Nationality Law: Righting the Wrongs of History?

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At a glance

This article looks at the effects of differential treatment, in particular on the grounds of gender or of birth status, in nationality law, and at its characterisation as the present-day effects of historical discrimination, or as ongoing discrimination. It examines the scope for eliminating discrimination in nationality law. It considers whether what is at stake is 'righting the wrongs of history' or present-day discriminatory laws. It considers the extent to which discrimination and the wrongs of history are amplified by the hostile environment and the treatment of persons under immigration control.

> I recognise the Minister's phrase about not being able to rectify all the wrongs of history but I do not agree with that expression... I think that we ought to remedy the wrongs of history …Lord Avebury HL Deb 7 April 2014, col 1205.

On 27 July 2017, the Home Office Nationality Instructions disappeared from its website, to be replaced by new, thoroughly modern 'Nationality Guidance'. The new guidance is in the form to which we have become accustomed from the Home Office: written less to guide staff than to provide a defence in the event of a legal challenge, prescriptive and hectoring in tone. There is no acknowledgement that nationality law is different entirely from codification of the broad discretion afforded the Secretary of State by s 3 of the Immigration Act 1971: the requirements for acquisition and loss are set down in primary legislation and the meaning of a term such as 'of good character' is a matter of law.

The sense of history that had pervaded the nationality instructions has largely disappeared from the guidance. The historical 'Summary of British nationality law', an essential teaching resource, had been removed, as had illuminating guidance such as 'Hanover, Sophia, Electress of' and sections explaining the meaning of arcane terms such as 'Denization'. Fortunately for the next generation of nationality lawyers, all these are preserved on the website of the national archives.[1]

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1 http://web.archive.org/web/20170425005852/https://www.gov.uk/topic/immigration-operational-guidance/nationality-instructions (accessed 10 September 2017).

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Nationality law does not so easily escape its past. On 11 October 2017 there appeared on the Home Office website guidance entitled 'Historical background information on nationality law'; a potted version of the 'Summary of British nationality law', incorporating bits from other axed chapters.[2] Those born under laws long gone may live for a century. Not only the place of birth of an individual, and the nationality and civil status of that person's parents, but also of the parents' parents and their parents before them, may be relevant to the nationality of a person born today.

Differential treatment is the point of nationality law, eloquently summed up by Robin White of the University of Dundee in his paper for the second European Conference on Nationality in 2001 as: 'The point of human rights is that all humans have them. The point of nationality is that all humans do not.'[3] Some of the grounds of differentiation used in the past today constitute unlawful discrimination. Gradually, they are eradicated from current rules on acquisition and loss. But their effects play out in the present and decisions must be taken as to whether, and how, to attempt to address those effects.

What is the problem being addressed? Is it the present-day effects of an act of discrimination in the past, or ongoing discrimination?

This article considers discrimination against women in respect of passing on their nationality to their children and discrimination against those born out of wedlock, with glances at grandmothers and adopted children along the way. It considers the relative strengths and weaknesses of the courts and the legislature as instruments for 'rewriting history', and the evidential burdens on both governments and individuals discriminated against. It considers the extent to which the 'good character' requirement for registration, introduced in 2006,[4] has exacerbated the differences in treatment and, in this context, whether the UK courts and the legislature have seen their tasks addressing the present-day effects of historical discrimination, or as addressing ongoing discrimination. Finally, it highlights the difference between the extent to which the wrongs of history are being righted, and discrimination removed for British citizens and for other British nationals.

Discrimination against women in passing their nationality on to their children

The question of discrimination against women in passing on their nationality to their children is today receiving renewed attention, in particular in the context of the fight against statelessness. On 18 June 2014, an international campaign to end gender discrimination in nationality laws was launched by a coalition of civil society groups, supported by UN Women and the UNHCR.[5] Now the Global Campaign for Equal Nationality Rights, it has enjoyed considerable success.[6]

2 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/650994/Background-information-on-nationality-v1.0EXT.pdf (accessed 11 October 2017). The guidance says on its face that it was published 'for Home Office staff' on 27 July.

3 How does nationality integrate? Paper for the 2nd European Conference on Nationality, 8–9 October 2001.

4 Immigration, Asylum and Nationality Act 2006, s 58 Acquisition of British Nationality & c

5 Ending gender discrimination in nationality laws, UNHCR press release 18 June 2017, available at http://www.unhcr.org/uk/news/press/2014/6/53a15cc56/ending-gender-discrimination-nationality-laws.html (accessed 21 September 2017).

6 See http://equalnationalityrights.org/about-us (accessed 21 September 2017) and 'Ensuring gender equal nationality laws is key to ending statelessness', Catherine Harrington, 15 January 2015, available at http://www.statelessness.eu/blog/ensuring-gender-equal-nationality-laws-key-ending-statelessness (accessed 30 September 2017).

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Article 9 of the UN Convention on the Elimination of All Forms of Discrimination against Women[7] not only requires States to afford women equal rights with men to acquire, change or retain their nationality, it also requires that they be afforded equal rights with men with respect to the nationality of their children. Like the other articles of the UN Convention on the Rights of the Child,[8] art 7, the right of the child to acquire a nationality, must be applied without discrimination, including on the grounds of sex or other status. It is arguable that the recognition of the rights of women to pass their nationality to their children has been a catalyst for the acceptance of dual nationality, even in times when concerns of national security might seem to point the other way.[9] It is against this background that the discrimination in nationality law, as a result of differential treatment according to gender and marital status in the past, has received increasing scrutiny.

Discrimination and the right of abode

British nationality law splits off what other countries would regard as integral to a nationality: the right to enter, remain in, leave and return to, one's country of nationality, into a separate concept, 'the right of abode'.[10]

Section 2 of the Immigration Act 1971, as originally enacted, afforded a right of abode to citizens of the UK and Colonies born, registered, naturalised or adopted in the UK,[11] or who had a parent,[12] or grandparent[13] (as defined),[14] who fulfilled these conditions, as well as to Commonwealth citizens with a citizen of UK and Colonies parent who fulfilled these conditions.[15] It also made provision for citizens of the UK and Colonies on the grounds of residence in the UK[16] and for Commonwealth citizen women on the grounds of their marriage to a citizen of the UK and Colonies.[17] That right of abode, in turn, was determinative of whether a citizen of the UK and Colonies became a British citizen on commencement of the British Nationality Act 1981.[18]

As is explained in the parts that follow, gender and the marital status of a parent could affect both whether a person was a citizen of the UK and Colonies and whether they had a right of abode. The roots of the present-day effects of historical discrimination lie deeply buried and are difficult to excavate.

