed by having to prove entitlement by status rather than, as before, by residence. The first domestic

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<sup>1</sup> Ordinary residence in the country with no restrictions on one's stay (sect. 33 Immigration Act 1971).

group to be defined and disentitled was that of asylum seekers, to whom there had previously been a laissez-faire attitude which resulted in many of them becoming part of the British social fabric and even liable to naturalise formally, possibly without any decision on their asylum claim. The earliest primary legislation relating to asylum was in 1993, and was followed by a torrent of redefinition of the British population that is still continuing.<sup>2</sup> Before this, residence was the key to most social provisions such as health care or education, either formally or as a matter of practice, the highest formal status being in any event generally not citizenship as such but ‘settlement’. Citizens, but also others, are settled. The UK had no system of personal identity documents, so it was in any case impracticable to ascertain what a person’s citizenship or immigration status was for everyday purposes such as working rights.<sup>3</sup> The current introduction of identity cards, which is still in an early stage, is highly controversial for various reasons, including proposals for its attachment to a wide-ranging computer database and the possibility of its being compulsory even for British citizens to carry the cards, on pain of a fine for infraction.<sup>4</sup> Moreover, although attempts to clarify and regulate the status of all individuals in the population have been going on for some years, it may even now be entirely unclear what a person’s status is, and it may be unclear what the implications are even once one knows.<sup>5</sup> Terminology may change without the meaning changing, or it may remain the same whilst coming to mean something different, or it may simply be misleading. For example, the name of the status may be clear but the legal implications not so at all, as with those on ‘temporary admission’.<sup>6</sup> The historical origins of the ambiguities are generally easier to trace than the contemporary meaning of the terms: for example, although attempts not only to cede political power in the colonies but also to shed responsibility for their populations have been going on for many decades, it is still possible that a non-British person may have greater rights as a settled person to live in the UK than an overseas-based British national, who may have no right to enter the UK at all and may appear therefore to be British but be effectively stateless.<sup>7</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> It is unclear despite political assurances that having a card will remain voluntary. The Home Office asserts that the first identity cards for foreign nationals were introduced in November 2008 (<http://www.homeoffice.gov.uk/passports-and-immigration/id-cards/>). However they were preceded by Asylum Registration Cards (API July 2006), which were of similar effect for asylum seekers. ID cards will be available to British people in Greater Manchester in late 2009, and more widely in north-western England in 2010. All those over 16 applying for a passport after 2011 will be entered on the identity database, and the scheme is intended to extend to all those applying for a British passport by 2012.

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

<sup>6</sup> *Szoma v DWP* [2005] UKHL 64; Sawyer and Turpin 2005.

<sup>7</sup> Mynott 2005

## 1.2 Ambiguity of meaning of rights

Secondly, the system is relatively unclear and arbitrary both as to the making of the legal rules and as to their day-to-day operation. Whilst primary legislation in the area of citizenship and immigration is made in this as any other area, by debate in Parliament, it is often ‘enabling legislation’. This means that important details are left to be made less formally by Regulation (secondary legislation made by Ministers, with or without the requirement that Parliament approve it overtly). In the areas of citizenship and immigration, there is a further provision for important rules as to the implementation of legislation to be made day to day by the relevant Minister, as in no other area, with little or no involvement from Parliament.<sup>8</sup> A great deal of discretion is allowed to individual officers in the interpretation of the rules, and there is relatively little supervision of how the rules are implemented day to day. Moreover, the Home Office has a widespread and well-known practice of giving in informally just before a legal case is decided that risks a decision the Home Office does not favour. Moreover, even where primary legislation is concerned, it is important to realise that an Act of Parliament that has been passed by Parliament and enacted by Royal Assent (the approval of the monarch, which must happen in relation to each piece of legislation) 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.<sup>9</sup> It is quite usual for an Act of Parliament to be passed and only parts of it to come into force immediately; legislation is brought into force by ‘commencement orders’, which are secondary legislation or statutory instruments made under enabling powers in the Act itself. There are specialist websites and telephone help numbers run by Halsbury’s Statutes under the name ‘Is it in force?’ for those who need to know. It is not easy or sometimes possible to ascertain from general public documents or websites what is in force and what is not. Particularly in the context of a common law system that works on precedent, it is a further reason why it is so difficult to obtain a grasp on what the law is in the UK either by reading formal legal texts or indeed at all, since the formally-recorded law may differ entirely from the day-to-day practice, especially in controversial areas (such as the release of immigration detainees on bail). In the absence of much legal aid provision, it takes a particularly determined and fortunate litigant even to begin proceedings, and cases that pass unrecorded will not change the apparent law on which others are entitled formally to base their own claims.

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<sup>8</sup> The new rules are effective when made by executive fiat. They are effective immediately and are now published promptly on the relevant government website <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/>. From time to time all the changes are gathered and placed before Parliament, which may accept or reject them in their entirety. If they are rejected (which has happened once), the old rules persist for 40 days while something more acceptable is found.

<sup>9</sup> For example, much of the divorce reform under the Family Law Act 1996 (which occupied the media waves night after night during its passage through Parliament) has never been brought into force, and the general transfer for trial provisions in the Criminal Justice and Public Order Act 1994 were repealed without having been enacted.

### 1.3 Lack of clear consensus on the appropriate basis for British citizenship

Thirdly, citizenship law underwent a profound structural change in 1983, the effects of which are still redefining the population. The loss of *ius soli* entailed a fundamental change to the definition of being British which is still largely unabsorbed within the culture. There is little in the way of a clear and unified national ethnic or cultural myth to justify the new *ius sanguinis* system.<sup>10</sup> The political wind is currently blowing towards a general rationalisation of both immigration and citizenship rules to make them simpler, in their overall construction as well as in their detail and operation - the word 'tough' appears frequently in the political rhetoric. The favoured method is to introduce a points-based system explicitly on the Australian model, which has already occurred in relation to immigration and is now proposed in relation to citizenship.<sup>11</sup> The Minister Phil Woolas has acknowledged that the latter would be a particular change of cultural tradition, saying that 'these proposals break the link between coming to work here temporarily and being given the right to citizenship'.<sup>12</sup> Nevertheless the principles for attributing citizenship do not have a clear or uncontested rationale especially when applied to the resident population rather than to future immigrants. The trajectory of current change is towards a clear distinction between citizens and others, with the foreign others being either temporary residents with limited leave to remain in the country or else novice citizens. The intention is broadly that citizens will have full civic entitlements whereas temporary residents will have very few. This appears to be a politically acceptable or desirable outcome.

The political controversy does however run deeper, even if the related issue of identity cards, which will be needed to distinguish the entitled from the unentitled on a day-to-day basis, is easier to see and to engage with and is more controversial. British law generally, and especially perhaps British nationality law, rarely has a clear and logical structure. Where it has grown organically from a variety of intertwined roots, it is often as much flexible and functional as it is ambiguous and apparently impractical. Current problems however stem from the superimposition of a framework of new ideals, based on theories of clarity and calculation, on this living compost of often dubious statuses. The changes have been fundamental and fast, and the new rules do not always fit the existing population, which equally is not always willing to fall in with the reconstruction. There is no clear consensus on what the rules of Britishness ought to be, and no political will to grasp the issues of transitional provisions for those caught between the old rules and the new. Some people who thought they were British find that they are not, or at least that it is very difficult to prove. At the broader social and political level, the legislative changes reflect and drive a restructuring of the philosophy of Britishness and belonging, and of foreignness and exclusion, that is proving potentially very uncomfortable.

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, often again requiring

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<sup>10</sup> 'The most notable feature of the legislative passage of the Bill was the absence of discussion of what a nation is, what the British nation is (as opposed to the English, Welsh and Scottish nations and the semi-nation of Northern Ireland) and how citizenship might differ from nationality.' (Blake 1982).

<sup>11</sup> For example, it is from time to time proposed to replace the system of applying for naturalisation with a 'points-based' citizenship system on the Australian model. (BBC 2007).

<sup>12</sup> UKBA (2009). This is not, however, the first time a points-based citizenship system has been proposed: see BBC 2007.

historical explanation, before considering the most recent developments and current proposals for change in detail. The concluding section provides an overview of the recent and current trajectory of British nationality and citizenship law.

## **2 Historical background and changes**

Historically, Britain has been a country of immigration, and thus of individual rather than national membership. Its citizenry has not claimed membership on the basis of long-standing residence over generations, and certainly not, historically, for reason of descent by bloodline. There has also been substantial emigration, 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. There are no restrictions on citizenship rights based on residence abroad. Formal Britishness, whilst ambiguous, has historically been generally inclusive. It has also not been necessary to formally be part of the fabric of society for practical day-to-day purposes, since that depended mostly on actual, rather than even explicitly lawful, residence. Attempts to change the culture of belonging, and to contradict the culture of inclusion have only recently, and arguably marginally, begun to take root and to be reflected in current legislative changes.<sup>13</sup> Most recent legislative changes so far, since the major changes to nationality and citizenship law introduced by the British Nationality Act 1981, have had to do with immigration and asylum (which in the UK are historically intertwined and treated together), but the focus is now moving to the law of naturalisation.

### **2.1 The link between immigration and citizenship in Britain**

Because of the historical lack of a concept of the nation as defined by blood and descent, in Britain immigration has always had a close logical link to nationality. 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. The sort of physical immigration that could lead to the establishment of a British family and fed into the constitution of the population in general was first restricted only in 1905, as a response to unwanted immigration mostly of poor Jews from Eastern Europe and Russia.<sup>14</sup>

Although immigration was not restricted until the early twentieth century, this is not to say that aliens were treated the same as British people. Resident aliens might be unable to own land, for example, and they did not have the protection of the monarch whilst abroad, because they then owed no allegiance. Nevertheless the difference between those who belonged and those who did not was a potential source of ambiguity. The concept of denizenship, which operated from the late thirteenth to

<sup>13</sup> The change in approach is symbolized by the changing approach to the pressure group Migrationwatch. This was founded in 2001 to oppose ‘large-scale’ immigration. In 2002 it began to attract widespread hostile commentary but within a few years was invited to comment on proposals in mainstream media reports including those presented by the BBC.

