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The Slow Death of Citizenship Rights

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It was once observed by Professor Richard B Lillich, a leading authority on international law, that the decision of the European Commission on Human Rights on the Admissibility of the *East African Asians Case* showed that 'a state's absolute right under traditional international law to decide whether to admit aliens onto its territory is becoming obsolete. Under contemporary international law the right should be deemed to be an important proviso that a state cannot exercise its right of admission in a fashion which is racially discriminatory in effect'.[1] Professor Lillich was wrong. Deprivation of citizenship rights is today occurring alongside the denial of citizenship rights. Moreover, there seems to be little that anyone can do about it. States these days do not just deny admission to citizens in ways that are arbitrary and capricious (including racially so). They also have laws on their statute books which enable them to expel their citizens to other territories, with all the consequent implications this has for stability in the international system. Indeed, the doctrine of the 'margin of appreciation' in international and European law means that states have a much freer hand in what they do—even (or especially) where their own citizens are concerned. Yet, citizenship was historically a serious matter, much more so than the law relating to domicile. In the United Kingdom, birthright citizenship had territorial underpinnings. This was the basic law of the land for over 700 years. In the mid-20th century a process of denudation of citizenship rights began, spanning a number of years. By the time the British Nationality Act 1981 was enacted, the last remnants of territorial birthright citizenship[2] had been removed, in a way which could not have been done so easily in a country with a written constitution.[3] In this way, the UK's rule of

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1 Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (William S Hein, New York 1985) 95–96.

2 Section 1 of the British Nationality Act 1981 states that a person is not a British citizen by birth unless 'his father or mother is a British citizen; or settled in the United Kingdom'.

3 In the USA, the Fourteenth Amendment would prevent such a course of action because of s 5, which places limits on the enforcement power of Congress by stipulating that '[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside', with the result that citizenship is conferred on those born within the United States and 'subject' to its 'jurisdiction': see US Constitution, Amendment XIV, section 1 (ratified 1868). Thus, the way in which

birthright citizenship changed from common law territorial birthright, whereby the place of birth determined citizenship, to one founded on the parents' citizenship.

This article explains how the shift from birthright principle to parentage citizenship, which the 1960s legislation came to epitomise, was bound to lead to difficulties for citizens and state alike. The argument will be advanced that legal machinations in citizenship laws are to date an unedifying spectacle of a departure from what was once a classic principle of law. Indeed, such is the opprobrium that attaches to the event that Kevin Wilson has cautioned the United States against using anti-immigrant sentiment as a basis for migration law policies.[4] The article will re-visit the *East African Asians Case*,[5] including the events leading up to it, because, as will be argued, the full lessons of this case have still not been entirely learnt by governments and lawyers alike. The *East African Asians Case* became a *cause célèbre* amongst human rights lawyers, in part because it highlighted how issues of race and culture can distort the policy-making process, destroying a person's legal and civil status in a community. Legal policy on an issue of such fundamental importance should not be distorted in this way. Principle should not be sacrificed to ill-conceived expediency.

In the *East African Asians Case*, a group of British citizens of Asian descent living in East Africa, and lacking the parentage connection to Britain, were denied admission when they sought to enter the country in 1970. The European Commission on Human Rights resoundingly found that racial discrimination, to which the applicants had been publicly subjected by the application of UK immigration legislation, constituted an interference with their *human dignity*, which in the special circumstances of the case amounted to 'degrading treatment' in the sense of Article 3 of the European Convention on Human Rights.[6] 'Degrading treatment' means interferences with human dignity of a particularly serious nature. The fact that the applicants had historical and cultural associations with the United Kingdom, but not racial connections, only helped to underscore how differential treatment by a state can become unacceptable, as did the fact that such differential treatment was carried out by a European country in respect of one of its own nationals.

In the circumstances, one would have thought that such differential treatment would never again be contemplated by the State because it was so inherently unequal and undoubtedly impacted on the human dignity of those persons who were subjected to it. Yet, governmental encroachment on citizenship rights continues unabated to this day.

the UK has been able to abolish pure territorial birthright citizenship, so as to deny citizenship to the children of illegal immigrants, would not be possible in the USA.

4 Kevin C Wilson, 'And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America should Take Heed of Disturbing Lessons from Great Britain's Past' (1995) 24 GA J Intl & Comp L 567, 568.

5 *East African Asians v United Kingdom* (1973) 3 EHRR 76 (EComHR).

6 Article 3 states that no one shall be subjected to 'torture or to inhuman or degrading treatment or punishment'.

This has serious consequences for the concept of the State and the rights of the individual. One may be forgiven for thinking that it was the dying days of Empire that provided the catalyst for the *East African Asians Case* and its build-up to the attrition of citizenship rights. This article shows that this is not the case. In March 2006 the UK Parliament passed the Immigration, Asylum and Nationality Act 2006, according to which the Secretary of State has the power to deprive a person of his British citizenship on grounds that are 'conducive to the public good', provided that person is a dual national, having citizenship of another country to which he can be deported. So the process of attrition continues, though this has hardly been commented upon even in the popular press. Yet it strikes at the heart of basic civil liberties.

(A) *CALVIN'S CASE* AND COMMON LAW CITIZENSHIP RIGHTS

The starting point for the legal discussion of citizenship laws is *Calvin's Case*[7] in 1608. This case provides the most famous statement by an English court of the common law rule of territorial birthright citizenship, with its affirmation of the principle that 'they that are born under the obedience, power, faith, ligealty, or ligiance of the King, are natural subjects, and no aliens'.[8] The principle was of ancient lineage.[9] In the case of *Elyas de Rababyn*, as early as 1290, it had been assumed that all persons born on English soil were the King's subjects.[10] What was important about the affirmation of this principle in *Calvin's Case* was the political background to the case, which resulted in an unusually high-profile determination. *Calvin's Case* was heard by 14 justices[11]—not just the Lord Chancellor and Barons of the Exchequer, but all the justices of the King's Bench and Common Pleas—and all but two found in his favour.[12]

Robert Calvin was born in Scotland on 5 November 1606. Three years earlier, in 1603, the Crown of England had passed to James VI of Scotland. Calvin had a claim to inherit land in England, but could not do so if he was an alien. It was clear that he was not an alien under the Crown of King James in Scotland; but the land that he stood to inherit was in England, not in Scotland. So, the issue was whether he was an alien under the Crown of King James in England, which had only three years earlier passed to King James VI of

7 *Calvin v Smith* (1608) 77 ER 377 (KB) (hereafter *Calvin's Case*).

8 Ibid 383.

9 For a comprehensive discussion, upon which the author relies, see Michael Robert W Houston, 'Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants' (2000) 33 Vanderbilt J Trans L 695–737.

10 See WS Holdsworth, *A History of English Law*, vol 9 (Methuen, London 1926) 75.

11 For a thorough analysis see Polly J Price, 'Natural Law and Birthright Citizenship in *Calvin's Case*' (1997) 73 Yale J Law & HR 82.

12 (1608) 77 ER 377 (KB).

Scotland. If he were an alien, he would not be able to seek a remedy in an English court for land held in England.