Section 2(2) of the Immigration Act 1971, as originally enacted, required only that a Commonwealth citizen woman had at some time in the past been married to a citizen of the UK and Colonies with a right of abode, for her to retain her right of abode. It is preserved by s 2(2) of the Immigration Act 1971, as substituted by the British Nationality Act 1981.[19]

7 UN Treaty Series vol 1249, p 13.
8 UN Treaty Series, vol 1577, p 3.
9 See eg the discussions of amendments and questions tabled by Lord Marlesford at HL Deb, 9 Feb 2016, col GC155; HL Deb, 9 February 2009, col WA 167; HL Deb, 12 January 2009, col 117W; HL Deb, 11 Feb 2009, col 1158HL; HL Deb, 11 Dec 2013, col WA127-8; HL Deb, 7 Apr 2014, col 1202; HL Deb, 6 April 2014, col 1199ff; HL Deb, 9 Feb 2016, col GC157-159.
10 Immigration Act 1971, s 2.
11 ibid s 2(1)(a).
12 ibid s 2(1)(b)(i).
13 ibid s 2(1)(b)(ii).
14 See Immigration Act 1971, s 2(3).
15 ibid s 2(1)(d).
16 ibid s 2(1)(c).
17 ibid s 2(2).
18 British Nationality Act 1981, s 11.
19 ibid s 39(2) (read with s 52(7) and Sch 8).

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Thus, Commonwealth citizen women could find themselves retaining a right of abode in circumstances where their husband did not, for example, because he had lost his citizenship of the UK and Colonies as part of an independence settlement. It would be possible to amend the Immigration Act 1971 to make provision for a Commonwealth citizen man who had at any time been married to a female citizen of the UK and Colonies to be afforded a right of abode. It might be argued that the differential treatment could be eliminated by removing this advantage for women, but art 9(1) of the UN Convention on the Elimination of Discrimination against Women provides that change of nationality by the husband during marriage shall not automatically change the nationality of the wife, and it can be argued that the right of abode should be treated in an analogous manner because it is so integral to the notion of a nationality. The provision is an example of how attempts to address discrimination in another political and historical context, may give rise to differential treatment the justification for which is now difficult to discern.

Section 4C of the British Nationality Act 1981

Prior to 1 January 1983, in British nationality law women could not pass on their nationality to children born overseas.[20] This was addressed for children born on, or after that date, by s 2(1) of the British Nationality Act 1981.[21] In the Nationality, Immigration and Asylum Bill of session 2001 to 2002, the Government acceded to representations made by Lord Avebury,[22] and made provision for a new s 4C of the British Nationality Act 1981,[23] giving certain children born overseas to British mothers on or after 7 February 1961, and before 1 January 1983, the right to register as British citizens. The mechanics of the section were that the applicant had to be born within the relevant dates and prove that they could have become a citizen of the UK and Colonies under s 5 of the British Nationality Act 1948, had that section provided for citizenship by descent from a mother (who would subsequently have had the right of abode in the UK by virtue of s 2 of the Immigration Act 1971) in the same terms as it provided for citizenship by descent from a father.

Section 5 of the 1948 Act provided for a child, wherever born, of a father who was a British Citizen otherwise than by descent, to be born British. If the father was a British citizen by descent, s 5 required that one of four conditions (a) to (d) must be met. These pertain to (a) the child, or the father, being born in a place where the sovereign has, or had, jurisdiction over British subjects; or (b) for a child not born in such a place for the birth to have been registered with a UK consulate within a year of its occurrence; (c) that the father of the child was in Crown Service at the time of the birth, or (d) that the child was born in Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, where a citizenship law had taken effect, but the child had not become a citizen of one of those countries.

The significance of the 7 February 1961 date was that persons born after that date had come within the scope of a policy introduced on 7 February 1979, to register by discretion, children born overseas to British mothers who had faced discrimination on the grounds of the gender of their British parent.[24] Lord Filkin was pressed by Lord Avebury to remove the

20 British Nationality Act 1948, s 5(1).
21 Read with s 50(9) to (9C), as amended.
22 See HL Deb, 8 July 2002, vol 637, cols 476–477; HL Deb, 9 October 2002, vol 639, col 267.
23 Inserted by s13(1) of the Nationality, Immigration and Asylum Act 2002 as of 30 April 2003 (SI 2003/754).
24 See Fransman's British Nationality Law (3rd edn, Bloomsbury Professional) s 17.7 and note 65.

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7 February 1961 cut-off[25] and responded, echoing the Federal Court of Appeals in the Joseph Taylor case, 'One can only go so far towards righting the wrongs of history before the number of "what ifs" to be taken into account becomes unmanageable'.[26]

Lord Filkin appears to be complaining of the difficulties for the legislature in making provision for the myriad consequences of past laws. Here the courts have the advantage over the legislature as they are asked to apply legal principles to a particular factual situation and can concentrate on a particular effect of legal provision, tracing its consequences to the present day, without having to envisage all possible effects.

Section 4C as originally enacted provided for registration as of right, and, following a direct appeal from Michael Tuberville of the CAMPAIGNS[27] group promoting the change in the law to the Rt Hon Theresa May MP,[28] no fee was payable.[29] The Explanatory Memorandum to the Immigration and Nationality (Fees)(No2) Regulations 2010 (SI 2010/2807) gives as its rationale equal treatment with those born to British fathers:

> '7.17 We propose introducing a fee waiver where a person makes an application for a Nationality registration in reliance upon section 4C of the British Nationality Act 1981 to better align the position of those applicants to that of applicants born to British fathers Registering [sic.] as British Citizens.'

In 2006, the ease with which David Hicks, then detained in Guantanamo Bay, registered under s 4C was one of the spurs to an introduction of a 'good character' requirement for all registrations.[30] The implications of this for the use of registration to right historical wrongs are discussed below.

On 31 March 2008,[31] David Davies MP raised the case of Ms Deborah Philips, a constituent affected by the February 1961 cut-off date.[32] In response, the Minister, Liam Byrne MP, cited Lord Filkin's comment about only going so far to right the wrongs of history without challenging it, but 'nevertheless' committed to a legislative solution. The 2008 document *Making change stick: an introduction to the immigration and citizenship bill*[33] confirmed the intention. It gave no further explanation of the rationale, but the confirmation sits under a subheading 'Fair rights to citizenship'. Arguably, it was felt that no rationale was needed. Mr Phil Woolas MP, the Minister, introducing the clause that removed the cut-off date[34], declared:

25 Lord Avebury had tabled a version of the amendment without the cut-off date, Amendment 88, see HL Deb, 8 July 2002, vol 637, col 476. The author and Laurie Fransman QC worked closely with him on these attempts and advocating tabling amendments both with and without the cut-off date.

26 HL Deb, 31 October 2002, vol 637, col 298, Nationality, Immigration and Asylum Bill, Third Reading.

27 Children and Maternal Parents Against Immigration and Nationality Situation.

28 Personal communication to the author. Mr Turberville's email was bold and memorable in its conversational tone, but did the trick. More detail can be found on the CAMPAIGNS page of www.turberville.org (accessed 30 September 2017).

29 Immigration and Nationality (Fees) (No2) Regulations 2010, SI 2010/2807, para 22.3.

30 Immigration, Asylum and Nationality Act 2006, s 58 Acquisition of British Nationality & c. See Secretary of State for the Home Department v David Hicks [2006] EWCA Civ 400.