<sup>14</sup> 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)).

the early nineteenth centuries, is reflected even today in the remnants of the idea of settlement, rather than citizenship, as the fount of belonging. Whilst there is a move to change the philosophy entirely, currently the status of Indefinite Leave to Remain not only suits many people who have particular reasons for not wishing to naturalise British but also fulfils all their needs for 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 led not so much to the favouring of its members in particular but more to practical anti-Catholicism which reflected the political background and results of the break with the Roman church.<sup>15</sup> In the absence of any developed sense of formal tribalism or *ius sanguinis* in relation to nationality or subjecthood, however, while *ius soli* persisted the British-born children of immigrants could be as British as anyone. But just as ambiguous citizenship may be unexpectedly inclusive, so it may turn out to be fragile. Borders open to immigration and emigration may be easily overlooked as boundaries to exclusion as well as inclusion. It may appear that the abandonment of overseas-based British people is being followed by the gradual redefinition of belonging to exclude some people based in the UK who consider themselves to be British, but even that is not new. The expulsion of Jews who were born British subjects in 1292 is still reflected over 700 years later in the practice of expelling British citizen children who have a foreign parent (and are probably from a visible ethnic minority), which has itself continued unchanged notwithstanding the replacement of *ius soli* with *ius sanguinis* and the arguably greater ‘Britishness’ of those children.<sup>16</sup>

## 2.3 Establishment of *ius soli*

The earliest confirmation of *ius soli* is Calvin’s Case,<sup>17</sup> decided in 1608, just following King James VI of Scotland’s becoming King James I of England as well. The issue was whether someone born in Scotland before or after the union of the two countries was a subject of the monarch, and it was held that after the union they were. *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 moreover always been a country not only of immigration but also of emigration as well as transit. Stopping off permanently whilst in theory being in transit, especially to America, historically established many families in the UK,

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<sup>15</sup> 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.

<sup>16</sup> The right not to be exiled is in Clause 29 of Magna Carta (1225), but expulsions still happen. The Chagos Islanders were British nationals expelled from the British Indian Ocean Territory (notes 38-41 below) and discussion continues of the expulsion of British citizen children from the UK; *Jaramillo vs United Kingdom* (ECHR Appl. 24865/94), *Sorabjee vs UK* (Appl 23938/93); Mole 1995; Sawyer 2006.

<sup>17</sup> 7 Coke Report 1a, 77 ER 377.

especially those leaving central and Eastern Europe in the nineteenth century; 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 of the same year, as a response to the outbreak of the First World War.<sup>18</sup> The immigration restrictions of war time were repeated and consolidated later, again affecting the future constitution of the citizenry, as well as laying the foundations for documentation of status and consolidating the need for travel documents even in peacetime. After the Second World War, with the end of Empire, nationality legislation was codified under the British Nationality Act 1948. Whilst British people now often claim that they are subjects (of the monarch) rather than citizens, the term ‘citizen’ was used in this Act, though the term ‘British citizen’ did not come until 1983.<sup>19</sup> Under the 1948 Act, British people were designated ‘Citizens of the United Kingdom and Colonies’, also known as ‘CUKCs’. Without making any practical distinction between the rights of UK-based British people and the non-UK-based, all of whom still retained the now relatively meaningless status of ‘subject’, it nevertheless laid the foundations for their divergence, without at that point any questioning of the basic *ius soli* rule.

## 2.4 Nationality, race and citizenship

After the Second World War, race and immigration control were more explicitly intertwined in the UK. Extra labour was needed for post-war rebuilding; there is controversy over whether immigration from the British Caribbean was encouraged, as British people from the old Empire coming to work in the mother country, or discouraged, for reasons of race (Dummett 2005:556, citing Dummett & Nicol 1990: 177 ff). Immigrant labour was however needed, a situation which remains the case; it is often concentrated in specific areas (a particular contemporary example is the National Health Service) which would be unlikely to function without it. The image of the immigrant ship the ‘Empire Windrush’ arriving from the Caribbean at Tilbury in June 1948, is an icon of the multiracial culture of later twentieth-century Britain. Whilst there is also controversy about how good or bad the treatment of Caribbean immigrants was, a substantial minority population was established which was then available as the visible focus for anti-immigration movements which directly affected the citizenship laws of the UK.

The end of Empire brought further substantial immigration of British nationals, especially people from East Africa of Asian descent. Along with decolonisation in the former colonies of Kenya, Uganda and Tanganyika (Tanzania) came policies of Africanisation in reaction to the previous white British rule. Whilst

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<sup>18</sup> Sect.1 (1) provided that ‘... any person born within His Majesty’s dominions and allegiance ...’ was a ‘natural-born British subject’.

<sup>19</sup> Before 1949, ‘British subject’ was the main status; after 1948, its prevalence and content dwindled. After the BNA 1981 it tended to denote the lowest form of British nationality, describing a person with no citizenship or right of abode anywhere.

residents were invited to take citizenship of the newly independent states, which entailed giving up their British nationality, much of the substantial population of mostly middle-class Asian families were wary of the political climate turning against them. They often did not apply for citizenship of the new countries but retained their British nationality in order, should they find things turning nasty, to be able to leave for the UK. As people from East Africa did begin to go to the UK, however, they met political resistance in the UK which translated directly into legislation. In 1962 the first Commonwealth Immigrants Act subjected Commonwealth citizens to immigration control, and in the 1968 the second introduced the concept of ‘patriality’. Only British people who were born in the UK, or had a parent or grandparent who was, could enter the UK without leave.<sup>20</sup> ‘Patriality’ says Dummett ‘had become a quasi-nationality’ (2005: 568). The provision was consolidated and repeated, albeit without the name, in the Immigration Act 1971, which currently remains in force.

## 2.5 The special place of Ireland

The restrictions of the 1960s did not affect those born in the UK or Irish citizens, or those Commonwealth citizens with British passports who had a parent or grandparent who was born, naturalised or adopted in the UK. The Ireland Act 1949 stated that Ireland was not a foreign country and that Irish citizens were not aliens. They could vote whilst resident in the UK, and the Common Travel Area meant that the borders between the Republic of Ireland and the UK were open.<sup>21</sup> Moreover, many Irish citizens had also formally retained the right of abode after 1949. After the Immigration Act 1971, Commonwealth citizens who had been resident in the UK for five years also had the right of abode, as did women Commonwealth citizens who had married, before 1973, a man with the right of abode. The effect of the British Nationality Act 1981 was that the right of abode was held only by British citizens under that Act and by Commonwealth citizens who had the right of abode when that Act came into force in 1983.

## 2.6 Nationality and racism: the East African Asians

The impact of this apparent ‘immigration’ rule change on the construction and operation of the law of British nationality, and its relation to the current issues about who is British citizen, cannot be overstated. British people had historically been defined essentially by geography rather than descent, and that geography had been

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<sup>20</sup> The circumstances in which these rules were introduced are a good example of how even basic constitutional rights are made fragile by lack of any entrenchment of them as different, and more difficult to amend, than ordinary laws. 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.

<sup>21</sup> 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.

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.<sup>22</sup> 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 its going to the European Court proper.<sup>23</sup>

The UK Government has never accepted the implication that British nationality law is racist, and continues to state its disagreement with any such inference (Department of Constitutional Affairs 2004: 208). The assertion is that it is pursuing a normal policy of defining its boundaries and citizenry and controlling immigration. Indeed, taken out of context, the British rules are not very different from those in force elsewhere in Europe. The special issue for the UK is firstly that this entails abandoning overseas communities who used to be considered as British and who feel they need to retain those rights, and secondly that the issue has been reinforced by the subsequent move to extend the principles of exclusion to apply even within the geographical borders of the UK, by instituting *ius sanguinis* in place of the former *ius soli* policy, so excluding even some people born in the UK.

### 3 Current British nationality and citizenship regime

British nationality law reflects not so much the stability of the territorial boundaries of an island as the vagaries of a monarchical system, and even today the structure of the system cannot be understood without reference to its history. The method of defining nationals was historically characterised by a strong *ius soli* principle, rooted in the common law system and referring to the whole of the territory of the reigning monarch.

The common law relies for authority on precedent and principle, and the British legal system remains fraught with ambiguity. Centuries of legal palimpsest have never been cleansed by a full-scale revolution following which conscious and deliberate structural principles are implemented. It is often pointed out that having no formal written constitutional document and no special method of amending those laws that are fundamentals of the unwritten constitution means that British constitutional law is very flexible. However, it also means that fundamental changes can be made to constitutional laws such as those defining the citizenry without any particular technical hindrance. The lack of clear rights incidental to citizenship only reinforces

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<sup>22</sup> 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).

<sup>23</sup> British law used to exclude the Home Secretary’s immigration and nationality functions from the anti-race-discrimination requirements under the Race Relations Act 1976. However the scope of this was severely limited by the Race Relations Act (Amendment) Act 2000.

its ambiguity. The UK has for example persistently refused to sign the Fourth Protocol to the European Convention on Human Rights, prohibiting the expulsion its own citizens, because of its at least ambiguous record, over a very long period, of such expulsions.<sup>24</sup>

The ambiguity around what territory is relevant – which interacts with the ambiguity of what rights it might be relevant to – is also unhelpful. British people used to be those born within the monarch’s realm or empire, which by the end of the nineteenth century covered about twenty per cent of the world. In theory everyone born within the Empire proper then had a similar nationality status, with a lesser status applying to those born within mere Protectorates.<sup>25</sup> British people from beyond UK territory could come to the UK and live there (even in theory – though many others managed it in practice) with the same civic rights as UK-born British people. On the whole, they did not come in great numbers.

Immigration to the UK in noticeable numbers before the later twentieth century came from outside the Empire, usually from religious persecution elsewhere in Europe;<sup>26</sup> thus beginning a conflation of immigration and refugee issues which is also peculiar to Britain and only now being addressed.<sup>27</sup> In the mid-twentieth century, however, the British empire began ceding independence to its colonies and protectorates just as the practical implications of having citizenry and nationals moved away from a country’s having the incidents of power and influence towards its bearing responsibilities towards the people such as providing education or health care (Beveridge 1942).<sup>28</sup>

Shedding responsibility for people proved more contentious than relinquishing political control of their countries. The issue of nationality became entangled with that of physical immigration, following substantial immigration of invited workers from the Caribbean in the 1950s. It also became entangled with public policy issues of racism, given that the immigrants objected to were not white but black or Asian. In the 1960s and 1970s, people who feared for their future after decolonisation used their British nationality and British passports to come to the UK without specific invitation, and they were often not white either. The result was some fundamental and controversial legislative change that remains in force in law and unresolved in principle.