The defendants argued that Calvin was an alien because King James had several distinct political capacities in several different kingdoms, arising from his holding the Crowns of England, Scotland, Ireland and France, with the result that the ligeance of each separate political unit was 'several and divided'. This potentially violated the concept of ligeance, which is central to common law birthright citizenship. It denotes a mutual relationship between the monarch and the subject whereby the monarch is obligated to maintain and defend his subjects.[13] Mutual consent is thus a component of birthright citizenship.[14] Coke rejected the defendants' arguments in giving the Court's judgment, holding that ligeance is 'true and faithful obedience … to his Sovereign'.[15] Calvin was not an alien because an 'alien' is a 'subject that is born out of the ligeance of the King and under the ligeance of another'.[16] This was notwithstanding the defendants' erudite argument that Calvin had to be an alien because of the distinction between the King's 'natural body' and his 'politic body'. The 'natural body' of King James referred to his being a descendant of the royal bloodline; whereas the 'politic body' referred to each separate Kingdom under his dominion.[17] Coke threw out this argument on the grounds that the essence of Calvin's birthright citizenship was territorial:[18]

> There be regularly three incidents to a subject born.
> 1 That the parents be under the *actual obedience* of the King's dominion.
> 2 That the *place of birth* be within the King's dominion. And,
> 3 The *time of his birth* … for he cannot be subject born of one kingdom, albeit afterwards one kingdom descend to the king of the other.

Accordingly, Coke held that 'Calvin was born under the King's power or protection; *ergo* he is no alien'.[19] Thus, in asking the question 'whether Robert Calvin … (being born in Scotland since the Crown of England descended to His majesty) be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England',[20] Coke found for Calvin. To the extent that ligeance implies 'obedience',[21] this suggests a paternalistic theory of governance. *Calvin's Case* provided the bedrock of British citizenship laws until the mid-20th century, whereby England recognised two forms of 'presence' for a person within the territory of England: either 'alien' or 'subject' status.[22] A subject owed allegiance to the monarch, whereas an alien, whilst not *per se* an

13 See Price (n 12) 83–84, who likens the relationship to master-servant or parent-child.
14 See Peter Shuck and Rogers M Smith, *Citizenship without Consent* (Yale UP, New Jersey 1985) 30.
15 *Calvin's Case*, 382.
16 Ibid 396.
17 Ibid 388–9.
18 Ibid 399 (emphasis added).
19 Ibid 407.
20 Ibid 379.
21 Ibid 399.
22 Ibid 86.

enemy of the monarch, was 'born in a strange country'.[23] A 'natural born subject' was, obviously, one born into the monarch's allegiance by birth in England or in one of the territories held by the monarch.[24]

With this decision, territorial birthright citizenship remained a cornerstone of traditional common law rights of the British subject for over 375 years, serving the demands of Empire as Britain expanded its influence throughout the world in the 18th and 19th centuries. The strain began to be felt in the 20th century in the twilight years of Empire,[25] culminating finally in a spate of statutory changes to citizenship laws in the 1960s. The *East African Asians Case* directly concerns these changes and can only be fully understood within that context.

(B) CITIZENSHIP

In the years following the Second World War, immigrants were both needed and despised. As pointed out elsewhere,[26]

> the immediate post-war years were … a time of full employment and economic growth which together with the reconstruction programme avidly sucked up the returning soldiers. Shortage of workers soon followed … For more than a decade after 1945 the United Kingdom was in need of urgently required labour in such industries as transport, catering, textiles, heavy metal and the National Health Service. New Commonwealth immigrant workers seemed to be the best group to attract into this void.

But xenophobic feelings soon arose against non-white immigrants.[27] Agitation in the 1960s, 70s and 80s led the UK government to pass four major pieces of legislation which helped to define modern citizenship laws in a way that favoured white indigenous Britons. These were the Commonwealth Immigrants Act 1962 (hereafter '1962 Act'), the Commonwealth Immigrants Act 1968 (hereafter '1968 Act'), the Immigration Act 1971 (hereafter '1971 Act') and the British Nationality Act 1981 (hereafter 'BNA 1981').

Under the first of these, admission was granted essentially only to those who were 'born in the UK' or those with passports 'issued by the UK government'[28] (and not a

23 Ibid.

24 Ibid 87.

25 Satvinder S Juss, *Immigration, Nationality & Citizenship* (Mansell, London 1993) 51–53.

26 Ibid 72.

27 There was concern over allegations of increased vagrancy, racial conflict and communicable diseases: ibid 75–79. See also Zig Layton-Henry, *The Politics of Immigration: Immigration 'Race' and 'Race' Relations in Post-war Britain* (Blackwell, Oxford 1992) 22–41.

28 The 1962 Act restricted 'the immigration of all holders of Commonwealth passports except those born in the UK, those holding passports issued by the UK government, and those included on the passport of a person exempt from immigration control under the first two exceptions'. See Commonwealth Immigrants Act 1962, ch 21 s 2.

representative government). Those who could not comply with these requirements had to apply for a voucher issued by the Ministry of Labour in order to gain entry.[29] Later, the 1968 Act appeared against the backdrop of the arrival of a large number of Asians with British passports from Kenya in 1967. The Act targeted this group by going yet one stage further and restricting the entry of those who had British passports issued by the British government 'unless they, or at least one parent or grandparent, had been born, adopted or naturalized in the UK, or registered as a citizen of the UK or its colonies',[30] thus excluding the vast majority of Asians in overseas territories who could not demonstrate such a connection with the UK. British citizens were divided into those who were subject to immigration controls and those who were not. The 1971 Act consolidated these laws and 'established the British government's complete control over the immigration of people without a close connection to the United Kingdom by either birth or descent'.[31] A distinction was drawn between 'patrials' (those who could enter by virtue of birth or descent connections) and 'non-patrials' (those who could not, lacking the connections of birth or descent), and only patrials had a right of abode in the UK.[32] Non-patrials were no longer eligible for a voucher but might be granted a temporary work permit, which did not carry a right to permanent residence as the voucher system once did.

(C) DECOLONISATION, 'AFRICANISATION' AND THE EAST AFRICAN ASIANS

The *East African Asians Case* concerned 25 applicants from East Africa who in 1970 sought to settle in Britain as British citizens. They held no other citizenship than that of the United Kingdom & Colonies. Under the Commonwealth Immigrants Act 1968, they were not granted admission. Upon arriving at a British port, a large number of them were detained for their troubles.

The 25 applicants were all of Asian origin. They had gone to live in East Africa, which then consisted of three countries—Kenya, Tanzania and Uganda. Asians had come in large numbers during the period of British colonisation after the mid-19th century: at the time a deliberate policy of emigration of Indian workers was being pursued by the colonial government for the building of the railway from the coast into the interior. After the railway was completed, Indian traders followed from British India, gradually building an extended commercial network. The flow of people from the Indian Sub-Continent

29 The vouchers were, of course, heavily controlled so that in 1964 only 550 Indians were issued with them as against 26,153 applicants; and only 532 Pakistanis as against 19,292 applicants: see Colin Holmes, *A Tolerant Country? Immigrants, Refugees, and Minorities in Britain* (Faber and Faber, London 1991) 46.

30 Commonwealth Immigrants Act 1968, s 2(A). The racist connotations of these provisions have been recounted by a number of commentators: see David Steel, *No Entry: The Background and Implications of the Commonwealth Immigration Acts* (Hurst, London 1969) 137.

31 Houston (n 10) 10.

32 Immigration Act 1971, s 2(1)(a).

continued until the beginning of the de-colonisation period in the mid-1960s, by which time they numbered several hundred thousand. They comprised not only traders and shopkeepers, but also civil servants, teachers, doctors and dentists.

When independence came at the beginning of the 1960s, only those born in East Africa, and one of whose parents had been born there, automatically became citizens of the country concerned. Others had a right over two years to opt for citizenship. Later, the so-called 'Africanisation' policy was introduced by the governments of East Africa: those who had not become citizens of the country experienced increasing difficulties by way of restrictions on trade licenses and on the areas in which they might trade. The applicants in the *East African Asians Case* had chosen not to become citizens of the country in which they resided, and thus became subject to the trade and licensing restrictions. They were no different in this respect from the majority of Asians in East Africa, who regarded themselves as British and valued their links with the 'mother country'. Many had begun to look to the UK for support, exercising their rights of citizenship and emigrating to Britain in search of better prospects.