31 HC Deb, 31 March 2008, vol 474, cols 601–6.

32 I am grateful to Ms Philips' lawyer, Trevor Wornham, for alerting me to the parliamentary question.

33 UK Border Agency 2008, available at http://webarchive.nationalarchives.gov.uk/20100406060916/http://www.ukba.homeoffice.gov.uk/managingborders/simplifying (accessed 16 September 2009).

34 Clause 46 of Bill 83, session 2008–2009.

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> 'We concur with the other place, again, on this point about descent through the female line, and we accept that we should right that wrong... At the moment there is a cut-off date of 1961, but we are righting that wrong.'[35]

The restriction was removed, but at a price.[36] In the new s 4C, a much more restrictive approach was taken to registration, purporting to reflect the experience and policy of the Nationality Directorate of the Home Office in dealing with applications between 2003 and 2009.[37] For example, the new s 4C required that where acquisition would not have been automatic had the child been born to a British father, then the mother had to have fulfilled all the steps that a father would have had to fulfil. Challenging the restrictive elements of the redraft, Lord Avebury drew attention[38] to art 9(2) of the UN Convention on the Elimination of All Forms of Discrimination Against Women. This provides: 'States Parties shall grant women equal rights with men with respect to the nationality of their children.' He also drew attention to the UK's reservation to that Article which continued in force until it was withdrawn on 22 March 1996:

> 'The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.'

Lord Brett, for the Government, indicated that the reservation was not 'linked to this clause'[39] but Lord Avebury doubted this, given the terms of the reservation.

The draft did recognise and attempt to deal with further provisions of the 1948 Act under which discrimination might have bitten: ss 12(2) (3)(4) or (5) read with s 5.

At Lords' Report stage of the Bill that became the Immigration Act 2014, Lord Avebury sought to tackle discrimination against the second generation born outside the UK where the British grandparent was a woman. He explained:

> 'Before 1983, a person born abroad to a British father automatically became a British citizen by descent. In certain cases, the children of a citizen by descent also became citizens by descent, automatically or conditionally. So, for example, a person born outside the UK and colonies or, before 1949, outside Her Majesty's dominions, and whose father was also so born, was a citizen by descent if his paternal grandfather was born in the UK. However, a person born abroad to a British mother and a foreign father had no right to UK citizenship, until this anomaly was dealt with for the first generation in the Nationality, Immigration and Asylum Act 2002 by the insertion of Section 4C in the British Nationality Act 1981.

35 HC Committee 11 June 2006, col 126.
36 See Borders, Citizenship and Immigration Act 2009, s 45 Descent through the female line, inserting new s 4C into the British Nationality Act 1981.
37 Communication from the Home Office to the author.
38 HL Deb, 2 March 2009, col 610.
39 ibid col 608.

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> However, there remains discrimination in the next generation. A person born abroad before 1983, whose maternal grandfather was born in the UK, so that her mother born abroad was also British, has access to British citizenship through registration under Section 4C. Yet the person whose maternal grandmother was born in the UK, and whose father or mother born abroad did not acquire British citizenship, has no right to UK citizenship. To put it simply, there is discrimination in our law according to whether your grandfather or grandmother was British by birth, all other circumstances being the same.'[40]

In some respects, this may be an unduly restrictive reading of s 4C. It assumes that the section does not permit the substitution of mother for father in s 5(1) of the 1948 Act, and in those places in s 5(2) where reference is made to the grandparent. The point is, however, well made as far as grandparents born before the commencement of the 1948 Act are concerned and this will have been the case for many of them.[41] The amendment was rejected, and once again the debate turned to righting the wrongs of history:

> Lord Taylor of Holbeach… 'I reiterate the point that was made when this issue was debated in the past: we can only go so far to right the wrongs of history. The original intention of Section 4C was to cater for the children of UK-born women, but the current legislation affects all children of British women. However, we think that there would be difficulties in extending this further to cover the grandchildren of British women as that could result in even more complexities. I think that my noble friend will recognise the complexity of the law in this area.'

Lord Avebury responded with the comment cited at the beginning of this paper.

The requirement to meet the condition imposed by s 5(1)(b) of the 1948 Act - registration at a British consulate, was tested in the case of Shelley Elizabeth Romein,[42] on its way from the Inner House of the Court of Session to the Supreme Court at the time of writing. The restriction that had prevented Ms Romein from registering under s 4C was that her mother had not registered her birth during her first 12 months of her life at the British consulate in Johannesburg, where the family lived, under s 5 of the British Nationality Act 1948. But Shelley Romein's mother provided evidence that she had indeed approached the consulate about registering the birth of her daughter, only to be told that because she was a woman, it would serve no purpose.[43] The Court of Session took a purposive approach to the construction of the section:

> 'Both parties were agreed that a purpose of the 1981 Act, as subsequently amended in terms of both the enactments of section 4C, was to reduce gender discrimination in the acquisition of citizenship. We accept that achieving that purpose retrospectively may introduce practical difficulties and that Parliament may reasonably have accepted an

40 Amendment 57E, HL Deb, 7 April 2014, col 1205.

41 See references to 'after the commencement of this Act' in s 5 of the 1948 Act and references to being a British subject 'immediately before the date of the commencement of this Act' in s 12 of the 1948 Act. The references in s 4C (3A)(b) and (3B)(b) to 'the applicant' do not limit the scope of subs (3A)(a) and (3B)(a) which encompass a grandparent.

42 [2016] CSIH 24. See https://www.scotcourts.gov.uk/search-judgments/judgment?id=1ac50fa7-8980-69d2-b500-ff0000d74aa7 (accessed 16 September 2017). I am grateful to Darren Stevenson of McGill and Co, solicitor in the case, for alerting me to it at any early stage and sharing his analysis of it.

43 Paragraph 2 of the judgment.

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> imperfect legislative outcome. Nevertheless, given the accepted purpose, as reinforced by the international obligation, we would see that the intention of Parliament is more likely to have been to achieve a greater rather than a lesser degree of reduction in discrimination.'[44]

The court analysed the section, following counsel's suggestion, in terms of counterfactuals, the 'what ifs' of which Lord Filkin had complained when urged by Lord Avebury to right the wrongs of history. The first, a legal counterfactual, that the 1948 Act provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father. The second: 'what would have been done by the applicant's parents had the law actually been as the first counterfactual assumes it to have been'.[45]

The court held the question of registration was a matter of proof of the balance of probabilities in the same way as those requirements (a), (c) and (d) of s 5(1) which were matters of historical fact: 'Each of the exceptions is a set of factual circumstances which, if disputed, would have to be established on a balance of probabilities as a matter of fact.'[46]

The applicant for registration under s 4C who needs to rely on the counterfactual of registration of the birth must prove that the birth would have been registered had s 5 of the 1948 Act provided for citizenship by descent from a mother or a father in the same terms. There is no assumption that a British mother by descent would have registered her child's birth, but it is open to her to prove that she would have done so.

The court's analysis both addresses and illustrates the complexities of the task of attempting to tease out the present-day consequences of historical provisions. The court does not become the instrument for re-writing history, but applies the re-writing achieved by Parliament to the facts of the case. The burden of proof, which is on the applicant, is not easy to discharge, although there appears to be every prospect that Ms Romein will succeed in so doing.