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<sup>24</sup> See note 16 above.

<sup>25</sup> The earliest of these was the United States of the Ionian Islands, established in 1815 under the Treaty of Paris.

<sup>26</sup> Notable waves of immigration were those of the Protestant Huguenots from France in the seventeenth century; Sephardi Jews from Iberia and the Spanish colonies after the effective readmission to Britain during Cromwell’s Protectorate (which also extended toleration to non-Church of England Protestants) in the late 1650s; and Ashkenazi Jews from Eastern Europe and Russia in the later nineteenth century.

<sup>27</sup> There was no primary legislation dealing with asylum in Britain until 1993; even now the domestic position as to the legal provisions relating to asylum itself is governed more fundamentally by court precedent than by anything statutory (see *Szoma vs DWP* [2005] UKHL 64). The making of an asylum claim traditionally meant a non-national with no permission to enter the country would not be physically expelled, but also did not necessarily entail any decision on whether the claim was accepted. Since pressing a claim would entail some risk of refusal and expulsion, and the issue of formal status was generally not relevant to day-to-day life, many people would simply remain in a state of ambiguity.

<sup>28</sup> See also legislation following, especially the National Insurance Act 1946, the National Health Service Act 1946, the National Assistance Act 1948 and the National Insurance Act 1949.

### 3.1 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. So far as territory outside the UK is concerned, there are many overseas-based British citizens as well as British people who are not British citizens, and who are therefore not necessarily entitled to enter the UK. The recent provisions that overseas-based British nationals may often obtain British citizenship as of right, which again blurs the territorial issue, shows the story not yet to be over. Nevertheless, broadly there is a move, over decades, to draw back the frontiers of Britishness to the islands of the UK. The legacy of history, and especially that of Empire, and of a ‘mother’ country that is herself internally divided, is one of ambiguity.

For most internal legal purposes, the law is different amongst the three major constituent jurisdictions of England and Wales (a united jurisdiction), Scotland and Northern Ireland. England, Wales and Scotland constitute Great Britain; the Kingdom that is united is that of Scotland with England and Wales, which occurred in 1701.<sup>29</sup> 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 nevertheless 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.

Some countries are clearly British but not UK countries, coming within the meaning of the British Overseas Territories Act 2002. People who are British Overseas Territories Citizens were formerly known as British Dependent Territories Citizens and their British nationality stems from the connection with a persisting British dependency. Overseas territories within the meaning of the BOTA 2002 include the Falkland Islands, Gibraltar and Bermuda.<sup>30</sup> More obviously foreign territories are those which were once part of the Empire but are now independent.<sup>31</sup>

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<sup>29</sup> 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.

<sup>30</sup> Also Anguilla, British Antarctic Territory, British Indian Ocean Territory (the Chagos Islands), British Virgin Islands, Cayman Islands, Montserrat, Pitcairn, South Georgia, Cyprus sovereign bases, Turks and Caicos.

<sup>31</sup> 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.

Some such territories were self-governing dominions.<sup>32</sup> Colonies were governed by the Crown via its appointed governor.<sup>33</sup> 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. There are however substantial numbers of people with dual British and another nationality where the other country permits this, and many permanent British residents who have however the citizenship of the other country. As to the latter, historically it made little difference to everyday rights whether one was ‘settled’ as a citizen or merely as a permanent resident, and indeed the difference first became relevant and noticeable principally in relation to the inmates of the United States detention centre at Guantanamo Bay, when there was a policy of releasing British citizens but not British residents.<sup>34</sup>

### 3.2 The Commonwealth today

A shadow of the old Empire is the Commonwealth of Nations, which has considerable emotional strength. Almost all of its member states are previous countries of the Empire, but not all former British territories are members.<sup>35</sup> A person from a Commonwealth country does not for that reason have any particular advantage in relation to access British citizenship rights, though many people do have rights rooted in the historical connection with the UK. In particular, many citizens of Commonwealth countries still have the right of abode in the UK, giving them the right to enter and remain in the UK and carrying with it all rights to a practical day-to-day life. The rules which prevented many Commonwealth-based British people from entering the UK during the 1960s, relating not so much to the allocation of British nationality as to its usefulness in entering the UK, were consolidated in the Immigration Act 1971. This is still in force and still regulates the rights of many British nationals to enter the UK, though there are current general proposals to replace it and all other immigration legislation with one consolidated piece of legislation. It may be expected that most residual rights which originate in the Commonwealth will disappear.

### 3.3 British nationality and citizenship law and the rest of the world

<sup>32</sup> Such as Canada, Australia, New Zealand, Newfoundland, South Africa, and the Irish Free State, as well as India, Pakistan and Ceylon (now Sri Lanka).

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.

Britain's citizenship laws are not apparently much directly affected by formal relations or agreements with foreign states.<sup>36</sup> 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*.<sup>37</sup> However policy towards certain categories of British nationals is clearly affected by international politics and, some claim, by different attitudes to overseas British nationals depending on whether they are white or not. Gibraltarians were British citizens from the inception of the 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 exiled 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. Some considerable subterfuge was deliberately used to represent the islands as uninhabited; an Ordinance was made refusing the islanders the right to return. In 2000, the High Court declared the Ordinance unlawful, and compensation was paid,<sup>38</sup> and a further decision favourable to the Islanders was made in 2006.<sup>39</sup> 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,<sup>40</sup> but the Government successfully appealed to the House of Lords in 2008.<sup>41</sup> It is unclear when the arrangement with the US will end, but the Chagossians themselves, after undergoing much privation in Mauritius (which has a claim to cession of the islands when the US leaves), were granted British citizenship under the British Overseas Territories Act 2002. The assertion of the House of Lords that the right of abode was in the gift of Parliament, who could give it and also take it away, was in line with Parliament's approach to such fundamental constitutional rights. The Chagos Islanders have now taken their case to Strasbourg.

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<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2000] EWHC (Admin) 413.

<sup>39</sup> *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2006] EWHC (Admin) 1038.

<sup>40</sup> *R vs Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2006] EWCA Civ 498.

<sup>41</sup> *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2008] UKHL 61.

There are now substantial populations of British citizens living in parts of the European Union, especially France and Spain and generally where there is better weather. This causes some controversy over their entitlements to social benefits from the UK and their integration in their new countries, particularly as British people living in Spain are often retired and non-Spanish speaking, and lack the social networks for support that are expected there. However, Britain has no policy of withdrawing citizenship from those who remain resident outside the territory for extended periods, and there are no current proposals to implement such a policy.

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

Within the UK, substantial populations are liable to possess the citizenship of other states. Such citizenship may be potential rather than actual, and in a culture where identity is not only fluid but also considered a private matter, it is not possible to assess accurately how widespread that may be, though many people also formally possess dual or multiple nationalities. Although the attribution of British nationality was until the 1980s based on the mediaeval idea of allegiance to the monarch, leading to the *ius soli* regime, paradoxically British law has only rarely leant against dual nationality (Dummett 2005 :556). Moreover 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 of whom may be perceptible as ‘ethnic minorities’. Any available statistics may however be still more difficult to interpret because some of the other countries allow dual nationality and some do not. 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 where the lack of formal citizenship was historically unimportant in Britain, a person might choose not to naturalise for that reason.<sup>42</sup> Moreover countries’ policies change, so that for example South Africa now allows dual citizenship, whereas in the past it did not.

By instituting a *ius sanguinis* system, the British Nationality Act 1981 introduced the idea that even UK-born people might be legally foreigners. The ‘time immemorial’ before which questions should not be asked has gradually receded, as the implications of the change permeate practice. 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 Indian subcontinent. Notably, not only political rhetoric<sup>43</sup> but also textbooks on migration (e.g. Castles & Miller 2009: 79) often also tend to suggest that migration began, or at least became a political issue, only after the Second World War. In the British context, this was the period during

<sup>42</sup> 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.

<sup>43</sup> For example, the government’s paper *Faster, Fairer, Firmer* (Home Department 1998) begins: ‘1.1 The contributions made by those who immigrated to Britain and their descendants are incredibly diverse. This year sees the 50th anniversary of the arrival of the SS *Windrush* at Tilbury Docks on 22 June 1948. The 492 passengers and all those who followed them have made an enormous contribution to today’s British society.’

which the substantial immigration was not white but from the Caribbean, the Indian subcontinent and Africa. The visibility of such communities, however, together with the more recent legislation making it likely that even UK-born members of such communities may be legally foreign, makes the social integration of immigrant communities and individuals more difficult, even if it is often striking how the reaction to immigrant communities today mirrors that of earlier communities of immigrants whose members are generally perceived as white.<sup>44</sup> The coincidence is unhappy, allowing a growing far-right political movement to align with the mainstream of legal reform.

Changes to the law of deprivation of citizenship, and in particular the policy of wide-scale removal and deportation of unwanted foreign nationals, are liable to affect the security of minority communities in the UK as well as individuals involved. The political call for more widespread deportation of foreign nationals convicted of criminal offences has 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. Whilst those deportees are not British citizens,<sup>45</sup> because of the historical tendency not to draw a clear distinction between resident citizens and non-citizen residents, many such people felt and believed themselves to be British, and their deportation is part of one aspect of current British citizenship policy – drawing a much clearer boundary around legal Britishness, and physically excluding those who fall outside it.

### **3.5 Internal and external pushes to change in British citizenship and nationality law**

Reform of citizenship policies has not generally been motivated or much affected by formal external influences. The withdrawal of *ius soli* in 1983 was influenced by concern over British citizenship being attributed to the children of transient parents, long before other formerly British countries such as Ireland or New Zealand did the same during the later wider panic over mass migration.<sup>46</sup> Although the UK's citizenship policies are now much more restrictive and exclusive than they used to be, they are still well within the range of normality, and the UK has not attracted much international criticism beyond that made in the East African Asians case (above).