In 1962, the British government passed the first in a series of anti-immigrant legislative enactments designed to abridge the rights of British subjects overseas. In that year the Commonwealth Immigrants Act 1962 imposed immigration controls on the great majority of citizens of the United Kingdom and colonies on the grounds that they were neither born in the United Kingdom nor were holders of 'United Kingdom Passports'. However, those Asians who retained their citizenship of the UK and colonies, after the independence of Kenya and Uganda, could escape these restrictions under the 1962 Act if they obtained a new United Kingdom Passport from the High Commission in Kenya or Uganda: this new passport was issued by a diplomatic representative of the government of the United Kingdom and therefore constituted a United Kingdom Passport. In this way, it was clear that solemn pledges were given to Britain's Asian citizens in East Africa that they would be allowed to enter Britain if and when they chose to do so. By contrast, the citizenship rights of white citizens of the UK and colonies were kept intact without further ado after the independence of Kenya and Uganda: this group did not have to acquire a new United Kingdom Passport in order to safeguard their rights of entry to the UK.

In fact, two years later, in order to protect the rights of non-Asian British citizens, the UK government passed the British Nationality Act 1964 which went on to allow those persons, who had actually chosen to become citizens of Uganda or Kenya, to resume their citizenship of the United Kingdom and colonies if they had the 'qualifying connection with the United Kingdom and colonies'. This condition applied to so-called 'white settlers', but not to members of the Asian communities in East Africa. As a result, white British subjects were welcomed back into the fold and re-admitted as members of the national polity of Britain. Yet in relation to its non-white subjects, in 1965, not only was this right

to hang onto British citizenship inapplicable, but indeed the United Kingdom government went on to produce a White Paper entitled *Immigration from the Commonwealth* which recommended a reduction in the annual number of employment vouchers available to persons subject to control under the 1962 Act from 20,800 to 8,500. The White Paper, however, did not indicate that any change of policy was envisaged with regard to the entry into Britain of citizens of the UK and colonies who were then resident in East Africa.

The policies of 'Africanisation' in the meantime led to a considerable increase in the number of Asians entering Britain intending to settle permanently. Thus, between 1965 and 1967 the number of such entrants rose from 6,150 to 13,600. In the first two months of 1968 there were 12,800.[33] Faced with this upsurge, on 1 March 1968 the United Kingdom re-imposed immigration controls on citizens of the UK and colonies who had managed, following the Commonwealth Immigrants Act 1962, to acquire a new United Kingdom Passport from a diplomatic representative of the government of the United Kingdom. As holders of colonial passports, they had originally been persons to whom the Commonwealth Immigrants Act 1962 applied, following the independence of the colony concerned, but they had then obtained UK passports and thus re-acquired the right to enter the UK free of any restriction imposed by that Act.

The British government now set out to amend the 1962 Act using the Commonwealth Immigrants Act 1968. Given this background, it is not surprising that the 25 applicants for entry into the UK were denied admission and detained at port for their audacity. It would have been more surprising if back in 1968 they had not in fact been denied entry, because what happened outside Parliament was only a mirror image of what was happening inside Parliament, with ever more strident calls for immigration restrictions on New Commonwealth immigrants at ports of entry. The government knew that it was vulnerable to charges of perfidy and racial discrimination even as it passed the legislation. During the debates on the Act, in the House of Commons on 27 and 28 February 1968 and in the House of Lords on 29 February 1968, opinions were divided, irrespective of party affiliations, on two questions. The first was whether the re-imposition of immigration controls on citizens of the UK and colonies coming from East Africa was in conflict with a 'pledge' of free entry to the UK, which was said to have been given to those persons at the time the East African states concerned became independent. The second was whether the Bill discriminated on racial grounds.[34] The terms 'pledge' and 'undertaking' were used by the Home Secretary, Mr Callaghan, who on 22 February 1968 openly recognised in the House of Commons that solemn pledges were given to Britain's Asian nationals to allow them to come to Britain. 'I believe that the citizens of this country recognise their responsibilities in respect of obligations which have been entered into by either present or previous Administrations … I very much regret that it is not possible for this country to

33 See paras 13–16 of the White Paper.

34 See Hansard, 27 February 1968, col 1241–68, and 28 February, col 1421–714. See also col 903–1217.

absorb these persons, to whom we have given the most solemn pledges. If we did, I fear it would cause racial disharmony and explosions.'[35]

The further question, whether the Bill constituted 'a form of discrimination in favour of white people', was also raised on the first day of debate in the House of Commons. However, the Home Secretary expressed the view that the ancestry clause in the Bill was not racial but geographical. Mr Callaghan said:[36]

> It has been suggested that this is a racial conception. This is not so. It is true that Clause 1 does not apply to Australian, or New Zealand or Canadian citizens because all of them are already subject to control. The test that is adopted is geographical, not racial. Those who, or whose fathers or fathers' fathers were born, naturalised, adopted, or registered in the United Kingdom, will be exempted whatever their race.

Mr Callaghan also hoped that it would be acknowledged that '[i]t is possible that the origin of this Bill lies neither in panic nor in prejudice but in a considered judgment of the best way to achieve the *idea of a multi-racial society*'. However, during the subsequent debate on the Bill in the House of Lords on 29 February, the Lord Archbishop of Canterbury considered that the Bill 'virtually distinguishes United Kingdom citizens on the score of race'. He continued:[37]

> I use the word 'virtually' because technically arguments can be adduced, and have been adduced this afternoon in the opposite sense … Clause 1, on any showing, creates two levels of United Kingdom citizens. Strictly the level is not that of race; strictly the Grandfather Clause means not race, but geography. But the actual effect on the bulk of the human situation with which the Bill is dealing is that one level is the level of the European and the other level is the level of the Asian citizens. And that is so because the object of the exercise, and the apology for the exercise is that we must keep an influx of Asian citizens out of the country.

In the meantime, the thwarted Asian immigrants were left to be rescued by India. India formally took the view that responsibility for British subjects rested firmly with Great Britain. It was quick to implement its own immigration rules to prevent an influx of another country's citizens being foisted upon it. In reality, however, the Indian approach back in 1968 was rather flexible, allowing Asians to enter wherever compassionate circumstances warranted such a course of action. The Indian Minister for Home Affairs explained why the strict controls had been deemed necessary, pointing out that it was 'not by way of retaliation but to emphasise (to the United Kingdom government) the urgent necessity of allowing persons their rights of citizenship irrespective of the country of origin'.[38] The question we should ask today is whether foreign countries are likely to be as flexible again, even where Britain is deporting people who hold citizenship of that

[35] See the statement announcing the forthcoming introduction of the Bill (Hansard, 22 February 1968, col 662).

[36] See Hansard, 27 February 1968, col 1251.

[37] Ibid col 951.

[38] See *The Times* of India, 7 March 1968, 1.

other country, given that these people are likely to be 'undesirable' citizens, tainted by illegal or terrorist activity. It seems very unlikely.