Rather than using only broad constitutional principles to right historical discrimination, the court was applying the detailed provisions of a statute, albeit that it takes a purposive approach to construction. The evidential burden is entirely on Ms Romein and the Government labours under no unbearable burden.

Section 4C, even as originally enacted, did not put those born to British mothers in the same position as those born to British fathers. The decision to require registration at all was taken on the basis that some persons would not wish to be British citizens; in some cases automatic acquisition of British citizenship could lead to automatic loss of another nationality. Others might already have acquired it by the time the provisions came into force.[47] This approach was not contested by those lobbying and advising on the 2002 Act. But it means that, for example, children born in the UK prior to registration of the parent are not born British,[48] and the use of the registration route has made it possible to impose additional requirements.

Even if the Supreme Court upholds the decision of the Inner House of the Court of Session in Romein, children born to British mothers before 1 January 1983 are not put in the same position as those born to British fathers. They must establish their good character and, in appropriate cases, satisfy a court of what a parent would have done many years before. Section 4C does not right historical wrongs for all those now living, or for future generations.

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44 Paragraph 30 of the judgment.
45 Paragraph 18.
46 Paragraph 24 of the judgment.
47 See Fransman (n 23)17.7.1 referring to a Home Office letter of 4 August 2010 setting out this rationale.
48 The section confers British citizenship by descent, therefore children born outside the UK would not be born British, even after registration: see the British Nationality Act 1981, s 2 (1)(a).

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Posit a man born in Argentina in 1960 to a British mother. He does not register. He has children with his Argentinian wife, one of whom is born in the UK in 1985 while they are studying there. The child is not born British because neither parent is British or settled at the time of the birth. The subsequent registration of the father will enable the child to register if still a child, but once the child is past the age of 18 the registration of the father will make no difference to the situation of the child, whereas had the father been British at the time of the child's birth, the child would have been British otherwise than by descent. Were the child British otherwise than by descent, the child's child would then have been British, whether born in the UK or overseas, and, in the former case, could have passed their nationality to their children.

The Chagos Islanders

The effect of not allowing women to pass on their nationality to children born overseas was particularly keenly felt in the case of the Chagos Islanders. In April 1969, the Chagos Islanders lost the right to reside on the British Indian Ocean Territory, a creation from islands of Mauritius and the Seychelles on 8 November 1965, with a view to the territories' eventual lease to the United States.[49] At the time of their exile, they, like other citizens of the UK and colonies, could acquire such citizenship by birth on the territory of the UK and its remaining colonies, and men could transmit it to the first generation born overseas. As a result of exile there was no prospect of a child being born on the territory of the islands, the newly created 'British Indian Ocean Territory'. Mauritius achieved independence from the UK on 12 March 1968, the Seychelles on 29 June 1976. From those dates they sat outside the UK and colonies, the latter renamed 'dependent territories' in the British Nationality Act 1981.[50] Like other citizens of the UK and Colonies, Chagossian women could not pass on their nationality to children born outside the UK and Colonies. The only means by which their children would be born British, was if the children were born on mainland UK, or, from 21 May 2002,[51] in one of the 'qualifying territories' under the British Nationality Act 1981. But exile deprived them of the opportunity to have their children on the British Indian Ocean Territory.

An amendment was proposed to the British Overseas Territory Act 2002. The result is now s 6 of that Act: The Ilois: citizenship. It provides for a child who is neither a British citizen nor a British Overseas Territories citizen, born between 26 April 1969 and January 1983 to a mother who was a citizen of the UK and Colonies by virtue of her birth in the territory now identified as the British Indian Ocean territory, to take the British citizenship of the mother and to become a British Overseas Territories Citizen, as of the commencement of the section.

The patch that is s 6 has been criticised as imperfect by those who identify as Chagossians exiled before 26 April 1969, including women who went to the mainland to give birth.[52] Thus there were children born outside the territory as a result of exile before that date. Section 6 has also been inadequate to deal with the long exile of the Chagossians. The children who became British citizens by operation of the section, like the children born in exile to Chagossian fathers,

49 British Indian Ocean Territories Order 1965 (SI 1965/19). See R v Secretary of State for Foreign and Commonwealth Affairs ex p Bancoult [2001] 2 WLR 1219, para 17 and R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] 3 WLR 955, para 6.

50 British Nationality Act 1981, s 50 read with sch 6.

51 British Nationality Act s 1(1), as amended by the British Overseas Territories Act 2002, s 5, Sch 1, para 1(1), (2) as of 21 May 2002 (SI 2002/1252).

52 See Chagos Islanders v Attorney General and Her Majesty's British Indian Ocean Territory Commissioner [2003] EWHC 2222(OB) at para 26 and appendix A paras 128 to 130.

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are British citizens by descent. They cannot pass on their nationality to children born outside the UK and the qualifying territories. The second generation of Chagossians born in exile are not British Citizens, or British overseas territories citizens.

The nationality law consequences of exile will persist even beyond the date of any return to the islands. For some, they have been ameliorated by new ss 4E to 4J of the British Nationality Act 1981, which have permitted children whose British citizen fathers were not married to their mothers at the time of their birth, to register as British (see discussion below). The generations born overseas, assuming that they too are one day permitted to go to the islands, may be able to naturalise, but this will depend upon meeting the requirements for naturalisation and payment of the substantial fee.[53]

The plight of the second generation of Chagossians results not from unlawful discrimination under current laws, but from treatment that is now condemned, even if its consequences have yet to be addressed. The courts have not proven a tool for righting the wrongs of history done the islanders by exile. R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs ([2008] UKHL 61, [[2008] 3 WLR 955) was an unsuccessful challenge to s 9 of the British Indian Ocean Territory (Constitution) Order 2004, enforcing the exclusion of the islanders from the territory. Finding for the Government, Lord Hoffmann recorded that 'it is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous disregard of their interests.'[54] Lord Rodgers described what had happened as 'in many ways, disgraceful'. Lord Carswell described the Chagossians as having been treated very shabbily, but held that righting the wrongs of history was not the task of the court:

> 'It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to a party who has been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially – in the words of the Book of Common Prayer, truly and indifferently minister justice.'[55]

Lord Bingham and Lord Mance dissented, and found for the islanders. Lord Bingham, inter alia, relied on the right to enter one's own country citing *Van Duyn v Home Office* (Case 41/74).[56] That right is protected by art 3(2) of Protocol 4 to the European Convention on Human Rights, which the UK signed on 16 September 1963, prior to the exile of the Chagossians, but has never ratified.

The situation of the islanders is, in microcosm, that of those citizens of the UK and Colonies who were deprived of the right to enter the United Kingdom by the Commonwealth Immigrants Acts of 1962 and 1968. As discussed at the beginning of this article, only those citizens of the UK and Colonies who retained a right of abode in the UK became British citizens under the British Nationality Act 1981;[57] the others, while they might retain a form of British nationality, became subject to immigration control. In 2002, with the abolition of the special voucher scheme,[58] attention focused on those with no nationality or citizenship other than a form of British nationality which gives no right of abode. The special voucher scheme dated from the

53 The Immigration and Nationality (Fees) Regulations 2017, s 2017/515, Sch 8, para 2 at 19.1. The fee for naturalisation is now £1,202.
54 Paragraph 10.
55 Paragraph 136.
56 [1975] Ch 358, 378–379, see para 70 of Bancoult (No.2).
57 British Nationality Act 1981, s 11(1).
58 HC Deb, 5 March 2002, vol 381, col 161W.