The interlinking of European rights of free movement of labour and British citizenship rules have however had to be considered carefully and amended in the light of the provision of the latter that children born in the UK to a 'settled' parent

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<sup>44</sup> It has been suggested that the origins of the perception that British people are white itself dates back only to the arrival in numbers of black people as a consequence of the slave trade (Winder Brown 2004 : 111). Considering particularly the United States, Lucassen has described how the definition of 'white' has changed historically (Lucassen 2005). In relation to the UK, the work of Brian Sykes on DNA however appears to prove something that is broadly the opposite, on an apparently scientific basis, namely that there is considerable genetic unity amongst the population. However, where he searched out particularly volunteers from amongst those whose ancestors were demonstrated to have lived in the same area for some generations, this result was perhaps likely from the outset (though Professor Sykes does also make the point that similar criticism of the methodology of an earlier study was made 'rather predictably from people who never themselves got into the field' (Sykes 2007 : 97))

<sup>45</sup> Whilst the law does not allow the deportation of British citizens, in practice immigration officers have apprehended members of the British Asian community, asserting that their British passports are false documents.

<sup>46</sup> Ireland lost the *ius soli* after 2004 and New Zealand after 2005.

will be born British citizens. The question was whether a parent exercising European rights of free movement was ‘settled’ within the meaning of the citizenship legislation. Until 2002, such a parent was regarded as sufficiently settled to pass British citizenship to a child at birth - though in reality this was also before the implications of the loss of the *ius soli* rule were wholly appreciated and enforced, and the practice of checking that a UK-born child was entitled to British citizenship was rather looser, and the parent’s situation as a settled person might have been less rigorously investigated. In 2006, the position was changed: regulations now provide that if the parent has a permanent right of residence, the condition is satisfied, but it is not if the parent is a lawful resident who 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.<sup>47</sup>

There have long been rules as to what service abroad would mean that children born abroad to British parents in such service would be considered as British as if they had been born in the UK. These rules have tended to widen. In 2006 secondary legislation provided that as well as diplomats and members of the armed forces, others such as those working in European institutions could pass full British citizenship (otherwise than by descent) to their children born abroad.<sup>48</sup> Nevertheless other rules have become more restrictive. Registration as a British citizen after a second renunciation, for example, now requires that the applicant be of ‘good character’ if over 10 years old (s 58 Immigration, Asylum and Nationality Act 2006)

Particularly striking has been the development of the law of deprivation of citizenship. The original sect. 40 of the British Nationality Act 1981 allowed on the grounds of fraud, false representation or concealment of a material fact. Particularly after the events of September 2001, there was antipathy towards anyone who might be suspected of being ‘foreign terrorists’. Dummett attributes the changes made by sect. 4 of the Nationality, Immigration and Asylum Act 2002 to this (2005: 575), though a more populist motivation existed: the popular Press was greatly excited by the Home Secretary’s inability to deport Abu Hamza al-Masri, an objectionable Muslim preacher originally from Egypt, because he had naturalised following his marriage to a British woman. Sect. 4 of the 2002 Act allowed deprivation of citizenship if the person had done something seriously prejudicial to the vital interests of the UK or a British overseas territory, but not if that would leave them stateless, or on the previous grounds (when however consequential statelessness was permitted).<sup>49</sup> This also applied to those born in the UK, which caused some public disquiet. Sect. 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 made appeals against deprivation orders non-suspensive. A further ‘war on terror’ case, this time one giving rise to legal report (*Hicks*, see below), was the apparent catalyst for a still weightier

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<sup>47</sup> A child born before the parent achieves the five years’ residence may subsequently be registered.

<sup>48</sup> British Citizenship (Designated Service) Order 2006. Such children may also be registered as British citizens.

<sup>49</sup> The change in the law was therefore ineffective as regards Abu Hamza, since he was no longer Egyptian and Egypt did not want him back; his case then continued to excite the media when he resisted extradition by the United States.

provision, allowing the Secretary of State to make a deprivation of British citizenship if he considered that conducive to the public good.<sup>50</sup>

### 3.6 British case law on citizenship

The interrelationship of citizenship legislation and case law in the UK is influenced by relatively few formal constitutional rights in relation to nationality,<sup>51</sup> so one would expect that case law might be very influential.<sup>52</sup> In reality, however, besides the unlimited power of Parliament to change laws, the most influential power lies with the executive to make rules and policies and thus to carry out a system with a large element of discretion that may amount to arbitrariness. Whilst the courts may then put a check on the intention of legislation or policy, if it is of any significance it will only invite legislative amendment to ensure that the original political intention is entrenched.<sup>53</sup> The related areas of immigration and asylum were the scene of fierce battles between the Government and the judiciary especially around 2004,<sup>54</sup> but have lessened since then – largely, it is said, because of the higher courts’ frustration at the quantity of cases.

There has however been some recent case law on the specific point of British nationality and citizenship, mostly obviously in the case of *Hicks*, which gave rise to sect. 56 IAA 2006 (above).<sup>55</sup> 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 refused to register him or, alternatively, proposed to withdraw his citizenship immediately thereafter, but was prevented from doing so by the Court of Appeal after careful consideration of the legislative provisions.<sup>56</sup> Accordingly, Parliament passed primary legislation effectively giving the Home Secretary discretion in the deprivation of citizenship which cannot realistically be

<sup>50</sup> Sect. 56 IAA 2006; this provision came into force immediately and is mirrored in sect. 57, which allows for the deprivation of the right of abode for the same reason. The provision itself reflects the previous threshold for deportation - see Majid 2008 where the author suggests that the impetus for this provision was the bombing in public transport in London of July 2005. Again, this appears to reflect the fuzzy boundary between citizenship and residence rights in the UK.

<sup>51</sup> Though the UK’s citizenship and naturalisation provisions largely conform to the European Convention on Nationality, it has not signed it.

<sup>52</sup> Probably the most popularly famous individual citizenship case was that of William Joyce, ‘Lord Haw Haw’, who was hanged for treason in 1946, having broadcast radio propaganda for Nazi Germany during the Second World War. He was British enough to be treacherous, though an American-born U.S. citizen, because the taking of a British passport by virtue of descent from an Irish father was found to be enough (*Joyce vs DPP* [1946] AC 347).

<sup>53</sup> The phenomenon, mentioned above, of settling at a late stage a case that might create an unwanted precedent is particularly relevant here. An exception which changed law and practice without, however, achieving the litigant’s real ends was the decision of the Court of Appeal in *R v Secretary of State for the Home Department ex parte Mohammed Fayed* [1996] EWCA Civ 946. Mr. al-Fayed, a controversial businessman of Egyptian nationality, had been refused naturalisation, and won his claim that the Home Secretary did have to give reasons. However, he still did not obtain a passport.

<sup>54</sup> The Asylum and Immigration (Treatment of Claimants, etc) Bill that became the 2004 Act originally had a provision for the ouster of judicial review in asylum cases. The then Home Secretary David Blunkett was reported as saying ‘I won’t give in to the judges,’ (*Evening Standard* newspaper, 12 May 2003), but that clause did not survive.

<sup>55</sup> [2006] EWCA Civ 400.

<sup>56</sup> The Home Secretary asserted that Mr Hicks’ activities in Afghanistan were disloyal to the UK, but the Court of Appeal held that at the material time, being prior to the registration he now sought, he owed no allegiance and so by definition could not have been disloyal.

questioned by the courts. The current provisions are in practice indistinguishable from a right of arbitrary deprivation, though they are in accordance with the law.<sup>57</sup>

The modern face of the historically changing definition of Britishness was also 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.<sup>58</sup>

The UK case-law in the European Court of Human Rights on the subject of citizenship is particularly productive, as is its case-law on the related topic of immigration and expulsion.<sup>59</sup> Since the *East African Asians* case, which was almost productive of human rights for the excluded, the UK has been at the forefront of cases confirming that the ECHR does not deal with matters of immigration and citizenship, notably that of *Abdulaziz, Cabrales and Balkandali* in 1985.<sup>60</sup> In relation to the incidents of citizenship, such as the right of a person to live in their own country, as *Sorabjee* and *Jaramillo* confirmed in 1995,<sup>61</sup> again these substantive rights are not central to the Strasbourg court's jurisprudence. These cases concerned children being expelled with their foreign parents, and the ECtHR confirmed that citizenship rights were of little account, although Article 8 rights might be accessible to expelled citizens just as they are to non-citizens. Though this was in line with previous cases, the expectation had been that the loss of *ius soli* and the institution of *ius sanguinis* 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; this notwithstanding that pure *ius soli* was not only a longstanding principle but had itself been codified.<sup>62</sup>

At the domestic level of European human rights, 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

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<sup>57</sup> The 'conducive the public good' provision in sect. 56 of Immigration Asylum and Nationality Act 2006 (see note 50 above) mirrors the test for deportation of foreign nationals. Both sect 56 and sect. 57 are subject to the condition that the person not be left stateless, though statelessness is difficult to prove, and indeed there is no prohibition on leaving a person stateless if their British nationality is found to have been obtained by fraud.

<sup>58</sup> Secretary of State for Defence vs Mrs Diana Elias [2006] EWCA Civ 1293.

<sup>59</sup> These are strongly related to citizenship because they define those who are permitted to reside in the country, which in the UK is historically a matter more of practice than of constitutional rights.

<sup>60</sup> (1985) 7 EHRR 471.

<sup>61</sup> See note 16 above.

<sup>62</sup> For closer discussion of these cases see Mole 1995.

civil rights).<sup>63</sup> Although the same effect could be achieved by seeking a declaration, as a commentator has said, ‘in matters seen to be affecting the State’s power to control its membership or borders, the courts are reluctant to imply private rights for an affected party’ (Clayton 2008: 67). The litigation over the position of the Chagos Islanders (above) has confirmed that the constitutional position in relation to the right of abode is indeed that it is a creature of Parliament, and Parliament may take it away.

### 3.7 Immigration, emigration and naturalization in the UK

Immigration (and emigration) is a historical constant in Britain, although there are often suggestions that it began after the Second World War.<sup>64</sup> The social response to immigrants, a definition which in Britain until recently did not distinguish between refugees and others, has historically often been hostile (e.g. Landau 1911), but the last two decades have seen a hostile legal response as well. Where until the implantation of the legislation of the 1990s and since (see note 1 above) it was relatively easy to arrive physically and to be given at worst a dubious status on which to live effectively before seeking, if one wished, a lawful or permanent status, it is now more difficult to arrive, probable that one’s status will be determined rapidly, and much more likely that one will be removed by force if not wanted.