One can see that much the same pattern of confusion and chaos emerges in discussion outside the British Parliament. Take the view of delegates at the London Conference of Commonwealth Heads of State in 1969—the largest Commonwealth Conference ever held. Delegates from Kenya, Uganda and Pakistan maintained that the United Kingdom was obliged to admit its own nationals even where (as these delegates themselves pointed out) those nationals had not been expelled from their countries of residence in Kenya and Uganda. The Indian Prime Minister was equally intransigent in principle on this issue. When James Callaghan discussed the problem of rising immigration to the United Kingdom with Mrs Gandhi, the Indian Prime Minister, as *The Times* of London recorded, although 'Mr Callaghan was assured of the Indian help with the problems created by Kenya's refusal of trading permits to Asians, ... Mrs Gandhi sees the issue as essentially a British responsibility'. Confusion reigned, though. Two days earlier, the same paper's Leader had carried the headline 'British help for our stateless citizens'.[39] Yet, this was factually wrong as a statement of principle. The statement only served to betray the prejudice against this group of citizens by another group of citizens. As the paper itself observed later, Mr James Gichura, head of the Kenya delegation, whilst 'well aware of controversies over recent measures … pointed out that Asians holding British passports were not stateless—they were British'.

The next day, *The Times* stated: 'By all accounts Mr Njonjo (the Kenyan Attorney General) appreciated Britain's difficulties and wanted to help. But he emphasised that Asians in Kenya could still, if they wished, apply for Kenyan citizenship and remain. It was their choice to be British citizens.'[40] The Indian Parliament decided that India would ultimately have to accept Asians with British passports from Kenya and elsewhere because of strong public pressures and sentimental ties in the country. *The Times* now reported that 'Under the compromising formula of last July, India agreed to give Kenyan Asians a three-month entry visa if they were required to obtain an endowment from the British High Commission, agreeing that they were Britain's ultimate responsibility and have an unimpeded right to enter Britain at any time in the future'.[41] These machinations are not just of historical interest; they serve to remind us today that the laws of citizenship are designed to root us in a national polity and a community and that a State that severs or weakens these bonds does so at its peril.

39 See *The Times* (Leader Page), 8 January 1969.
40 See *The Times*, 9 January 1969.
41 See *The Times*, 10 January 1969, 7.

(D) CITIZENSHIP, THE EUROPEAN CONVENTION, AND THE 'FOURTH PROTOCOL' RIGHT

It was in this context that the 25 applicants in the *East African Asians Case* brought their claim under the European Convention on Human Rights. The British government of the day fought tooth-and-nail to avoid liability. When the matter went up to the European Commission, the government argued that what the applicants were trying to obtain was a 'Fourth Protocol right' but that because the UK had not ratified the Fourth Protocol to the European Convention on Human Rights, the present cases fell outside the scope of the Convention. The Fourth Protocol reads: 'No one shall be deprived of the right to enter the territory of the state of which he is national.'[42] The purpose of the Fourth Protocol, as stated in its preamble, is to ensure the collective enforcement of certain rights and freedoms 'other than those already included in section 1 of the Convention'. For their part, the applicants argued that the British government's non-ratification of the Fourth Protocol did not absolve it of its obligations. The mere fact that the government had chosen not to ratify did not mean that it was entitled to treat its citizens as it pleased. It is not insignificant that in the first decade of the new millennium, as we ponder on the effects of the Immigration, Asylum and Nationality Act 2006, the Fourth Protocol remains unratified by the British government and cannot technically be relied upon.

In respect of the applicants in the *East African Asians Case*, the European Commission decided that the contracting parties had agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations that they had assumed under the treaty.[43] To that extent, this is the most important general conclusion of the Commission arising from the case. What is interesting for future purposes, however, especially in the context of the Immigration, Asylum and Nationality Act 2006, is the Commission's conclusion that in certain circumstances the deportation of a person may be contrary to the Convention and, in particular, may constitute 'inhuman treatment' within the meaning of Article 3 of the Convention.[44] It is interesting to note that the focus of the Commission in a non-admission case was on deportation. This resonates with present-day initiatives to remove nationals. Having decided this, it was relatively easy for

[42] It has been observed that 'the right of abode in UK domestic law is not conferred on all British nationals and so there are important groups of British nationals who do not enjoy its benefits. Protocol 4 would give them a broadly equivalent right, which is the principal reason why it has not be ratified so far by the British government'. See I Macdonald and F Webber, *Macdonald's Immigration Law & Practice* (6th edn Butterworths, London 2005) p 61 para 2.6.

[43] Paragraph 186 ('the Commission has nevertheless found that the Contracting Parties agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they assumed under this treaty').

[44] Paragraph 186 ('In certain exceptional circumstances, the deportation of a person may thus be contrary to the Convention and, in particular, constitute "inhuman treatment" within the meaning of Article 3 thereof').

the Commission to then hold that these conclusions applied equally to the present applications. The Commission held that although the right to enter one's country is not protected by the Convention, the refusal to acknowledge this right may nevertheless violate quite independently another right already covered by the treaty.[45]

It was in this way that the Commission found the applicants to have been subject to degrading treatment. A person is subject to degrading treatment 'if it lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people'.[46] Article 3 holds that no one shall be subject to 'torture or to inhuman or degrading treatment or punishment'. The term 'degrading treatment', according to the Commission, indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature.[47] However, 'degrading treatment' in the sense of Article 3 had to reach a certain level of severity, and could include mental or physical suffering. This was because 'The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable',[48] while torture is 'generally an aggravated form of inhuman treatment'.[49] The Commission held that the European Convention on Human Rights, like the Convention on Genocide, had a humanitarian character,[50] and endorsed the following view as being applicable here:[51]

> The Convention was manifestly adopted for a *purely humanitarian and civilizing purpose* ... its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and *endorse the most elementary principles of morality*. In such a convention the *contracting States do not have any interests of their own*; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention … The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The overriding feature of the *East African Asians Case* was (as even the Home Secretary, James Callaghan, recognised in Parliament) its racial discrimination. That being so, the Commission had little difficulty in holding that 'discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of

45 Paragraph 187 ('It concludes that, although the right to enter one's country is not protected by the Convention, the refusal of this right may, in certain special circumstances, nevertheless violate quite independently another right already covered by this treaty').

46 Paragraph 189 (as the Commission said, 'The term "degrading treatment" in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character can only be regarded as "degrading treatment" in the sense of Article 3 where it reaches a certain level of severity').

47 Ibid.

48 Paragraph 191 ('The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, *mental or physical,* which in the particular situation is unjustifiable').

49 Ibid.

50 Paragraph 192.

51 Ibid (emphasis added).

article 3 of the Convention'.[52] It went on to find that it established that the 1968 Act had racial motives and that it covered a racial group because, when introduced into Parliament as a Bill, it was clear that it was directed against the Asians citizens of the United Kingdom and colonies in East Africa, and especially those in Kenya.[53] The government, which was claiming that the Act was based on geography, nevertheless admitted that it had racial motives, because the Home Secretary accepted that the Bill was based on a 'considered judgment of the best way to achieve the idea of a multi-racial society'.[54]

Interestingly, the Commission also went on to consider the Immigration Act 1971, which had replaced the second Commonwealth Immigrants Act of 1968. This was because under the new Act of 1971, persons who belonged to the category of 'patrials' alone had the right of abode in the United Kingdom irrespective of whether they were citizens of the UK and colonies. The Commission gave added force to its decision by stating that here, too, 'such persons would normally be white Commonwealth citizens'. It observed that 'the Asian citizens of the UK and colonies in East Africa, on the other hand, would not normally be 'patrials' and thus have no 'right of abode' in the UK, the state of which they are citizens'.[55] The Commission did not believe that 'the United Kingdom gave an express undertaking, by way of a formal pledge', to the East African Asians, but there did appear to have been an 'assumption'[56] that led to their being unfairly treated.[57] The most pertinent observation by the Commission was that a special significance was to be attached to 'differential treatment of a group of persons on the basis of race' because this 'could be capable of constituting degrading treatment' where 'some other ground would

52 Paragraph 196.

53 In fact, nothing could be clearer in this respect than para 199, which reads: 'The Commission finds it established that the 1968 Act had racial motives and that it covered a racial group. When it was introduced into Parliament as a Bill, it was clear that it was directed against the Asian citizens of the United Kingdom and Colonies in East Africa and especially those in Kenya. The Commission refers in this connection to statements made in both Houses of Parliament during the debate on the Bill in February 1968.'