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commencement of the Commonwealth Immigrants Act 1968. It provided an annual quota of vouchers, issued on a discretionary basis, to heads of household who were British Overseas Citizens, British subjects and British Protected Persons, whose situation was precarious in the country in which they were living, and who had no other nationality or citizenship, and no other country to which to turn.[59] They had to intend to settle in the United Kingdom and were excluded if they had voluntarily renounced a second citizenship. Dependants were required to apply for entry clearance. Such persons had no country in the world where they could claim the rights normally associated with citizenship, including, as set out in art 3 of Protocol 4 to the European Convention on Human Rights, the right to enter the state of which they are nationals. The UK has signed Protocol 4,[60] which, as described above, the UK has yet to ratify. It is arguable that such persons are stateless. Article 1 of the 1954 UN Convention on the status of stateless persons, defines a stateless person as one registered as a national by any State by operation of its law. If one considers that recognition as a national entails according a right to enter or remain, then these persons are stateless. This is not the view taken by UK law: Sch 2 Statelessness to the British Nationality Act 1981 makes provision for certain persons with no other nationality or citizenship to be registered with a form of British nationality, including those forms that carry no right of abode, and treats this as lifting them out of statelessness.

There was a push during the passage of the Bill that became the Nationality, Immigration and Asylum Act 2002 to make provision for those who had lost the opportunity to apply under the special voucher scheme. This resulted in s 12(1), inserting s 4B into the British Nationality Act 1981. This allows such persons, on proof of a negative, that they hold no other nationality or citizenship, to upgrade to British citizenship. It is the closest that the UK has come to acknowledging that these forms of nationality are not true nationalities at all. As with the elimination of discrimination on the grounds of gender, or of the marital status of the parents, the provision was seen as righting historical wrongs. The Home Secretary, the Rt Hon David Blunkett MP, declared: 'We are talking here about righting an historical wrong, in terms of what happened back in the late 1960s and early 1980s in regard to British overseas citizens, protected persons and British subjects'.[61] But the 'historical wrong' is far greater than he acknowledges, for those who had another nationality or citizenship in addition to their British one, nonetheless lost their rights to enter, remain, leave and re-enter, the UK and the effects of that loss continue until the present.

Section 4B itself discriminated, against British Nationals (Overseas), who were omitted from it. These are persons who were British dependent territories citizens by virtue of a connection with Hong Kong and for no other reason and were, for a limited period, to register as British Nationals (Overseas) under art 4 of the Hong Kong (British Nationality) Order 1986.[62] Different reasons were given for their omission at different times. At the time of the passage of the Act, relations with China were cited.[63] In 2006, when attempts were made to amend the section during the passage of the Immigration, Asylum and Nationality Bill, the reason given was that British Nationals (Overseas) were in a less precarious position in their

59 For the full criteria, see the Nationality Instructions until 27 July 2017, Vol 2, Pt 2, East African Asians, now archived at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632319/eastafricanasians.pdf (accessed 26 September 2017).

60 16 September 1963.

61 HC Deb, 5 November 2002, col 147.

62 SI 1986/948. See further Home Office Nationality Guidance British Nationals (Overseas) v 1.0, 14 July 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633109/british-national-overseas-v1.0.pdf (accessed 26 September 2017).

63 Personal communication from the Home Office to the author and Lord Avebury.

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countries of residence than those benefiting from s 4B.[64] By the time of Lord Goldsmith's 2008 review of citizenship, Citizenship: our common bond, the rationale had crystallised into:

> 'I am advised that this would be a breach of the commitments made between China and the UK in the 1984 Joint Declaration on the future of Hong Kong, an international treaty between the two countries; and that to secure Chinese agreement to vary the terms of that treaty would not be possible.'[65]

Lord Goldsmith said in his review: 'The only option which would be characterized as fair would be to offer existing BN(O) holders the right to gain full British citizenship'.

The Government dropped its opposition to the inclusion of British Nationals (Overseas) in the course of horse-trading over the provisions of the Borders, Citizenship; and Immigration Act 2009, and Lord Avebury's amendment to include them was carried with the full support of the Government and the particular support of the Minister taking the Bill through the Lords, Lord Brett.[66]

Sections 4e to 4i of the British Nationality Act 1981

In the UK, s 9 of the Nationality, Immigration and Asylum Act 2002 provided for the equal treatment of children, regardless of the marital status of their parents. It only came into force four long years later, on 1 July 2006, for children born on, or after, that date.[67] In the meantime s 3(1) of the British Nationality Act 1981 was used to register those children waiting for the coming into force of s 9.[68] Section 3(1) continued to be used after 1 July 2006 for children born before that date, but the over-10s registering under it were, from 4 December 2006,[69] subject to a good character test.[70]

Those who had already attained adulthood were shut out. Attempts were made to persuade the Government to address this in 2009, arguing by analogy with attempts to address discrimination against women, discussed above.[71] The reason given for rejecting the amendments then was the discretionary power under s 3(1) to register children.[72] That this was of no assistance to adults was not, although the point had been put, addressed.

In 2014, Dr Julian Huppert returned to the question of legitimacy at Committee stage of the Immigration Bill.[73] The then Minister, Mr Mark Harper MP, acknowledged the anomaly and indicated that the Government might look favourably on a private members' Bill on the topic, but said that the matter was outside the scope of the Bill. That view changed when, at report stage in the House of Commons, the Government introduced an amendment

64 HL Deb, 14 March 2006, col 1197 per the Baroness Ashton of Upholland.
65 The reasons for doubting this are discussed in the Immigration Law Practitioners' Association 25 February 2009 briefing for Amendment 90 to part 2, Citizenship, of the Borders, Citizenship and Immigration Bill, in the names of Lord Avebury and Lord Wallace of Saltaire.
66 Hansard HL Deb, vol 709, cols 1082ff and see also the letters of Lord West of Spitfield to the Baroness Hanham of 14 March 2009 and of Lord Brett to Lord Avebury of 20 March 2009. See further Harvey, 'The Borders, Citizenship and Immigration Act 2009' (2010) 24 IANL 113–133.
67 Nationality, Immigration and Asylum Act 2002 (Commencement No 11) Order 2006 (SI 2006/1498).
68 Nationality Instructions, Volume 1, Chapter 9, until 27 July 2017.
69 Immigration, Asylum and Nationality Act 2006, s 58, commenced 4 December 2006 by SI 2006/2838, art 4(1) (with art 4(2).
70 ibid.
71 See, for example, Borders, Citizenship and Immigration Bill Amendment 99, in the name of Lord Avebury ***.
72 Letter of Lord Brett to Lord Avebury 20 March 2009.
73 Public Bill Committee, sixth sitting, 5 November 2014, cols 176–179.

