



Citizenship Denied

The stateless British
children of Hong Kong

CITIZENSHIP DENIED: THE STATELESS BRITISH CHILDREN OF HONG KONG

I. Background

1. The former Home Secretary Mr Michael Howard QC MP announced on 4 February 1997 that provision would be made to allow the solely British ethnic minorities of Hong Kong “to apply for registration as British citizens, giving them a right of abode in the United Kingdom, after 30 June 1997”. This was the response to expressions of concern in both Houses of Parliament resulting from views on the subject put forward by the Hong Kong Legislative Council and the Governor of Hong Kong that the nationality status of some 8,000 people from the ethnic minorities in Hong Kong would have been ‘uncertain’ after the handover to China¹.
2. The 3½ million former Hong Kong British Dependent Territories citizens of Chinese race were not “solely British”, as they had always been considered Chinese citizens under the Nationality Law of the People’s Republic of China. Chinese law provides that all Hong Kong residents of Chinese descent are Chinese nationals², whether or not they hold British Dependent Territories Citizens passports or British National (Overseas) passports. The provision announced by the Home Secretary was intended to benefit the solely British ethnic minorities³, mainly of South Asian descent.
3. The ethnic minorities were never technically stateless – they have the status of British National (Overseas), which was created by the Hong Kong Act 1985. They were, however, effectively stateless. A British National (Overseas) [“BN(O)”] passport carries with it the right of abode nowhere and merely states that the holder does not require a visa to visit the U.K. The Rt. Hon. Jack Straw MP, the present Foreign Secretary said on 30 January 1997⁴ that a claim that this amounts to British nationality “is pure sophistry”.

¹ Commons Hansard, 4 February 1997, Columns 552-3, “Ethnic Minorities (Hong Kong)”

² Explanation of the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in Hong Kong, 15 May 1996

³ Ethnic Minorities Citizenship Unit, Hong Kong – statement of 10 June 1997

⁴ Labour Call for British Citizenship for Hong Kong Ethnic Asians, 30 January 1997, 19:09 GMT

4. The British Nationality (Hong Kong) Act 1997 (the “1997 Act”) came into force on 19 March 1997. It entitles a British national who possesses no other nationality, and who was ordinarily resident in Hong Kong immediately before 4 February 1997, to apply for registration as a British citizen, if he was ordinarily resident in Hong Kong on the date of his application. Solely British nationals covered by the act include former Hong Kong British Dependent Territories citizens, British Nationals (Overseas), British Overseas citizens, British subjects and British protected persons.

II. The difficulty faced by British National (Overseas) children of Indian descent

5. Both adults and minors can apply for British citizenship under the 1997 Act in their own right⁵. This paper concerns the difficulties faced by a small number⁶ of BN(O)s of Indian descent in exercising their entitlement to register as British citizens.
6. The key identifying features of these cases are that:
 - (i) the person acquired British National (Overseas) status by registration,
 - (ii) the person was a minor immediately before 4 February 1997, and
 - (iii) at birth, they had acquired Indian citizenship by descent.
7. It is a statutory requirement for registration as a British citizen under Section 1 of the 1997 Act that the applicant must have been solely British, and not held another nationality immediately before 4 February 1997.
8. In order to assist the consideration of applications under the 1997 Act, through most of 1997 and during the first two months of 1998, the Home Office sought, via the Foreign & Commonwealth Office and the British High Commission in New Delhi, to clarify with the Indian Ministry of Home Affairs the terms of Indian citizenship law.

⁵ Ethnic Minorities Citizenship Unit, Hong Kong – statement of 10 June 1997

⁶ It is estimated that the number of people affected does not exceed 200

9. The Consulate General of India in Hong Kong issued a press release on 16 June 1997 which stated that “It is confirmed that neither the Constitution of India nor the Citizenship Act, 1955 recognizes the concept of dual nationality for a person of full age and capacity.” It is correct that the mere fact that a child is born of an Indian parent abroad and thereby involuntarily acquires the citizenship of that country should not affect his right to be a citizen of India by descent.
10. The Consulate General of India in Hong Kong issued a further press release⁷ on 20 March 1998. Paragraph (II)(2) of the Indian Consulate’s press release states that an Indian citizen minor who acquires a BN(O) passport “for having been born in Hong Kong” remains a citizen of India till the age of 18.
11. Relying on the press release, the Home Office takes the position that the minors were therefore not solely British and do not meet the requirements for registration under the 1997 Act.
12. For this reason, for the past seven years, a British citizenship application by a BN(O) of Indian descent who was a minor on 4 February, 1997 is normally refused.

III. Why the Home Office’s reliance on the clarification press release is misplaced

13. The real position is that the Home Office’s reliance on the Consulate-General of India’s press release of 20 March 1998 is misplaced. The error lies in the fact that the press release is based on a misunderstanding of the manner in which BN(O) status was granted.
14. As is clear from its wording, the press release only considers the position of persons who have acquired BN(O) status “for having been born in Hong Kong” (i.e. by birth). BN(O) status, however, could not be acquired by virtue of birth in Hong Kong. It could only be acquired by making an application for registration. This is entirely clear

⁷ Lords Hansard, 27 October 2004, Column WA 126, “Minors with Indian Nationality”

from the wording of article 4(2) of the Hong Kong (British Nationality) Order 1986⁸.