54 The Commission also noted (at para 200) that 'the Government submitted in the present proceedings that the Act was intended to promote "racial harmony"'. It then (at para 202) went on to highlight the differential treatment between white and non-white citizens, pointing out that 'the 1968 Act was preceded by the British Nationality Act 1964' which 'facilitated the resumption of citizenship of the United Kingdom and Colonies by persons who had chosen to become citizens of Uganda or Kenya, provided that such persons had a "qualifying connection with the United Kingdom or Colonies or with a protectorate or protected state"; this condition would normally be fulfilled by the so-called "white settlers", but not by members of the Asian communities in East Africa.'

55 Paragraph 202.

56 Paragraph 203.

57 Paragraph 203, where it is asserted: 'These people had apparently not opted for local citizenship, but retained their status as citizens of the United Kingdom and Colonies, because they considered this status as a safeguard for their future position in that it gave them the rights of entry into, and residence in, the United Kingdom.'

raise no such question', thereby resulting in an 'affront to human dignity'. This is because of the 'special importance' attached to racial discrimination.[58]

Yet, the process of stripping away citizenship rights did not end with the legislation of 1962, 1968 and 1971—all of which were the subject of adverse comment by the European Commission in the *East African Asians Case*. In the next decade, the BNA 1981 was the most forthright, severing the link with common law birthright citizenship altogether. With the BNA 1981, a tripartite British citizenship arose falling into three categories, comprising (i) British Citizenship[59] (BC); (ii) British Dependent Territories Citizenship[60] (BDTC); and (iii) British Overseas Citizenship[61] (BOC). Only those with close ties to the UK were granted British citizenship, and only they had the 'right of abode' in the UK. The 'right of abode' signified the right to enter and leave the UK without hindrance and it was intrinsically linked to the right to citizenship. In this way, the principle of territorial birthright citizenship was dispensed with completely. British citizens could not comprise those people whose claim to nationality arose (as in the case of BDTCs and BOCs) through connection with another territory where the Crown was responsible. Under *Calvin's Case*, every person born in the United Kingdom acquired British nationality.[62] But under the BNA 1981, there was a parentage component to birthright citizenship.[63] The status of full British Citizenship could only be secured through the father or mother being 'a British Citizen or settled[64] in the United Kingdom'.[65] This means that although the BNA 1981 details several ways[66] in which British Citizenship can be acquired, it links this with a parentage component, and as such rejects the purely territorial basis for nationality laws. To that extent, it represents a clear repudiation of British territorial birthright citizenship which *Calvin's Case* came to epitomise at common law. Indeed, the term 'settled' in the BNA 1981 prevented a child of a parent unlawfully residing in the UK from becoming a British Citizen,[67] thereby subverting the common law concept of birth within the territory as a basis for citizenship status.

58 Paragraph 202, where the Commission said that, 'as generally recognised, *a special importance* should be attached to discrimination based on race; that *publicly to single out a group of persons for differential treatment* on the basis of race might, in certain circumstances, constitute *a special form of affront to human dignity*; and that *differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question*' (emphasis added).

59 British Nationality Act 1981, ss 1–6.

60 Ibid ss 15–18.

61 Ibid ss 26–28.

62 Lord Hailsham of St Marylebone, *Halsbury's Laws of England* (4th edn Methuen, London 1992) vol 3, Part I, para 1(1).

63 British Nationality Act 1981, s 1(2).

64 To be 'settled' one had to be residing in the UK without being subject to any restrictions under UK immigration laws: see ibid s 50(2).

65 Ibid s 50(1).

66 Ibid ss 1, 2, 3, 6, 7.

67 Ibid s 50(5).

(E) BRITISH CITIZENSHIP AND THE HONG KONG CHINESE

The story of British nationality law did not end there. Thirty years later, history repeated itself when Britain's Hong Kong citizens, pending the transfer of sovereignty of Hong Kong from Britain to China in July 1997, sought to enter Britain. In September 1995, when Governor Chris Patten publicly suggested that those inhabitants of Hong Kong who held British passports should be given the right to live in the United Kingdom, a furore erupted in England amongst those who feared a massive influx of an alien race. Over three million of Hong Kong's residents hold British passports, but they are described as *British Dependant Territories Citizens* or *British National Overseas Citizens*. Neither of these categories entails a right of abode in the United Kingdom. Formerly, the people of Hong Kong, in common with other British subjects, were citizens of the United Kingdom and colonies, and were free to live and work in Britain, but after a series of measures to restrict immigration, beginning in the 1960s, an Act was passed in 1981 which separated citizenship from the right of abode. Under the 1981 British Nationality Act, citizens in Hong Kong no longer enjoy a right of abode in Britain. Their British passports are no more than travel documents, carrying no rights of residence in, or even entry into, the United Kingdom. In 1984, however, by a joint declaration between Britain and China, it was agreed that all BDTCs in Hong Kong would lose their status in 1997 but a new 'appropriate status' would be created.[68] This would be *British National Status (Overseas)*. Such status did not confer a right of entry, but those holding it could apply for consular protection at a British embassy.[69]

On 4 June 1989, however, the Chinese authorities brutally suppressed pro-democracy student demonstrations in Tiananmen Square in Beijing, promptly raising doubts in people's minds about the Chinese guarantees in the settlement of 1984. An exodus from the colony began, at a rate of 50,000 people a year. The British government retracted and passed the British Nationality (Hong Kong) Act 1990,[70] conferring upon a select minority an automatic right of abode in the UK because their presence was crucial to the continuing prosperity of the colony. The government hoped that if this skilled and highly qualified minority were secure in the belief that they could, if they wished, exercise their right of abode, they would not wish to leave for the time being. The retraction was thus one of form only, not of intent. In the event, the continuing uncertainty meant that not all those who were expected to stay in Hong Kong as July 1997 neared did so. In anticipation of the

68 In anticipation of the expiry of its lease over Hong Kong in 1997, Britain agreed, in the Joint Declaration of 1984, to give up all its claims to sovereignty over Hong Kong in return for China's promise to retain capitalism there for at least 50 years: see Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 26 September 1984, UK-PRC, (1984) 23 ILM 1371.