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that allowed for deprivation of citizenship resulting in statelessness.[74] The Immigration Law Practitioners' Association and others protested, with reference to the debate on Dr Huppert's amendment, that the matter was outside the scope of the Bill,[75] but it had made it past the Public Bills Office and neither House chose to test the point.

While the deprivation of citizenship provisions threatened to be all-consuming, the author was prompted by Solange Valdez[76] of the Project for the Registration of Children as British Citizens, and Sue Shutter working with the project, to press for a change to the law on legitimacy, reviving the point made by Dr Huppert. It was suggested to Lord Avebury that, in view of the positive reception Dr Huppert had received, to press the matter again in no way compromised the coalition agreement with the Conservative party. Despite views expressed to him that the attempt was doomed to failure and would only annoy the Government with whom the Liberal Democrat party was in coalition, Lord Avebury took up the challenge at Lords' Committee.[77] To his surprise and that of all, but with hindsight perhaps because of the inconsistency of the Government's position, his amendment received a favourable reception and parliamentary counsel were set to work in the short time left to come up with a legislative solution.[78] Various different approaches were tried, with the solution that is now ss 4E to 4I of the Immigration Act 2016 carrying the day.

The provisions take a different approach to those who would have been born British had their fathers been married to their mothers, and to those who could have registered as British had their fathers been married to their mothers. Both must meet a good character test and may be required to prove paternity. While in the case of the latter, it is also necessary to fulfil all the other requirements for registration. What this means in practice is that the person must still be a child at the time of the application for registration. While the approach in many ways mirrors that taken in s 4C, as redrafted in 2009, the consequences are to shut out those most in need of the registration provision: adults, for it is open to those who are still children to apply to register under s 3(1) of the 1981 Act.

Adoption

Before leaving a discussion of the status of children depending on the marital status of their parents, it is worth pausing to observe that the British Nationality Act 1981 also discriminates against adopted children. Section 3(2) of the Act, which makes provision for the registration of children as British on the basis of their parent's residence in the UK prior to their birth, requires that the father or mother of the child be a British citizen by descent at the time of the birth. Section 3(5) (a) requires that at the time of the applicant's birth, 'his father or mother was a British citizen by descent'. Section 50(9) of the Act defines the mother as the person who gives birth to the child, and s 50(9A) identifies the father as her husband, going on to provide alternatives where this does not yield a result. Thus the nationality of the parents of the adopted child will determine whether or not they can register under these provisions.[79]

74 New Clause 18: Deprivation of Citizenship: conduct seriously prejudicial to the vital interests of the UK, HC Deb, 30 January 2014, col 1026.
75 See the Immigration Law Practitioners' Association briefing to New Clause 18 of 29 January 2014.
76 Now Solange Valdez-Symonds.
77 Amendment 79G, HL Deb, 19 Mar 2014, col 179.
78 ibid cols 181–182.
79 I am grateful to Marie-Christine Allaire-Rousse of South West Law for identifying this discrimination.

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Good character

In 2006, a Government stung by the David Hicks case[80] and needing to act in response to the 7 July 2005 bombings in London, imposed a good character test on all those registering as British citizens under s 4C of the British Nationality Act 1981 and other provisions of British nationality law.[81] David Hicks was an Australian, born to a British mother, detained in Guantanamo Bay. With Australia failing to defend him from appearance before a US military commission, he attempted to acquire British nationality, divest himself of Australian nationality and hold on to his British nationality as, at the time,[82] persons could not be deprived of British nationality where this would leave them stateless. The Secretary of State originally sought to refuse to register him on character grounds, but Mr Justice Collins quashed this decision on 13 December 2005 because the section made no provision for this.

Section 58 of the Immigration, Asylum and Nationality Act 2006 Act imposed a good character test on all registrations, with the exceptions of children under 10 years old,[83] in cases of statelessness[84] and in cases under s 4B of the British Nationality Act 1981.

The imposition of a good character test has introduced a new, discretionary element into registration under provisions such as s 4C, which were designed to address discrimination. Character has always been irrelevant to whether a baby born outside the UK to a British father, or a baby born to married parents, is British, albeit that it can found deprivation of citizenship under s 40 of the British Nationality Act 1981. Some persons are shut out from registration under s 4C, or under the provisions on legitimacy by the good character test, and thus discrimination persists.

The inclusion of the good character requirement was the subject of a challenge in R (Johnson) v Secretary of State for the Home Department ([2016] UKSC 56). No application had ever been made to register Mr Johnson, born out of wedlock to a British father in Jamaica, but who had lived in the UK since the age of four years. Had an application been made while he was still a child, it would have been Home Office policy to grant it.[85] By the time of the case, Mr Johnson was shut out from registration under the provisions inserted by the 2014 Act because he could not meet the good character test, having by that time a lengthy criminal record, which included grave crimes. That criminal record was the basis of the Secretary of State's decision to deport Mr Johnson. He challenged this as a breach of his rights under art 14 of the European Convention on Human Rights read with art 8, as unjustifiable discrimination based on his birth outside wedlock.

In R Johnson) v Secretary of State for the Home Department ([2014] EWHC 2386 (Admin)) Judge Dingemans found for Mr Johnson, but the Court of Appeal ruled against him and in favour of the Secretary of State.[86] The Court of Appeal held that the discrimination 'began and

80 Secretary of State for the Home Department v David Hicks [2006] EWCA Civ 400.

81 Immigration, Asylum and Nationality Act 2006, s 58 Acquisition of British Nationality & c. The provisions were subsequently consolidated into the British Nationality Act 1981, s 41A. Section 41A was inserted (13 January 2010) by the Borders, Citizenship and Immigration Act 2009, ss 47(1), 58; SI 2009/2731, art 4(f).

82 Before the coming into force of s 66 of the Immigration Act 2014, amending s 40 of the British Nationality Act 1981.

83 The Bill that became the Immigration, Asylum and Nationality Act 2006 was taken through the House of Lords by the then Minister for Children, the Baroness Ashton of Upholland. The author and others met with her and she was persuaded that the requirement was both foolish, for example in the case of babies under 12 months old, one of the registration provisions (s 3(2) of the British Nationality Act 1981) as then in force and inappropriate, for example in the case of children under six registering under that provision. The age of 10 was selected as the age of criminal responsibility in the UK.

84 Cases under Sch 2 to the British Nationality Act 1981.

85 R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56, para 3.

86 R (Johnson) v Secretary of State for the Home Department [2016] EWCA Civ 22.

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ended' on his birth, which took place prior to the Human Rights Act 1998 coming into force,[87] and had no continuing effect capable of being a violation of the Convention.[88] The Supreme Court disagreed.[89] It focused not on Mr Johnson's failure to become a British citizen, but on the effect of that under current UK law:

> 'The Court of Appeal held that the denial of automatic citizenship was a "one off" event that happened at birth and had no continuing effect capable of being a violation of the Convention rights. For example, in Posti and Rahko v Finland (2002) 37 EHRR 158, the restriction on the applicants' right to fish in state-owned waters, imposed by a decree in 1994, obviously continued to limit their fishing, but was a single event and their complaint was out of time. However, the court reiterated that "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the state to render the applicants victims" (para 39). Thus, in Norris v Ireland (1988) 13 EHRR 186, it was held that the very existence of legislation penalising homosexual acts "continuously and directly" affected the applicant's private life, despite the fact that he had neither been prosecuted nor threatened with prosecution. In this case, the denial of citizenship has a current and direct effect upon the appellant who is currently liable to action by the state, in the shape of deportation, as a result.'