Broadly, the large immigration flows in the later twentieth century were British workers from the Caribbean, especially in the 1950s, and those coming from the Indian subcontinent, and their families who in both cases joined them later. Though it is less common now to find primary immigration from the Caribbean being followed by families seeking reunion, this remains a substantial and visible mode of immigration from the Indian subcontinent. From the 1980s, asylum-seekers were perceived to be the major group of immigrants, and an intense political and media campaign was instituted to prevent the abuse of the asylum system by those who were not fleeing persecution within the meaning of the Refugee Convention but were economic migrants, albeit often fleeing desperate conditions, or even war.<sup>65</sup> When the legislative changes of the 1990s began, indeed it was very easy to abuse the asylum system, as the practice was to allow those who claimed asylum to remain in the country with sufficient status at that point to make a life; many claims were simply not dealt with by the Home Office, whose way with losing files was legendary. Just after the turn of the century, legislation allowing the system to be run more tightly was reinforced with a systematic and practical effort to tidy up the backlog of cases, to decide applications more promptly in future, and to remove the unwanted (Home Office 1998, 2002).<sup>66</sup> ‘Legacy cases’, meaning people who would have been expelled had the system operated efficiently at an earlier stage, were sometimes dealt with by amnesty,<sup>67</sup> although amnesties of this kind are not common in the UK. Historically one would expect that many long-term residents with or without status would naturalise, and current proposals to remove the rights of non-citizens might be likely to mean that the proportion seeking naturalisation may rise in future. Against that

<sup>63</sup> *Harrison vs Secretary of State for the Home Department* [2005] EWHC 706 (Ch).

<sup>64</sup> These suggestions are not confined to the British domestic sphere – see the discussion in Castles & Miller, 2009: 79. For an alternative summary of the British context, see note 26 above.

<sup>65</sup> Major ‘sending’ countries moved on to include Somalia, Iraq, the Democratic Republic of Congo and Zimbabwe.

<sup>66</sup> These documents were the precursors to, respectively, the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002.

<sup>67</sup> Family Indefinite Leave to Remain (ILR) Amnesty, 24 October 2003.

likely trend, however, is the high cost of fees, the concern of those of uncertain status about coming forward at all, and the recent approach in proposed citizenship legislation to restrict naturalisation for many categories of people.

For those who do stay, provision for naturalisation remains much as before, namely a period of residence followed an application for citizenship, but the tests for official language ability have been made more formal, and there is now a test of knowledge of life in the UK which remains, however, somewhat controversial.<sup>68</sup> This is however subject to change. The overall political idea in present proposals is to make a much clearer division between those who are citizens and those who are not; the latter are presumed to be temporary and expected to leave the country in due course. The right of abode for many Commonwealth citizens may also end. Draft legislation so far has however been inconclusive in achieving these ends.

Two less visible developments have had the most impact recently on access to citizenship in the UK. Firstly, the changes of 1983 have begun to be implemented in practice. For example, it has begun to be necessary to produce evidence of one's parents' immigration status at the time of one's birth in order to obtain or renew a passport; this practice did not become routine until perhaps twenty years after the changes were brought in that made it appropriate. Secondly, changes to immigration and asylum practices have begun to exclude from citizenship at birth communities who would previously have been included: for example, before August 2005 on the acceptance by the Home Office (or as a result of a tribunal or court hearing) that a person is a refugee, they would have been given Indefinite Leave to Remain and thus been settled in the UK and able to give British citizenship at birth to any child of theirs subsequently born in the UK. Now however they are given five years' leave, and so even if that is later extended, their children will not necessarily be born British but will be citizens, if at all, of the country their parent has fled.<sup>69</sup> These slower consequential changes suggest that the impact of the loss of *ius soli* in 1983 is only now being properly felt, perhaps because it truly began only when all the country's children were born under *ius sanguinis*.

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<sup>68</sup> 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.

<sup>69</sup> 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.

### 3.8 Being and becoming a British citizen today

In relation to British nationality it is important to distinguish between British citizenship – a term of art – which means that a person has full rights in relation to the UK and is a European citizen, and other forms of British nationality. The latter are based overseas, may carry few practical rights and do not make the individual a European citizen. It is necessary however to encompass the other forms of British nationality in this report because the connections between the two are close, and although some forms of British nationality are disappearing, others are becoming a route to full citizenship.

The usual method of being born a British citizen otherwise than by descent is now to be born 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; this now includes those exercising European Union rights of free movement provided they have a right of permanent residence, which is implied after five years’ actual residence. It no longer matters whether the parent is the mother or father or whether or not they are married.<sup>70</sup> A person may be born a British citizen by descent, if born outside the UK to a British citizen or a member of the armed forces. This form of citizenship, by descent, generally lasts only one generation. Thus generally for a child to obtain British citizenship from a parent who is a British citizen by descent, the child must be born in the UK. 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 citizenship to children born abroad. British citizens, whether by descent or otherwise, have the right of abode in the UK.

British citizenship may now also be held by those who have a connection with an existing British overseas territory and who are British Overseas Territories Citizens (formerly called British Dependent Territories Citizens); following the British Overseas Territories Act 2002, the two forms of British citizenship may be held simultaneously. As explained above, before that Act, BDTCs from Gibraltar had access to full British citizenship because of the position of Gibraltar in the EU, and those from the Falkland Islands were also made British citizens (by the British Overseas Territories Act 2002) following the conflict with Argentina over the sovereignty of the Falkland Islands.<sup>71</sup> Even after the Act, full citizenship is not available to those claiming by a connection with the British sovereign bases of Akrotiri and Dhekelia in Cyprus - it is variously suggested that this is in accordance with the UK’s promise not to use the bases for civilian purposes, or because of fears

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<sup>70</sup> 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).

<sup>71</sup> See above and at note 19.

that asylum seekers and other migrants in the Mediterranean area would be encouraged to try to establish rights to come to the UK.

There remain other categories of British nationality which are declining and will disappear, as they cannot be acquired in future (save in isolated cases of statelessness). People who were CUKCs through connections with former colonies such as Kenya or Malaysia but could not become British citizens or BDCTs under the 1981 Act may be British Overseas Citizens. British Nationals (Overseas) are people from Hong Kong who applied for this status before Hong Kong was passed back to China in 1997.<sup>72</sup>

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 where the local ruler was at least nominally independent, such as Iraq. 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.

### **3.9 British citizens as dual or multiple nationals**

Surprising as it may be for a system historically based on allegiance to the monarch, where one might expect residual ideas about indivisible loyalties in time of war, there are no restrictions on dual or multiple nationality. This has long been the case, as Dummett points out (2005: 556).

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 as a British citizen, but only once (sect. 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 the rights of those with Indefinite Leave to Remain can be so withdrawn.

### **3.10 Barriers to naturalisation**

Naturalisation is easier for the spouses or civil partners of British citizens, who need to be over eighteen years old, of sound mind and good character, sufficiently good at English (or Welsh or Scottish Gaelic) and familiar with life in the UK, and, broadly, to have lived in the UK for three years without being in breach of the Immigration Rules on the day their application is received by the United Kingdom Border Agency; the spouses or civil partners of those on Crown and designated service may apply from abroad. Others need to show that they intend to make their home in the UK, and the residence period is five years rather than three, again unless a person is on Crown service. There are proposals to increase these time-periods unless applicants have

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<sup>72</sup> Hong Kong Act 1985 and the British Nationality (Hong Kong) Order 1986.

undertaken voluntary work. 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 as such. 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 in detail below. As to the lack of an appeals process in relation to many applications, the UKBA suggests that a person whose application has failed can write to them and they will explain themselves. One can ‘appeal’ against many immigration and nationality refusals only by way of judicial review, which means showing that there was something very wrong with the decision appealed against, usually about the way the decision was taken rather than the merits of the decision itself. This is a very high test, and, since there is a large element of discretion, it is often particularly difficult to show that a refusal is not merely a permissible exercise of that discretion. The Home Office does however now have to state its reasons for refusing to allow a person to naturalise.<sup>73</sup>

The process of registration as a British citizen also exists. This is similar to naturalisation but a simpler process, with lesser elements of discretion. The scope of the provisions is much more complicated. However non-British-citizen British nationals who have been lawfully resident in the UK for five years may register as British Citizens otherwise than by descent. Most such people who have no other nationality may register without a residence requirement, though it is difficult to prove the lack of another nationality in practice.<sup>74</sup> British Overseas Territories Citizens who did not become British Citizens under the British Overseas Territories Act 2002 can also register, unless their British connection is with the sovereign bases in Cyprus (see above). 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, when 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.

A child can also become British by adoption if at least one adoptive parent is a British citizen on the date of adoption, and the adoption order is made by a relevant court,<sup>75</sup> 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

<sup>73</sup> See note 53 above

<sup>74</sup> Not having another nationality is not quite the same as not having another passport. For example, it is clear that persons are not stateless if there is a nationality they could be acknowledged to have were they to apply for it (KA (statelessness: meaning and relevance) [2008] UKAIT 00042).

<sup>75</sup> One in the UK, Channel Islands, Isle of Man or Falkland Islands after 1982, or after 21st May 2002 in another British Overseas Territory.

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.

There are also particular 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 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)<sup>76</sup>, and children born stateless in the UK. British Nationals (Overseas), as well as British Overseas citizens, British Subjects and British Protected Persons, may be registered as British Citizens if they are stateless and have not done anything to effect the loss of any other citizenship or nationality since 19<sup>th</sup> March 2009. 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.

In the context of the UK's changing approach to the interface of immigration and citizenship, the 'ten year rule' and the 'fourteen year rule' should be particularly noted.<sup>77</sup> These provide that ten years' lawful residence or fourteen years' unlawful residence may form the basis for an application for naturalisation. Unlawful residence includes any time before removal directions are made, so this is a likely 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. By definition it is not known how many such people live in the UK,<sup>78</sup> but many are long-established residents with houses, jobs and families. New requirements of 'good character' for registration of adults and children over ten years old means that naturalisation and registration are converging.

### 3.11 Gender inequality in British nationality law

Historically there was considerable discrimination against women, both as regards the status of women on marriage, and as regards mothers' ability to pass British nationality to their children, but this has been largely done away with. For a while 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 (see Dummett, 2005: 559). 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

<sup>76</sup> SI 1498/2006, bringing into force sect. 9 Nationality, Immigration and Asylum Act 2002.