69 See 'How the Special Administrative Region will be Organised', *The Financial Times*, 27 September 1984, 4.

70 British Nationality (Hong Kong) Act 1990, ch 34, Sched 1.

transfer, Hong Kong citizens began to relocate to such countries as Australia and the United States. The most popular destination was Canada, where visa applications almost doubled between 1993 and 1994, from 4,000 households (about 12,000 people) to 7,700 households. In 1996 there was another increase in applications, with 8,700 households applying. Once again we see that the question of responsibility was not properly resolved and vulnerable populations were diverted from the country with which they had both long-term traditional and historical connections. It was left to the resourcefulness of the coerced immigrant communities themselves to find countries that would accept them. In contrast, as with the case of the 'white settler' community in East Africa, the Falkland Islanders were *all* given a real 'right of abode' carrying citizenship after Argentina invaded them in 1982 retrospectively to the commencement of the British Nationality Act 1981 (in much the same way as the UK government passed the British Nationality Act 1964 for the protection of 'white settler' citizens after the Commonwealth Immigrants Act 1962 had taken those rights away from those citizens in Kenya) in the British Nationality (Falkland Islands) Act 1983.[71]

(F) CITIZENSHIP AND THE LEGACY OF COLONIALISM

The story of the East African Asians itself remains unresolved. In the case of *Rekha Modhavadiya*[72] in 2005, the sponsor and appellant's mother, Tamu Modhvadiya (hereafter 'the mother') was a British Overseas Citizen (BOC), who, following a grant of permission by the High Court,[73] in a challenge to the Secretary of State for the Home Department's refusal to issue her with a special voucher, was granted indefinite leave to remain (ILR) by the SSHD, thus obviating the need to proceed with the High Court application. The mother entered the UK on 19 April 2001 and was granted ILR in May 2002. The appellant's four children thereafter applied for entry clearance to settle in the UK as children of the mother on 6 December 2002. The special voucher scheme had been withdrawn by the government in March 2002, but not without an official statement that all those eligible for settlement under the system would now be eligible for British Citizenship. The Special Voucher Scheme for BOCs was discontinued in August 2002 under Cmnd 5597 and replaced by the normal immigration rules in para 317 of HC 395. Delay in considering applications was a notorious feature of the system, so much so that

71 British Nationality (Falkand Islands) Act 1983, ch 61.

72 See *Rekha Modhavadiya v Secretary of State for the Home Department* [2005] EWCA Civ 1340, CA (Richards LJ, 25 October 2005). The author discloses an interest. He was Counsel in this case before the Tribunal and the Court of Appeal.

73 Sir Andrew Collins (C0/5109/2004) gave permission on the grounds that (i) the adjudicator 'should have considered the argument based on the Voucher Scheme and the acceptance that the sponsor was entitled to ILR'; and (ii) 'if there was a legitimate expectation, there may have been an unlawfulness and the extent of *Abdi* may need to be answered'. (*Abdi* is a reference to *Abdi v SSHD* [1996] Imm AR 148, 156.)

a voucher-holder's immediate family who may qualify to come to the UK included all children up to 25 years of age (the eight-year queue in India meant that children who were nearly 18 when their parents applied would be 25 before the application was considered). Thus there were already delays.[74]

The withdrawal of the special voucher scheme in 2002 was preceded by a statement from the Immigration Minister, Beverley Hughes. She stated expressly that the intention behind the withdrawal was to 'right a historical wrong' and that the UK had 'a moral obligation to these people going back a long way'. The Minister also made it clear that the government was 'acting to put that right'. BOC cases such as these used to be determined under para 252, which was abolished on 18 September 2002 and which omitted to prescribe an age limit for children eligible to enter, in the interests of maintaining family unity in circumstances where delay in a head of household being able to exercise his right of entry with his family would have resulted in his children being over-age. Because that rule had been abolished, in the instant case the Entry Clearance Officer refused the applications under para 317 of HC 395[75] on 25 February 2003. It was argued before the Immigration Appeals Tribunal (as it then was) that rule 252 had only been withdrawn because the special voucher scheme (upon which that rule was parasitic) had been rescinded, in the interests of righting a historical wrong. The government's avowed intention was *not* to substitute a more stringent rule. However, para 317 (which was intended for entirely different circumstances) was applied to these cases simply because there was no other rule left to apply! This has to be right, otherwise it would be a nonsense to speak of righting a historical wrong.

However, the effect of the withdrawal of the Voucher Scheme and the deletion of rule 252 was to leave this category of entrant in a worse position than before: there was no longer any provision allowing a voucher-holder to bring their children with them. Appellants accordingly suffered a clear injustice in cases such as this. The case before the court also involved family separation. There was no issue here of illegal or unlawful entry: it concerned a British subject who formerly had a right of entry to the UK. It was argued that policy reasons also favoured a more liberal approach. As Beverley Hughes said:[76]

74 This delay had undoubted implications for Article 8 rights as the State itself was causing the delay. In *Kroon v Netherlands* (1994) 19 EHRR 263 the ECJ decided that there are 'positive obligations inherent in the "effective" respect for family life'.

75 Paragraph 317 of the Statement of Immigration Rules (HC 395) deals with the 'Requirements for indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom'. Most family members seeking entry fail to fulfil the requirements because they have to satisfy the condition in para 317(i)(f) that they are 'the son, daughter, sister, brother, uncle or aunt over the age of 18 if *living alone* outside the United kingdom *in the most exceptional compassionate circumstances* and *mainly dependent financially on relatives settled in the United Kingdom*' (emphasis added).

76 See Press Release, *British Overseas Citizens to Get Right to Live in UK*, 4 July 2002, No 188/2002, Circular JMT/97/02. See also BBC News, 'UK to Right "Immigration Wrong"', 5 July 2002 (see http://news.bbc.co.uk/2/hi/uk_news/politics/2088560.stm).

> The number who would want to live in the UK is likely to be small—*less than 500 BCs a year* have applied to live in the UK in recent times. They are likely to *view it as an insurance policy* in case their circumstances change in the future. *I am pleased we are able to offer them that added security*.

The basis for a 'legitimate expectation' arose as follows: first, given the historical antecedents in this case which were openly recognised by the government as causing an injustice; and second, in a statement by the government which declared that it had righted a historical wrong. There was a legitimate expectation here that the appellants would follow the sponsor. How else could the historical wrong have been corrected? Surely not by dividing families, which an earlier rule (para 252) had been so careful to avoid. Next, and more importantly, however, under the special voucher scheme as it then applied, these appellants would have succeeded in obtaining entry clearance. Fourthly, the change in government policy, giving a voucher-holder British Citizenship as of right, had perversely in this case put the appellants in a worse position than the original voucher scheme! Fifthly, this surely defeated the objective of the reform which in terms was intended to honour 'a moral obligation' whereby the government would be 'acting to put that right'. Finally, the situation whereby dependent applicants would now have to comply with the 'exceptional compassionate circumstances' requirement of rule 317, rather than automatically follow the special voucher-holder, provided they were not over 25 years of age, was surely not one that was ever intended.

Yet, the application was rejected. This was despite the fact that the immigration tribunal had considered the following specific facts: (a) the personal histories of the appellants and their mother, the sponsor; (b) the withdrawal of the voucher scheme and the specific reasons given for this by the government in terms of righting a historical wrong; (c) the deletion of the immigration rules relevant to the voucher scheme and the accompanying statements, eg that it is 'unfinished business'; (d) certain announcements made by the government in press releases, and in Parliament, following the withdrawal of the voucher scheme. The Court of Appeal in turn rejected the argument that there was a legitimate expectation arising from a course of conduct[77] going back into history. Indeed, this was a family which had applied five times over several years, but each time faced a decision-maker who failed to appreciate the correct legal context of this type of

77 A 'procedural legitimate application' signifies some *process right* that the applicant claims to possess as the result of behaviour by the public body which generates the expectation (see *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 and *R v Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299). A 'substantive legitimate expectation' signifies some *particular benefit or commodity*, such as a welfare benefit or a licence, and this would be founded on an action which is said to justify the existence of the relevant expectation (see *R v Minister for Agriculture, Fisheries & Food, ex p Hamble (Offshore) Fisheries Ltd* [1985] 2 All ER 714, 729 where Sedley J said that 'the real question is one of fairness in public administration'. See also *R v North & East Devon Health Authority, ex p Coughlan* [2001] QB 213, where the court said that it would itself decide whether frustrating the expectation was so unfair as to amount to an abuse of power).

case. Thus, in this way the challenge in the case of *Rekha Modhvadiya*[78] in 2005 on the grounds that the applicants were entitled to be treated in accordance with the terms of the special voucher concession because of a legitimate expectation, were rejected outright by the British courts.[79] It is clear that the interests of the wider British Overseas Citizens community still remain unresolved 30 years after the *East African Asians Case*.