It held that what fell to be justified was not liability of non-citizens to deportation but:

> '…the current liability of the appellant, and others whose parents were not married to one another when they were born or at any time thereafter, to be deported when they would not be so liable had their parents been married to one another at any time after their birth.'

It held that the difference in treatment was based solely on birth status and could not be justified, relying on case law of the European Court of Human Rights including Genovese v Malta ((2014) 58 EHRR 25).[90] The Secretary of State was not entitled to certify Mr Johnson's appeal against his deportation as 'clearly unfounded' under s 94(1) of the Nationality, Immigration and Asylum Act 2002. It must be allowed to proceed and was 'certain to succeed'.[91] The case is an example of human rights law pushing back against the differential treatment inherent in so much nationality law and the arguments used in Johnson can be applied, mutatis mutandis, to the other requirements to be fulfilled by a person born out of wedlock.

The new nationality guidance on good character omits any mention of Johnson and there is no mention of the case in the guidance on registration of children of British parents, on registration of children more generally, on children of unmarried parents, or on automatic acquisition. The judgment of the Supreme Court is ignored throughout. The Immigration Law Practitioners' Association wrote to the incoming Minister, the Rt Hon Brandon Lewis MP on 12 June 2017, prior to the publication of the new guidance on 27 July 2017, to ask when and how Johnson would be given effect, and that in the meantime guidance should be amended to alert staff to its existence. At the time of writing, it had received no reply.

87 ibid [47].
88 ibid [28].
89 Ibid.
90 ibid [24] to [26].
91 ibid [34]–[35].

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That the effect of the good character requirement was to get rid of registration by entitlement was also considered in Remi Akinyemi v Secretary of State for the Home Department ([2017] EWCA Civ 236). Mr Akinyemi was born in the UK on 21 June 1983, at a time when neither of his parents were settled. His father subsequently did settle and his late mother is assumed to have done so.[92] Mr Akinyemi could, at the time when his parents settled, have been registered under s 1(3) of the British Nationality Act 1981 and from the age of 10 could have registered by entitlement under s 1(4) of that Act. But no steps were taken to register him. His right to register under s 1(3) ceased on his attaining the age of majority. The imposition of a good character requirement in December 2006,[93] meant that as an adult with a criminal record, including convictions for importing heroin, he would not pass the good character test. For those convictions, he faced deportation.

The Court of Appeal rejected the characterisation of his presence in the UK as unlawful within the meaning of s 117B of the Nationality, Immigration and Asylum Act 2002, given that his presence was in breach of no specific provision and that he had had, from the ages of four to 23, 'an absolute right at any time to acquire British nationality simply by making the necessary application.'[94] The judge below had misdirected herself as treating his presence as unlawful. The Court of Appeal was not, however, persuaded that the only possible conclusion was that Mr Akinyemi's human rights would be breached by his deportation, given his 'serious and persistent' record of offending, and the question of whether his deportation would be proportionate fell to be determined again in a rehearing de novo.

In both Johnson and Akinyemi, the courts were attempting to right the wrongs of history applying broad principles, rather than, as in Romein, detailed statutory provisions designed to right such wrongs. The courts' focus on the present-day situation, the law in the present applied properly and impartially to echo Lord Carswell in the Bancoult case, and do not become involved in judging the moral values of the past. The Government is called upon to justify the measures taken today, not those taken in the past.

We can look, for comparative purposes, to the way in which the courts of Canada have grappled with similar questions in a series of citizenship cases.[95] These have turned on the application of the Canadian Charter of Rights and Freedoms which does not have retrospective effect.[96] Benner v Canada (Secretary of State) ([1997] 1 SCR.358) concerned provisions put in place to allow those born outside Canada to Canadian mothers before 15 February 1977, before which date women could not pass on their nationality to their children born overseas, to register as Canadian. There are close parallels with the Johnson case: those registering were required to undergo a security check and to swear a citizenship oath, and it was alleged that these discriminated against them. The court held that the subject of the challenge was not the legislation that had prevented women from passing on their citizenship, but rather:

> 'The appellant's quarrel is purely with the operation of the current Act and the treatment it accords to him because only his mother was Canadian. To the extent that the current

92 Remi Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236, para 2.

93 Immigration, Asylum and Nationality Act 2006, brought into effect 4 December 2006 by SI 2006/2838, art 4(1) with art 4(2).

94 Paragraph 43 of the judgment.

95 Benner v Canada (Secretary of State) [1997] 1 SCR. 358; Dubey v. Canada (Minister of Citizenship and Immigration), 2002 FCT 582, 222 FTR 1; Wilson v. Canada (Minister of Citizenship and Immigration), 2003 FC 1475; Augier v Canada (Minister of Citizenship and Immigration), 2004 FC 613; Minister of Citizenship and Immigration v Joseph Taylor [2007] FCA 349 (Canada).

96 Benner v Canada (Secretary of State), [1997] 1 SCR 358, para 40.

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> Act carries on the discrimination of its predecessor legislation, it may itself be reviewed under s. 15, which is all the appellant has asked us to do.'[97]

In Augier v Canada (Minister of Citizenship and Immigration) ((2004) FC 613) the court held that s 5(b) of the Citizenship Act 1970 as amended, unlawfully discriminated on the grounds of race and gender contrary to the Canadian Charter of Rights and Freedoms. At the time of Mr Augier's birth, a child born outside Canada whose parents were not married to each other did not take the citizenship of his father and s 5(b), while changing the law for those born after 15 February 1977, did nothing for those in his position. The court held that the applicant was discriminated against on two grounds: the marital status of his parents at the time of his birth, and the gender of his Canadian parent. This denied him the benefit of claiming Canadian citizenship and was found to be unconstitutional.

Minister of Citizenship and Immigration v Joseph Taylor ([2007] FCA 349 (Canada)) also concerned the child of an unmarried father, but one born in 1944, before 'Canadian citizenship' was a citizenship, rather than an immigration status. The Federal Court of Appeals held that, unlike the appellants in Benner and Augier, Mr Taylor was complaining of the effects of s 4(b) of the Canadian Citizenship Act 1947, which created Canadian citizenship as a nationality, and not of provision of the Citizenship Act 'live and in force'[98] as relied upon in Augies. It held that therefore, his argument based on the Canadian Charter of Rights and Freedoms could not succeed.