<sup>77</sup> Immigration Rule 276A-D.

<sup>78</sup> 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.

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.<sup>79</sup> This does, 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).

### 3.12 Institutional arrangements peculiar to the UK

The making of British nationality and citizenship law is subject, as is the rest of UK law, to the absence of constitutional rights which are more difficult to change than ordinary legislation.<sup>80</sup> This is an aspect of the idea of parliamentary sovereignty that was the resolution of the Civil War; Parliament may do as it likes, and may not bind its successors. Accordingly rights may change almost overnight, especially in a political response to media pressure.<sup>81</sup> Moreover the related Immigration and Nationality Rules, which govern the day-to-day application of the legislation, are anomalous; they are made by Government Ministers in accordance with the politics of the moment and subject to only minimal scrutiny by Parliament.<sup>82</sup> The Rules and the policy governing their application are at least now mostly available publicly, following the dictum of Lord Roskill in *Salamat Bibi*.<sup>83</sup> In between this, the tendency of Parliament to pass ‘enabling legislation’, giving power to the Secretary of State to write regulations by secondary legislation which do not have the full scrutiny of Parliament, has been particularly prevalent in the related area of immigration (Dummett 2002 : para 1). Moreover, the freedom extended to the Home Office militates against case law. It has a broad freedom to operate ‘outside the rules’ and to grant citizenship (or, more usually, leave to remain) to those who might create unhelpful precedents. This freedom is frequently used and it is uncontroversial to say so if, by definition, awkward to show. The practice, mentioned above, of preventing the establishment of unfavourable court precedents by agreeing cases just before they are heard, only supports this lack of clarity and openness.

<sup>79</sup> See note 70 and the British Nationality (Proof of Paternity) Regulations 2006 (SI 1496/2006).

<sup>80</sup> For the odd way in which British legislation may be made and then possibly never brought into effect, see the Introduction.

<sup>81</sup> 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).

<sup>82</sup> Secondary legislation does have to be presented to Parliament, but there exist ‘negative’ and ‘affirmative’ resolution procedures. Under the former, which is much more common, the regulations are available for MPs to find, but unless someone raises the issue, no vote or other approval need be made for them to pass into operation. Only secondary legislation that is acknowledged to be controversial is generally presented under the affirmative procedure.

<sup>83</sup> *R v Chief Immigration Officer Heathrow Airport, ex p Salamat Bibi* [1976] 1 WLR 979, see also *Odelola* [2008] EWCA Civ 308.

## 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 are overshadowed and obscured in the media especially by the debate over ‘citizenship’ in the sense of how a good citizen should behave. The atmosphere and rhetoric of recent general elections have likewise focused not so much on citizenship in the sense of nationality as either on citizenship in the sense of a conception of reciprocal rights and obligations (especially obligations) or else on the concept of Britishness. These issues do obliquely affect the debate about whom the law should define to be a citizen. Immigration, including asylum, rather than citizenship has however been an important policy issue in general elections since the late 1980s. These issues relate to citizenship law because of the historical and structural links between the areas, especially given the reforms of 1983 which removed *ius soli*. The immigration debate itself is now also beginning to feed into proposals on the reform of citizenship law, although these are so unclear as to be relatively undebated by the media. Many or possibly most people (often including those who should know better) have overlooked the loss of *ius soli* and still believe it operates.

### 4.1 Political parties and citizenship policy

The major parties in Britain are the Labour and Conservative Parties, with the Liberal Democrats as a longstanding alternative contender. There are also smaller parties including the Greens and, more recently, the United Kingdom Independence Party. 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, Scottish National Party policy is for a return to *ius soli* in Scotland as part of a new Scottish constitution on independence (SNP 2005: 29). Power in Britain overall has been held, however, 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) and the alternation between the two has had little impact on the trajectory of citizenship and immigration law. 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)<sup>84</sup> but also of responsibility for their people. Whilst the major structural change in British citizenship law was that brought about in 1983 by the loss of *ius soli*, in the Conservative party’s British Nationality Act of 1981, the element of *ius sanguinis* was foreshadowed in the closing of the UK to the East Africans in the 1960s, again under a Conservative government and consolidated in the institution of ‘patriality’ in the Immigration Act 1971.

The changes to the treatment of resident non-nationals that has led into the current proposals in relation to citizenship law generally began in the 1990s with the Conservative government’s Asylum and Immigration Act, but the thrust has continued through successive Acts beginning in 1993 but without any appreciable change of

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<sup>84</sup> 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.

direction when the Labour party took over power in 1997. There is no expectation of a change of direction should the Labour party lose power to the Conservatives at the next election. Broadly speaking, policy leans throughout toward the curbing of immigration, the enforcement of the social and economic exclusion of those without immigration status, limiting naturalisation, and removing the unentitled physically from the country. A further constraint is the general silence on the effects of European Union law on free movement and establishment; EEA nationals are generally not specifically mentioned but must find their place in the general legislation.

There is also a general lack of clear or overt stances or differences amongst the political parties on citizenship policies. The Labour Party currently has no obviously publicised political policy on citizenship, though it does on immigration, where it takes a stance on both admissions and expulsions that it regards as amounting to ‘protection of our borders’ (Labour Party 2009). The tone is one of security in the face of threat, though the gloss put on by Ministers may be about control of immigration leading to better treatment of migrants, or the firmness and fairness of the new Australian-style immigration points system. The tone of the Conservatives’ stated immigration policy is much gentler, perhaps because it was felt that having a reputation as the ‘nasty party’ had previously damaged their electoral success. The content of their policy is however similar to that of Labour, admitting only those who are useful to the economy and putting an overall limit on the numbers of immigrants, though they do not think that asylum seekers should be tested on their economic usefulness. Again, there is no publicly stated policy on citizenship reform, and probably there is no unstated policy either. To an extent, this apparent vacuum of policy on citizenship is however 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 smaller parties, which have no realistic hope of taking power, can perhaps afford to be more equivocal, generous or extreme. Liberal Democrat policy has a more definite commitment to acceptance of obligations to asylum seekers, a feeling that problems attributed to excessive numbers of immigrants in the population are actually general economic problems for which the Labour Government in particular is to blame, and the suggestion that although England is quite full, Scotland is relatively empty. This policy is not however discoverable on their website, presumably indicating that the issue is not regarded as central to that Party; unsurprisingly, they also have nothing on citizenship as such (New Statesman 2009). The Green Party has no clearly stated policy on immigration at all, let alone citizenship, though it has policies related to specific issues of asylum.

Recent times have however seen a consolidation of anti-immigration and anti-‘foreigner’ rhetoric in organised political activism. The United Kingdom Independence Party, whose its headline description of itself begins ‘libertarian, non-racist ...’, again has no stated policy on citizenship, though it is not considered particularly well-disposed towards foreigners. It has a strong presence in European politics. It proposes to freeze immigration for five years, to triple the numbers of ‘illegal immigrants’ being deported, and require people to be able to prove that they will be adequately housed in the UK before they can obtain a visa.<sup>85</sup> Notable in very recent years is the rise of the British National Party and its entry into mainstream political life. It has had some success over several years in local council elections in

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<sup>85</sup> It should not be thought that all this would be new. These are standard current requirements.

more economically deprived areas such as east London and the north of England, and in the European elections in June 2009 it won two seats in the European Parliament. This last is regarded by some as being or indicating a fundamental shift in the national political debate and by others as a blip, though it appears more generally agreed that the move is an exception to past expectations. 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. The BNP, which is broadly opposed to immigration, admits only members it considers British in its own terms, so excludes black and Asian people, and its policies include the redefinition of those communities as foreign and then their physical exclusion.<sup>86</sup>

## 4.2 The trajectory of recent reform proposals

The concerted programme of legislation dealing principally with immigration statuses but also with nationality and citizenship which began in 1993 may now be approaching its endgame. The Government announced a review of the immigration system in July 2006 with the aim of consolidating the 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, with the ‘path to citizenship’ itself identified with the naturalisation of immigrants.

The White Paper was foreshadowed by the commission by Prime Minister Gordon Brown of the former Attorney General Peter Goldsmith to write a paper on ‘citizenship’. His paper *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 tends 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, in both senses of constitutional rights and responsibilities and also more general and more personal feelings.<sup>87</sup> 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.

The paper was based on the thoughts of Peter Goldsmith and publications and research which are available through his citizenship review webpage (Goldsmith 2008). There are three such publications apparently for future use, none of which is

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<sup>86</sup> There seem to be what might be regarded as anomalies. In East London a man of partly Turkish origin became a BNP councillor, and stated party policy at least appear to consider long-settled communities not to be foreign even if one might expect otherwise: the BNP has a Jewish councillor in Epping Forest. For further discussion of the BNP and its rise see John, Margetts, Rowland & Weir 2006.

<sup>87</sup> 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. ...’

aimed at the issue of the attribution of citizenship (Kiwani; TimeBank; Rimmer 2007), and five research papers, which are referred to in Peter Goldsmith's paper. Three of the research papers were broadly 'library' works, and the other two were based more on reported experiences. None of the papers considered the legal aspects of citizenship law, the intended and / or unintended consequences of past changes, or even the various current live issues in that respect. It seems unlikely that Lord Goldsmith or the Prime Minister set out deliberately to undertake reform proposals without background knowledge of the relevant areas; it is far more likely that this is an example of the historical lack of interest, legal and political as well as social, paid to the question of whether or not a resident is formally a citizen or not.<sup>88</sup>

A research paper from the University of Oxford, based on ESRC-funded work done for other purposes, (Heath & Roberts 2008) looked at feelings of British identity, especially in the light of ideas about English, Scottish, Welsh and Irish identity, but also in the contexts of black Caribbean and Muslim communities, though without confronting these issues directly.<sup>89</sup> They found that British identity could be ethnic rather than civic, but did not distinguish the legal structures of citizenship from feelings of Britishness – perhaps unsurprisingly, as the authors are a political sociologist and a data services officer. They nevertheless identified the relevant issue as perhaps the one that ought to have been asked about: 'the crucial question therefore may not be whether or not to promote national identity but what form of national identity to promote', noting that a civic identity is more inclusive than an ethnic one (23/35).