(G) DOMESTIC CITIZENSHIP LAWS AND EUROPEAN COMMUNITY RIGHTS

The *East African Asians Case* has not just failed to deliver results in this sense. It is also going to have a limited impact on the removal of existing citizenship rights that the government is currently countenancing. On 30 March 2006, the Immigration, Asylum and Nationality Act 2006 received the Royal Assent. It was the fourth piece of immigration legislation in six years. Barely is the ink dry in the last Act passed just two years ago,[80] which in turn followed hot on the heels of an earlier one passed two years before that.[81] Yet this Act, more than the others, has gone unnoticed; such is the state of ennui with immigration legislation these days. It is all the more pernicious for that. It puts paid to citizenship rights in ways that have hitherto been understood. The deprivation of citizenship was inevitable. Over the last five years, a barrage of legislation has indiscriminately linked immigration, asylum and terrorism. The abrogation of citizenship rights is the result. Yet, the deportation of British citizens who have dual nationality may not *per se* amount to degrading treatment under Article 3 in the way that it did in the *East African Asians Case*.

The Immigration, Asylum and Nationality Act 2006 is not just about immigration, asylum and nationality, as its name implies. The Preamble to the Act provides a sinister reminder that it is an Act intended also 'for connected purposes'. One such purpose is the removal of time-honoured citizenship rights. The government can revoke a person's citizenship if the Secretary of State for the Home Department is satisfied that such deprivation is 'conducive to the public good'.[82] It can also 'remove from a specified person

78 Richards LJ considered the argument to 'lack any real prospect of success' (para 23). See *Rekha Modhavadiya v Secretary of State for the Home Department* [2005] EWCA Civ 1340, CA (Richards LJ, 25 October 2005).

79 A challenge before the ECtHR in Strasbourg has been initiated.

80 Asylum and Immigration (Treatment of Claimants etc) Act 2004. For a commentary see Satvinder S Juss, *A Guide to the Asylum and Immigration (Treatment of Claimants etc) Act 2004* (Cavendish Publishing, London 2005).

81 Nationality, Immigration and Asylum Act 2002.

82 Section 56(1)(2) of the 2006 Act states, 'The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good', and inserts a new s 40(2) into the British Nationality Act 1981.

a right of abode in the United Kingdom'[83] with the consequent right to remain there. The Nationality, Immigration and Asylum Act 2002 had already made it possible to de-register and deport a person whose presence the Secretary of State deemed to be 'seriously prejudicial to the vital interests of the United Kingdom'.[84] However, the use of the power to remove people on grounds that it is 'conducive to the public good' was previously only available in respect of non-citizens.[85] It is now available in respect of citizens of the realm. It will be recalled from the analysis of the *East African Asians Case* above that during that time India accepted British citizens of Asian origin, who were refused entry by Britain, but only whilst pointing out that strict controls had been deemed necessary by the Indian government 'not by way of retaliation but to emphasise (to the United Kingdom government) the urgent necessity of allowing persons their rights of citizenship irrespective of their country of origin'.[86] Foreign governments today are likely to be much more disinclined to accept persons being deported by Britain, even where they have the citizenship of that other country, given that these people are likely to be regarded as 'undesirable' by all governments concerned about public order and national security in an age of global terrorism. Consequently, under the Immigration, Asylum and Nationality Act 2006, it is most doubtful whether any country will be in a rush to accept people being removed by Britain in these circumstances. This is particularly so given that they will have been erstwhile citizens of the UK, prior to being stripped of that nationality and then being deported, in what amounts to a unilateral action. In the 1960s, India had accepted a large number of Asians. That was a very different case. They were not only kith and kin, they were not of undesirable character. In fact, there was considerable sympathy for their plight. Today, a country like India would be every bit as concerned about subversives and terrorists in its midst as anyone else.

Deportation is also likely to be degrading and inhuman for the persons concerned because the removal from the United Kingdom of a former citizen is the palpable aim of these 2006 provisions. Citizenship revocations are only permissible on the grounds that

83 Section 57(1) of the 2006 Act states, 'The Secretary of State may by order remove from a specified person a right of abode in the United Kingdom which he has …' and thereby inserts a new section 2A(1) into section 2 of the Immigration Act 1971.

84 Section 4 of the Nationality, Immigration and Asylum Act 2002 reads, 'The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of (a) the United Kingdom, or (b) a British overseas territory', and thus amended, as from 1 April 2003, the British Nationality Act 1981 by inserting a new s 40(2). The phrase 'seriously prejudicial to the interests' was taken from the European Convention on Nationality (Strasbourg, 6 September 1997). It is the government's intention to ratify this Convention: see N Blake and L Fransman, *Butterworths Immigration Law Service* (LexisNexis, London 1999) A[2604].

85 It was a power first used in the Immigration Act 1971 whereby s 3(5) states, 'A person who is not a British citizen is liable to deportation from the United Kingdom if (a) the Secretary of State deems his deportation to be conducive to the public good; or (b) another person to whose family he belongs is or has been ordered to be deported'.

86 See *The Times of India*, 7 March 1968, p 1.

'it would be conducive to the public good for the person to be excluded or removed from the United Kingdom'.[87] Unlike the Nationality, Immigration and Asylum Act 2002, the power to deport people on grounds 'conducive to the public good' will now be applied to citizens as well as non-citizens. For this reason, it is likely to have a major impact on minority ethnic groups in that its application will invariably be racially and/or religiously discriminatory. Even more worryingly, the Secretary of State can refuse to register as a citizen or British subject a person aged 10 or over if not satisfied that he or she is of 'good character'[88]—whatever that means. So, the power to deny people a basic right of sojourn is not confined to those whose presence within the realm is not deemed to be 'conducive to the public good'. This too is likely to have a disproportionate impact on minority ethnic people.

Accordingly, the interesting question is whether, as a matter of law, the deportation of a British citizen to the country of his dual nationality abroad can also constitute a violation of Article 3 as it did in the *East African Asians Case.* Technically, as a matter of law, it can, because of the recognition by the Commission that 'treatment of an individual may be said to be degrading in the sense of Article 3 "if it grossly humiliates him before others or drives him to act against his will or conscience"'. As the Commission observed, it is recognised that that 'the word "grossly" indicates that Article 3 is only concerned with degrading treatment' which reaches a certain level of severity.[89] However, it seems unlikely that this result would be reached in Strasbourg today. Despite the fact that a person may be 'grossly humiliated' in his ill-treatment he may still be unable to prove an Article 3 violation because, without some special feature to his case such as race discrimination, he would not be able to prove that his ill-treatment had reached a certain level.

The answer to the removal and deprivation of citizenship would appear to lie in European Community law. British citizenship is the pathway to citizenship of the European Union. In the landmark case of *Manjit Kaur,*[90] the European Court of Justice[91] held that whereas the EU is not concerned with how states grant citizenship to individuals, it is concerned with how states deprive those individuals of citizenship, as this has a direct

87 Section 57(2) of the 2006 Act states, 'The Secretary of State may make an order … only if the Secretary of State thinks it would be conducive to the public good for the person to be excluded or removed from the United Kingdom', and thereby inserts a new s 2A(2) into s 2 of the Immigration Act 1971.

88 Section 58(1) of the 2006 Act states, 'The Secretary of State shall not grant an application for registration of an adult or young person as a citizen of any description or as a British subject … unless satisfied that the adult or young person is of good character'.

89 Paragraph 195.

90 *R (on the application of Kaur) v Secretary of State for the Home Department* [2001] ECR I-237, [2001] All ER (EC) 250, ECJ.