Mr Taylor further contended that he was discriminated against by the provisions of the 1977 Act[99] because of his date of birth, and that this amounted to age discrimination. The Federal Court of Appeal did not agree. It held that this argument sought to read the repealed para 4(b) into the current legislation. It overturned the judgment of the Federal Court of British Colombia,[100] and found against him, highlighting the legal and evidential complexities of the approach he advocated:

> '…it would be unfair to the Parliament and to the government of that day to judge moral values of a distant past in the light of today's values. It could also be an unbearable burden on today's government to demonstrate today that the measures taken then were then justified in a free and democratic society. …All this is to suggest that courts may not be the best instruments for rewriting history.'[101]

The case did not progress to the Supreme Court of Canada because the government of Canada agreed to amend the law.[102]

The Supreme Court expressed its decision in Johnson in terms of the effect of the law and to the ultimate cause of differential treatment in the present day. It could have adopted

97 Paragraph 76 of the judgment.
98 Minister of Citizenship and Immigration v Joseph Taylor [2007] FCA 349 (Canada), para 103.
99 Paragraphs 3(1)(d) and (e).
100 Taylor v Canada (Minister of Citizenship and Immigration) [2006] FC 1053. http://www.canadianwarbrides.com/taylor-joe-bio.asp (accessed 16 September 2017).
101 Minister of Citizenship and Immigration v Taylor [2007] FCA 349 at para107.
102 Section 3(1)(b) of the Citizenship Act, as amended by Bill C-37 of 9 January 2008 allows Canadian nationality to be transmitted to the first generation born abroad, while s 3(1)(j) permits those in Mr Taylor's position to resume citizenship. See Bill C-37: An Act to amend the Citizenship Act of 9 January 2008 https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C37&Parl=39&Ses=2&source=library_prb (accessed 16 September 2017). The subsequent amendments were nonetheless criticised for preventing citizenship from being passed to the second generation born or adopted abroad to, or adopted from a foreign country by, Canadian parents.

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the approach of the Canadian courts and come to the same conclusion, pointing to the good character requirement as the offending provision 'live and in force'. The approach of the Supreme Court is potentially the more inclusive one, which could lead to extensive challenges to the discriminatory laws.

The British overseas territories

The changes to the law on legitimacy with effect from 6 July 2006 benefited both British citizens and British overseas territories citizens, because they changed the definition of a parent under the 1981 Act and thus applied equally to both. The registration provisions for those born out of wedlock, ss 4E to 4I, however, apply only in cases of registration as a British citizen. Section 4C, providing for the registration of those born overseas to British mothers, applies only where a person is registering as a British citizen. Section 5 of the British Nationality Act 1948 provides that the status of citizenship of the UK and Colonies can only pass through the paternal line to those whose fathers are married to their mothers. Thus, those whose fathers were not married to their mothers cannot benefit from s 4H of the 1981 Act. Section 4H provides for a route to registration as a British citizen for citizens of the UK and Colonies unable to become British, because it is targeted at those citizens of the UK and Colonies who did not become British citizens on commencement of the 1981 Act. But, those whose fathers were not married to their mothers were not citizens of the UK and Colonies on 1 January 1983, when the British Nationality Act 1981 came into force. Section 4I is designed as a catch all provision for those who were not citizens of the UK and Colonies on commencement of the British Nationality Act 1981, but it captures only those who would have become British citizens on the commencement of the Act had their parents been married to each other, not those who would have become British dependent territories citizens.

Lord Avebury made the case for the extension of ss 4E to 4I to the overseas territories. Lord Taylor of Holbeach responded: 'Changes to those provisions require consultation with the territories concerned and this has not been possible in the time available. …the Government will look for suitable opportunities to discuss this issue with the overseas territories once the provisions are implemented.'[103] While the UK Government has power to legislate on nationality law without the consent of the territories, it would not be politically acceptable to do so. But there is no information to suggest that Westminster has made any attempt to find suitable opportunities to discuss the provisions with the overseas territories.

Future developments

The discussion above has identified fertile ground for development of the law by agreement, as well as for challenges in the courts. Some of the changes to the law identified have already been proposed as amendments.[104] Areas ripe for development of the law include: changes to the good character requirement, building on Johnson, in reliance on art 8 of the European Convention on Human Rights, read with art 14 and, by extension, changes to onerous evidential requirements on the same basis. To permit transmission to the second and subsequent generations born overseas in the case of the Chagos islanders. Changes to enable adopted children to register under s 3(5) of the British Nationality Act 1981. Changes to make provision for subsequent

103 HL Deb, 6 May 2014, col 141 per Lord Taylor of Holbeach.

104 See for example the third sitting of the House of Lords' Committee on the Borders, Citizenship and Immigration Bill, vol 709, cols 734 to 750.

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generations who cannot benefit from a registration provision because of the death of a parent, or for whom the parent's registration comes too late. It is perhaps those areas most likely to be vulnerable to challenge on human rights grounds post Johnson that the Government might be persuaded to change the law.

Righting historical wrongs is a task of considerable complexity. As the court in Romein identified, it is necessary to grapple not only with legal counterfactuals, but what persons might have done had the law been different. Had a person been British, their spouse might have applied to naturalise as a British citizen, for example. Knowledge of current nationality and future entitlements can shape choices persons make, for example as to place of residence and counterfactuals multiply.

The more the legislature and the courts grapple with those complexities, the more arbitrary the distinctions in treatment between nationals and non-nationals come to seem. If s 2 of the Immigration Act 1971 today gives women an advantage over men that is hard to justify, it is nonetheless the wrong that was done to citizens of the UK and Colonies by stripping them of their right of abode that lies at the root of the problem. That wrong is also at the route of the element of the persisting discrimination in s 4C, that Lord Avebury sought to tackle in 2014: against the second generation born outside the UK where the British grandparent was a woman. The wrong done to the Chagos islanders is at the root of why the discrimination against women in passing on the nationality of their children matters to them. At the root of both the Johnson and the Akinyemi cases is that persons who have lived most of their lives in the UK and have family in the UK are regarded not as the UK's problem to solve, but can instead be deported with relative ease.

Registration is a means by which persons with some better claim on British citizenship are exempted, not only from the full rigours of naturalisation, but from the immigration controls to which discrimination and other differential treatment of an ancestor has made them subject. While it is nationality law that identifies that persons are not equal, it is immigration controls and laws pertaining to immigration status that give form to unequal treatment and lead to differential treatment in the present. The UK's 'hostile environment' policy has increased the reach of those controls into many aspects of daily life: employment,[105] renting accommodation, banking and driving.[106] Differences in treatment between nationals and non-nationals are too readily accepted on the grounds that immigration control justifies such differential treatment, with insufficient attention paid to how far that justification reaches. The UK's current restrictive immigration system and the barriers placed in the way of those wishing to naturalise, not the least of which is the substantial fee,[107] can only increase the focus on the present-day effects of past discrimination and on the discriminatory elements of today's laws. It is the extent of the differential treatment between nationals and non-nationals in the present that falls to be justified and to be challenged.

Alison Harvey

105 Immigration, Asylum and Nationality Act 2006, s 15 and see the Immigration Act 2016, Part 2.
106 Immigration Act 2014, Pt 3 ; Immigration Act 2014, Pt 2.
107 Supra, note 14 and Project for the Registration of Children as British Citizens and Amnesty International UK Brief on fees for the registration of children as British Citizens, 28 September 2016, revised 1 January 2017.

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