The British Institute of International and Comparative Law contributed a 'major' report mostly on the 'hallmarks of citizenship', meaning what states offer their citizens, not who is likely to be defined as a citizen (Medjoubi, Steganelli & Sanchez 2008). Although the issue of attribution of citizenship is mentioned, as with the Heath and Roberts report, it is not investigated, or even very clear (69-70). The paper is principally an exposition of other countries' policies and an analysis focused on the integration of minority communities, rather than what to do about naturalisation in Britain.

The third library-based research paper is from the Institute for Public Policy Research and does contain considered analysis (Rutter, Latorre & Sriskandarajah 2008). A suggestion is made, with considerable statistical support, that the basis on which reforms to immigration and citizenship law are being proposed is unclear and that they may be based on false premises. Rather than take for granted any political rhetoric about increasing immigration, it proposes an analysis of the figures that suggests migration tends now to be temporary and circular, especially in relation to Eastern European immigrants. They come, but they go again, and would not want to naturalise, especially if it were very expensive. Again, this paper suggests that the most relevant issue may be the question of what the government wants to achieve in naturalisation policy (23).

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<sup>88</sup> This lack of interest is reflected at the academic level, though recently, in response no doubt to the instigation of legal reforms, an academic legal discourse has begun to develop. The Oxford University Press, for example, began publishing a Textbook on Immigration, Asylum and Nationality Law (Clayton 2008), with the first edition appearing in 2004.

<sup>89</sup> For example, the reference to 'a small but growing number in all these territories, but especially in England, who do not subscribe to any of the four main national identities of Great Britain' (8/35) does not consider whether this category of geographically domestic identities might, in the context of a citizenship review, benefit from the addition of other identities such as British Asian.

The two practice-based papers looked at immigrants' experience of the UK, with particular reference to naturalising. This was mostly considered not in relation directly to how to become a citizen but more in relation to how to be the sort of citizen the government wants, favour then falling on those undertaking voluntary work. The company Edcoms did however look at the process of naturalisation (Edcoms 2008). Again, it found that a, if not the, major disincentive to naturalisation was the fees: 'The single most frequent obstacle to British citizenship was the cost... It is possible that cost is an absolute deterrent to some...' (35).<sup>90</sup> The other non-academic research report was from the organisation 'Stimulating World', who were 'required to investigate the response to practical methods of encouraging citizenship ... [including] ... Civic Participation, Citizenship Education, Citizenship Ceremonies and a National Day...' (Stimulating World 2008 : 3). The researchers suggested however that the government's focus on how good citizens might behave was unrealistic in terms of many new migrants' circumstances, the fearfulness of which – including social hostility and corrosively long working hours - affected their approach to formal naturalisation (7, 23). Both citizenship ceremonies and the idea of a National Day attracted equivocal responses (60, 62, 64, 68) and, again, the researchers mentioned the deterrent effect of the high cost of naturalisation fees (58).

Peter Goldsmith's paper itself likewise presents issues of focus. His terms of reference were prescribed by Gordon Brown, the Prime Minister.<sup>91</sup> He remarks that 'it is worth saying that the 'law on citizenship' is neither a discrete nor a clear subject. ... citizenship is much more than a legal subject. Its other elements are political and social, and cannot be wholly reflected by, or distilled from, a statement of the law.' (3/21) Nevertheless, a clear and full statement and discussion of the law would be at least the starting-point one might expect in a document of this kind, prepared by a noted government lawyer and looking at legal reform.

Most of the paper (pages 13-71) is devoted to a 'short history of British citizenship' and setting out the legal rights and responsibilities of citizenship, including a great deal on EU citizenship. The history section is remarkable in what it does not countenance, even for a 'short' history, and the approach is surprisingly non-legal.<sup>92</sup> For example, the meaning of the word where 'subjects' are discussed is unclear, (2/2; 18/17) and there is no mention of the highly contentious aspects of the East African Asians case. This was in effect the first major engagement in the legal battle to change the concept of Britishness, and the significance and embarrassment of the judgement at Strasbourg in 1973, where the European Commission condemned the UK for race discrimination, is indicated by the refusal of the British government to agree to its publication until 1981, when citizenship reform was imminent. References such as that to 'the odd situation whereby people who hold a form of British passport are subject to immigration control' (4/72) indicate a historical stance

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<sup>90</sup> As he mentions, fees can increase suddenly, and in April 2007 had increased from £200 to £575. Interviewees also suggested that the 'life in the UK' 'test was not really one of knowledge about the UK, but an ability to recall sections of the book' (39).

<sup>91</sup> They were: (1) to clarify the rights and responsibilities of British citizens, in addition to the HRA, as a basis for defining citizenship 'in Britain's open democratic society'; (2) to consider the difference between (sic) different categories of British nationality; (3) to examine the relationship amongst residence / citizenship / British nationality and incentives to become British; (4) to explore the role of citizens and residents including voting, jury service and other forms of civic participation.

<sup>92</sup> As for example his intriguing remark that it 'should be borne in mind that Northern Ireland is in the UK but not in Great Britain.' (5/21) The relevance of the position of Northern Ireland is not explained and, as he also says, nationality law is not a devolved function.

from which it would always be difficult to assess the current position. Where Lord Goldsmith comments later that ‘more recent history though has set the law in the right direction’, this appears to mean that he approves the gradual move towards exclusion and the redefinition of the excluded as not sufficiently connected (12/14 – 15/16; 6/73). He does not however explain or justify this fundamental change which affects the position of even UK-British minority communities. The statement that British nationality law ‘remains complex’ is undoubtedly true, but not perhaps adequate to the scene-setting for a serious and detailed review of legal provisions (27/18).

Discussing ‘Civic Rights and Responsibilities’, Lord Goldsmith goes at length through the basics of British constitutional law, including treason, and through European citizenship law and the rights following on the back of free movement, which often appears tangential and largely unnecessary. The different categories of British nationality are somewhat skated over, but one might not expect a focus on them in a paper apparently concerned principally with the main category of British citizen, the other categories being residual and liable to disappear. The interpretation of the fourth task focuses on exhortations to volunteer, which where it translates into a possible prerequisite for naturalisation raises a great many questions.<sup>93</sup> It is in relation to the third task, however, that the report is perhaps most noticeable in what it does not say. Where Lord Goldsmith considers that ‘there has been a blurring in the distinction between citizens and non-citizens, especially in terms of rights and entitlements ... there is no clear distinction between permanent residents and citizens ... This is a muddle that probably exists for honourable reasons,’ (22-24/77) it is not clear that at least some would find this ‘muddle’ fundamental to the British approach, which is historically based on settlement rather than citizenship. Citizens are settled, and so are permanent residents, so this is arguably a well-established way of life which is currently being dismantled; where Lord Goldsmith is in search of the ‘bright line that distinguishes citizens from non-citizens so far as their legal rights and responsibilities are concerned,’ (5/21) he is suggesting a major cultural change. The many people whose effective residence is attached to an immigration status which falls short of settlement, for example those who have been on temporary admission for a protracted period, or even those long-term residents who have no status at all are not addressed. The closest countenancing of the issue comes at the end of the paper, where he suggests that ‘[t]he rules for gaining citizenship should be rigorous but there is no advantage to having people, who have lived in society for over a decade, deciding not to become a part of it in the fullest sense by seeking citizenship.’ (41/121) It is however unclear what the point of ‘over a decade’ is – it could be a reference to the current provisions for naturalisation for persons lawfully resident for ten years (or unlawfully for fourteen years, provided that no removal directions have been issued),<sup>94</sup> or whether and why he proposes to retain or amend the provisions.

Elsewhere, similarly the context appears to be missing: it is the case that the right to work for asylum seekers was first introduced formally in 1986, (47/121) but that was because practical restrictions on employment for foreigners were then beginning to take effect and so it preserved rather than changed the position. So far as

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<sup>93</sup> The idea that volunteering might be effectively compulsory may appear contradictory. The proposal also reflects ideas elsewhere in related areas of government policy such as asylum, where an attempt to oblige asylum seekers to work for benefit payments collapsed under pressure including assertions that this amounted to forced labour, in breach of the UK’s obligations under international law (Casciani 2005).

<sup>94</sup> See note 77.

the position of accepted refugees is concerned, Lord Goldsmith does acknowledge that giving them only five years' leave, rather than indefinite leave as was the case before August 2005, is a 'difficult issue', and in an unusually direct challenge to government orthodoxy he says: 'I propose ... that the government should review the effects of the policy in practice and re-examine the issue in that light.' (58-59/121)<sup>95</sup> Moreover, certain specific live and contentious points are mentioned without being explained or investigated: the deportation of citizens is mentioned, but not that the active abandonment of citizens is a highly contentious issue; and the UK Government's active attempts to have British residents, as well as British citizens, returned from Guantanamo is mentioned with an approval, which appears to contradict the philosophy of the 'bright line' between citizenship and other statuses (4/10, 14/12). Given that the legal reforms to be undertaken were principally to do with naturalisation policy, it seems odd not to consider the position not only of new immigrants but of current foreign national residents who might well want to naturalise.

Lord Goldsmith's tone is different, but the narrative little clearer, when he discusses the proposed future: 'we need to create a shared narrative about citizenship which threads through very many different aspects of our lives and our lives together' (9/88). There is room to infer that outsiders should be treated with specific caution given their origins: 'citizenship must not be devalued by the fact that it is open to people who have moved to the UK' (15/115). He emphasises the importance of 'taking part in civic activities' (10/89) and commends citizenship education in primary schools (14/90; 24/92), a National Day on the Australian model (33-34/94-95; 39/96),<sup>96</sup> national awards for citizenship participation (38/120)<sup>97</sup> requiring new migrants to register with a 'welcome centre' in order to get a NI number to ensure they find out more about their locality (10/115), and volunteering. On the last, he touches on the difficulties of making 'volunteering' compulsory, and even the practical problems it can cause, without proposing any clear resolution (53/99 – 62/100).<sup>98</sup> On the issue of the financial cost of English lessons, he is equivocal (7/112). Fees for naturalisation are acknowledged as 'the most-mentioned deterrent to applying for citizenship,' but there is no particular direct criticism of government policy (41/120).