91 In November 1998, with the coming into force of Protocol 11 of the ECHR, the European Court became full-time and took over the functions of the European Commission, with the result that cases no longer go to the Commission first, with the Court deciding the admissibility of the application itself. The move was intended to streamline the procedure and reduce the huge delays in getting a case heard. This latter target has not been fully achieved.

impact on the deprivation of European Citizenship. The deprivation of citizenship of the EU must, therefore, be in accordance with principles of natural justice, the prohibition on statelessness and international law. This is entirely consistent with Protocol 4 of the European Convention on Human Rights, which in Article 3(2) states that 'no one shall be *deprived* of the right to enter'. In fact, it is well established that notwithstanding the non-ratification of Protocol 4 by the UK, the ECHR as a whole (and all human rights and Protocols contained within it) is part of the corpus of general principles of EC law[92] and as such can be used in the construction of EC law.[93] It is for this reason that cases are already beginning to be argued before the British courts on grounds of European citizenship laws. It is a curious state of affairs when in order to protect the right to British nationality—a right so assiduously developed by the common law over hundreds of years—aggrieved citizens have to turn to the law relating to EC nationals. One such recent challenge arose in the case of *W (China) and Anor*.[94] A child who, as an Irish citizen, wanted to assert her right of free movement within the European Union, by relying on Articles 17 and 18 of the EC Treaty, failed because she was not in possession of sickness insurance or sufficient resources to avoid becoming a burden on the social assistance system in the UK. As a citizen of the Irish Republic, the claimant was, under Article 17 of the EC Treaty, also a citizen of the European Union. Under Article 18 of the EC Treaty, every citizen of the EU has the right to move and reside freely within the territory of the member states. The claimant wanted to stay in the UK. She narrowly failed. Had she had health insurance she would have had a good chance of succeeding. On this basis, citizens of the UK today, who by virtue of that fact are also EU nationals, can set out to protect their rights where under UK law those rights of citizenship are being violated. The matter will have to await further argumentation in the future.[95]

(H) CONCLUSION

The *East African Asians Case* remains instructive for governments and lawyers alike, not just for its elaboration of human rights principles in the context of the ECHR, but for its illustration of how the UK government in 1968 abandoned territorial birthright citizenship at common law in favour of statutory innovations. This aspect of the case has gone largely unnoticed over the years, perhaps because the decision was so politically explosive. Twenty-

92 See EU Treaty, Art 6 (ex Art F.1). See also *Elliniki Radiophonia Tileorassi AE v Pliroforissis and Kouvelaas* [1994] ECR I-2951, ECJ; *B v Secretary of State for the Home Department* [2000] Imm AR 478, paras 13–14.

93 *R (on the application of Kaur) v Secretary of State for the Home Department* [2001] ECR I-237, [2001] All ER (EC) 250, ECJ.

94 *W (China) and Anor v Secretary of State for the Home Department* [2006] EWCA Civ 1494 (Buxton, Sedley and Dyson LJJ). See also *The Independent*, 17 November 2006, p 41.

95 A Petition to the House of Lords has been initiated.

five citizens of the United Kingdom and Colonies petitioned Strasbourg on the denial of the citizenship right when as East African Asians they were refused entry to the United Kingdom. What was at issue was the United Kingdom's responsibility for its own citizens. They lived in East Africa and most had never set foot in the United Kingdom. They were British citizens and regarded themselves as such. The United Kingdom itself served as a model of contemporary liberal western democracy. Yet, it denied entry to its own citizens simply because they were Asian, and used racial discrimination to do so. On 14 December 1973, the European Commission on Human Rights found in their favour. But the Commission's determination was suppressed for 20 years, and was not disclosed, published or released into the public domain. This remains a remarkable fact given the hugely wide-ranging implications of the determination.[96]

It is worth remembering that the *East African Asians Case* only arose because Parliament decided in the 1960s to end territorial birthright citizenship—which had been an accepted principle of law for over 700 years in England—in favour of 'parentage birthright citizenship'. Had the British Parliament not done so, the East African Asians would not have made the history that they did because they would all have been granted entry to the UK, as they deserved. These days it is all too easy to forget that the classical understanding of citizenship laws in the United Kingdom lies at the heart of English common law. The common law was based on the feudal system. The feudal system of early England rested on the ligeance of the subject to the King or lord.[97] Territorial birthright citizenship arose from this feudal relationship as a purely practical matter.

The concept of *jus soli* arose directly from the formulation of a citizenship rule founded not on heredity or parentage but territorial birthright. Jus soli meant citizenship by the mere fact of birth within the territory.[98] Modern legislation has denuded this concept considerably. However, there are only two common law rationales for limiting territorial birthright citizenship. The first is where the parents of a child born within the territory are foreign ambassadors or diplomats, and the second is where the parents of a child born within the territory are alien enemies in an area under hostile occupation.[99] In neither case does the common law allow for removal of citizenship. It would certainly be curious if one group of citizens were able to deprive another of their rights of citizenship simply because that group had a control over Parliament that the other did not.

96 *East African Asians v The United Kingdom,* Applications Nos 4403/70–4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70 and 4526/70–4503/70.

97 See John Salmond, 'Citizenship and Allegiance: Nationality in English Law' (1902) 18 LQR 49, 53.

98 The other method of acquiring citizenship is *jus sanguinis* and it relies on the status of at least one parent for determining citizenship.

99 *Calvin v Smith* (1608) 77 Eng Rep 377 (KB) 384, 399. The reason for such common law exceptions is that persons born under these circumstances do not owe allegiance to the sovereign nation: see the discussion in the US cases of *Wong Kim Ark* 169 US at 656 and *Rabang v INS* 35 F 3d 1449, 1457 n 5 (9th Cir 1994).

What is often not realised, however, is that the *East African Asians Case* also demonstrated the limits of human rights law. Article 3 cannot be invoked in every case where citizenship rights are denied. The *East African Asians Case* did not determine that it always would be.[100] Common law rights—especially those that are fundamental—may still therefore be of value and not without significance where human rights law reaches its limits. There was also the question of the responsibility that was foisted upon weaker nations to admit a group of people who were citizens of another country. This has not often been recognised, but it has implications for future policy-making by the powerful nations of the world.[101] Both Kenya and India were having to take responsibility for a group of people who were citizens of the United Kingdom. Today, under the newly-passed Immigration, Asylum and Nationality Act 2006, the Secretary of State has the power to deprive a person of his British citizenship on grounds that are 'conducive to the public good' where he is a dual national, with the power to deport him to the other country of which he holds nationality. This does not technically countenance statelessness (which is unlawful in international law)—in the way that the treatment of the East African Asians did—because the deported person will be removed to a country where he holds citizenship, but it does countenance the loss of citizenship without a fair procedure. Only a flurry of agitated renunciations of inconvenient foreign nationalities by Britain's dual nationals will provide an absolute guarantee against deportation of British citizens from the United Kingdom. Given the loss of citizenship without the safeguards of fair procedure, there is every chance that those deprived of citizenship will be subjected to inhuman and degrading treatment—the very question that the *East African Asians Case* so famously determined—particularly where such persons may be removed to countries to which they have a very tenuous connection.

[100] *East African Asians Case* (n 97), para 196, where the European Commission said, 'The Commission … observes that it is not faced with the general question whether racial discrimination in immigration control constitutes as such degrading treatment'.

[101] For example, plans have recently been drawn up by the European Commissioner for Justice and Home Affairs, Franco Frattini, aimed at making African countries take back illegal immigrants who are already in Europe, although these are to be worked out on a country-by-country basis: see David Charter, 'EU May Fund African Job Centres' *The Times*, 1 December 2006, 58.