The Government Green Paper<sup>99</sup> *The Path to Citizenship* followed. Although its general approach to the likely effect of its proposals for reform is no more practically rigorous, it does show more acquaintance with the non-citizen statuses such as temporary admission. However, that might have been in part because its remit

<sup>95</sup> He does not, however, mention that the UK is out on a limb so far as the definition of a refugee is concerned, having departed from the definition obtaining in international law and being thus in breach also of the relevant European Directive: see *Szoma v DWP* [2005] UKHL 64; EU Directive 2004/83, preamble, para (4) and Art.2(c).

<sup>96</sup> Here he seems conscious that he is trying to change a culture: 'I was particularly struck by the recognition on the part of many participants that having such a day may not be seen as part of the UK's traditional heritage but that it could become the catalyst for a positive and celebratory new image of citizenship.' (39/96)

<sup>97</sup> Based on the ideas of Mark Rimmer of Brent; an invited publication appears on Lord Goldsmith's webpage.

<sup>98</sup> There have long been government moves to tie voluntary work particularly to the migration sector: see for example para 8.3 of *Faster, Fairer, Firmer* (Home Office 1998): 'The Government believes that the voluntary sector has an important role to play in helping asylum seekers.'

<sup>99</sup> 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.

was much narrower than that of Lord Goldsmith's paper. As the Immigration Law Practitioners' Association (ILPA) pointed out in its *Response to Consultation* (ILPA May 2008), it was concerned only with naturalisation. In an echo of the famous statement of John Reid as Home Secretary that immigration law in the UK was 'not fit for purpose', it commented moreover 'that key objectives underlying the proposals are to achieve laws and legal processes that are simpler to understand and manage and to encourage greater integration into UK society by migrants whose long-term future is to be in this country. Measured against these objectives, the proposals on citizenship are not fit for purpose.'

An Immigration and Citizenship 'Simplification' Bill was published in July 2008 with a narrative entitled 'Making Change Stick' suggesting a particular consciousness that primary legislation ought at least to oust the perceived attempts of the judiciary to undo the work of Government Ministers. The Bill was to replace all existing Immigration Acts and give a 'sharper and more consistent set of immigration rules, which can continue to be quickly adjusted in response to changing circumstances' – this last appearing to indicate retention of the quite odd system of Statements of Changes of the Immigration Rules (see above). The new Act would however, it was said, make the relevant law and rules more transparent, clear and predictable, bringing about greater speed and efficiency and would be easier to enforce.

The Simplification Bill however inspired little confidence. Concerns included its alleged promotion of convergence in values, rather than respect for diverse beliefs and practices within a multicultural society. Moreover it was felt that making access to citizenship more difficult would make immigrants less secure and thus less able to integrate successfully, as would the protracted restriction of social benefits to those who had not yet obtained citizenship. The Bill's novel concept of 'active citizenship' meant that those seeking naturalisation would be expected to undertake some form of community service outside the home, which might disqualify certain groups and especially women. Indefinite Leave to Remain was to be replaced with 'Permanent Residence' and 'Probationary Citizenship', which was not a form of citizenship and might in practice be the obvious step onwards from temporary residence for those who never intended to obtain full citizenship. In particular, there was no clear provision for the family members of those with limited leave, inviting potentially large numbers of applications to the Strasbourg court seeking recognition of rights under Article 8 ECHR. The period during which a non-citizen had to be resident in the UK before being able to sponsor the admission of relatives was unexpectedly extended, and it appeared that the children of those on Probationary Citizenship would not be born British citizens in the UK. The commentary of the Immigration Law Practitioners Association (ILPA Sept. 2008) in particular points out the way in which the Bill did not fulfil its stated aims, or even appear to be drafted in a way that was legally clear.

The 'Simplification Bill' disappeared from the Queen's Speech of November 2008.<sup>100</sup> It reappeared later however with an assertion that it would be completed before the end of the 2008-09 parliamentary session, the drafters saying they

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<sup>100</sup> The Queen's Speech is the formal Government statement of legislation proposed for the forthcoming session of parliament. The Bill had previously disappeared from the Government website, but could always and can still be found nevertheless on the website of the Migration and Law Network at <http://www.kent.ac.uk/law/migration/consultation.html>.

‘recognise that this is a major undertaking that needs to be done well rather than done quickly’.

### 4.3 Very recent legislation

In January 2009 the Borders, Citizenship and Immigration Bill was introduced, covering some aspects of the ‘Simplification Bill’. The terms in which the Bill was originally described were tough; repeating the rhetoric of his predecessor, Liam Byrne, the Minister Phil Woolas described the changes as ‘part of the biggest shake-up to the immigration system for a generation’. Citizenship was still implicitly treated as an aspect of immigration, and foreigners linked with a threat to security: the reference to a new system for ‘counting people in and out of the country’, for example, can only echo a famous quotation from the Falklands War. Measures are described as designed to ‘strengthen the border’, even if the measures are just as likely in reality to destabilise communities. The stated view of the Minister was that: ‘Migration only works if it brings benefits’, meaning benefits to the UK: accordingly the Bill formed part of the project to restrict access to full social welfare benefits and housing much more closely restricted to citizens (though in reality policy in this respect has already been heavily restricted), to make foreign nationals carry identity cards, and to begin to implement a systematic requirement for ‘earned citizenship’, which will mean ‘active citizenship’ (volunteering). Enactment having been expected in the autumn of 2009, the Bill received Royal Assent on 21<sup>st</sup> July. However, the provisions that would have brought the beginning of the end to the Common Travel Area with Ireland had been thrown out of the Bill during debate in the House of Lords in April. The parts of the 2009 Act concerned with border functions and restriction on overseas students’ studies came into force immediately. Sections including those relating to naturalisation, to the registration as British of people born abroad to British mothers before 1961, to people-trafficking for exploitation and to the requirement that the UKBA safeguard children’s welfare in its work (although this, without more, is likely to be of little practical significance in any event<sup>101</sup>), and provisions allowing British citizenship to be transmitted by members of the armed forces, even if they are not British, were delayed. They are not yet in force.<sup>102</sup>

As to the changes to naturalisation law, the Government is now consulting as to how to bring them into practice. Following the consultations in the Green Paper ‘The Path to Citizenship’, there will be three routes to citizenship, namely work, family or protection, and everyone will pass through temporary residence and probationary citizenship to either British citizenship or permanent residence. Currently, it is proposed that the process should be shorter for those who undertake voluntary work during their naturalisation period. There are already commentaries on the similar proposals in the former Simplification Bill from the Immigration Law Practitioners’ Association, the Migration and Law Network and other groups setting

<sup>101</sup> The commentary of the Immigration Law Practitioners Association (see Submissions for August 2009 on their website) is also highly critical of this provision.

<sup>102</sup> Other provisions not in force include that allowing the children of members of the Armed Forces to be born abroad as British citizens or registered if their parents join the Army later, and that a minor child born outside the UK may be registered under sect. 3 (2) BNA 1981 (children of British citizens by descent) at any time, not just before the age of twelve months; and the amendment of sect. 4B BNA 1981 so that British Nationals (Overseas), as well as British Overseas Citizens, British Subjects and British Protected Persons, may be registered as British Citizens if they are stateless and have not done anything to effect the loss of any other citizenship or nationality since 19th March 2009.

out reservations, but it remains to be seen how far such comment is taken into account and how any subsequent reforms work in practice.

## 5 Conclusion

Though 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 been developed since the mid-twentieth century largely to exclude those based abroad and to limit those who may come to, and now those who may remain in, the UK itself. Citizenship law has always been a tool of immigration policy. It is being used to define a nationality to which people may belong when previously belonging was a matter of geography and practice; citizenship law is used as much to exclude as to include. 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 bound both territory and population to the UK.<sup>103</sup> The 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 leaving the old country behind.

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 but 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, which is still in force: British subjects who were not born in the UK, and did not have a parent or grandparent who was either, 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. 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 is likewise largely accomplished, often as part of a common European policy on asylum seekers. Domestically, however, this has thrown up the issue of the 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 lawfulness. Given the ambiguity that characterises British nationality law, many 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

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<sup>103</sup> 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.

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, though less of this is achieved than is often suggested.

The current project of legal reform is to ‘simplify’ both citizenship and immigration law to make them clearer and easier to operate. This philosophy is proving popular and pushing rhetoric and policy in at least the medium term. 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 really 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. Undoubtedly there are indeed underlying political issues, including proposed tidying-up arrangements which damage the existing position of individuals of vulnerable status (such as certain overseas-based Commonwealth nationals who might lose the right of abode in the UK but may be relying on it in case of foreseeable personal disaster in their home country). However, proposals to reform the law so as to require an applicant for citizenship to show particular forms of ‘active citizenship’ before being allowed to naturalise may prove even more awkward, as those who are excluded will also be excluded from many day-to-day rights but may still not leave the country. This could create similar practical problems to the problems of destitution currently seen with refused asylum seekers who are now deprived of both welfare benefits and the right to work. Moreover the project of separating citizens and the unentitled entails a new identity registration system which may prove unpopular as well as difficult to operate; it is not easy to tell, at this juncture, how that system will work out in practice and politically.

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,<sup>104</sup> 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 recent proposals to abolish the Common Travel Area,<sup>105</sup> so that centuries of history will be truly overcome. Moreover if this ends the general treatment of Irish citizens as non-foreigners settled in the UK immediately that they become resident, it will in turn mean that children born into the large Irish community in Britain, who are currently automatically born British for that reason, will may be born aliens instead.

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, though they are now taking their case to Strasbourg. Moreover, there is no proposal to limit the power of the executive to make extensive rules on immigration

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<sup>104</sup> There have been separate citizenships since the declaration of Eire as an independent republic and the Ireland Act 1949 in the UK.

<sup>105</sup> See Goldsmith 2008 and the original draft of the Borders, Citizenship and Immigration Bill.

and nationality law and practice, often with subsequent, minimal or no reference to Parliament.

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 *ius sanguinis* system. Ambiguity as to status is to be cleared out, with the preferred statuses being either citizen or useful guest worker. 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. Moreover, even if the new system is made to work, it constitutes a major cultural change. Though already some assert that the exclusion of Commonwealth citizens from the 1960s onwards was an expression of endemic and racist British attitudes, nevertheless the new domestic separation of the entitled from the unentitled, even amongst the UK-born, constitutes a greater and also a more rapid departure from the culture which created domestic British society in the first place.

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