15. Regulations 3-5 of the British Nationality (Hong Kong) Regulations 1986⁹ necessitate an “application for registration as a British National Overseas” for both adults and minors who wished to acquire the status. There is simply no way to acquire BN(O) status involuntarily (e.g. by birth, by descent or the operation of law).
16. Regrettably, in seeking clarification from the Indian authorities, the British authorities only sought clarification on whether “involuntary acquisition of another citizenship does not automatically deprive an individual of Indian citizenship”¹⁰.
17. The British authorities did not advise the Indian authorities that BN(O) status could be acquired solely by making a written application for registration. This has been recently confirmed in a Written Answer of the Minister of State (FCO), Baroness Symons of Vernham Dean¹¹.
18. Understandably, Indian authorities will have therefore restricted their clarification to those who involuntarily acquired British nationality by birth, without considering the position of those who acquired British nationality by registration.
19. The distinction between involuntary acquisition of British nationality by birth in Hong Kong and acquiring it by registration is a critical one. A nationality acquired by birth is forced upon the recipient by operation of law, whereas acquisition by registration requires an application to be made for the nationality.
20. Nowhere in the press release of the Consulate-General of India does it suggest that minors who acquire British nationality by registration remain citizens of India.

⁸ SI 1986/948 Hong Kong (British Nationality) Order 1986

⁹ SI 1986/2175 British Nationality (Hong Kong) Regulations 1986

¹⁰ Telegram to HM High Commissioner to India to approach Government of India, dated 11 February 1997

¹¹ Lords Hansard, 16 November 2004, Column WA 134, “Minors with Indian Nationality”

21. Consequently, the Home Office's reliance on the press release is misplaced because
- (i) Indian authorities do not appear to have been properly advised on, or to have even considered the position of those who acquired British nationality otherwise than by birth;
 - (ii) BN(O) status could only be achieved by applying for registration, and the press release itself makes no reference to the position of minors who have acquired British nationality by applying for registration.

IV. The termination provisions of Indian citizenship law

22. Section 9(1) of India's Citizenship Act, 1955 provides that "any citizen of India" who by naturalization or registration acquires the citizenship of another country shall cease to be a citizen of India.
23. On 16 February 1962, a Constitution Bench of the Supreme Court of India held in the case of *Izhar Ahmad Khan Vs. Union of India* that: "Just as the citizenship of India can be acquired by naturalisation or registration, so can the citizenship of a foreign country be similarly acquired by naturalisation or registration. **If it is shown that the person has acquired foreign citizenship either by naturalisation or registration, there can be no doubt that he ceases to be a citizen of India in consequence of such naturalisation or registration...**it is only in regard to the category of cases where foreign citizenship is acquired otherwise than by naturalisation or registration that difficulty may arise."
24. The Home Office Nationality Instructions assert that an Indian minor who acquires British nationality by registration does not lose Indian nationality as a consequence¹². Since, other than the press release which clearly does not address this point, "Home Office records do not include copies of any other correspondence between the British High Commission in New Delhi and the Indian Government on this subject¹³," it is unclear on what basis this assertion is supported. The Home Office state that they

¹² Nationality Instructions, Chapter 14, Annex H, Paragraph 7.1

¹³ Home Office IND letter, 19 September 2003, reference: NY/98 170/1080/1

“are satisfied that the summary is a fair reflection of Indian citizenship law” but do acknowledge that the “Indian authorities have not agreed every point¹⁴”.

25. As a minor cannot act on his own, the BN(O) registration application was made by parents acting on behalf of the child. It is therefore deemed to be made by the child. The BN(O) registration application contained a declaration that the parent’s “rights in respect of the child have not been limited in any way”. Regulation 2 of the British Nationality (Hong Kong) Regulations 1986¹⁵ makes it clear that the “applicant” in relation to an application made on behalf of a person not of full age or capacity is the person on whose behalf the application is made.

26. In effect, the Home Office contends that section 9(1) of India’s Citizenship Act, 1955 applies only to adults. In fact, quite the opposite is true. A crucial difference exists between section 8 (renunciation) and section 9 (termination) of India’s Citizenship Act, 1955. Section 8(1) envisages renunciation of Indian citizenship by “any citizen of India of full age and capacity”. This is to be contrasted to section 9(1) which clearly refers to “any citizen of India”. If the Indian Parliament’s intention was that section 9(1) should apply only to adults, then in conformity with section 8(1), section 9(1) would have been worded “any citizen of India of full age and capacity”. It must be assumed that the Indian Parliament was properly aware of the citizenship law that it enacted, and intended the natural meaning of the wording of section 9(1), namely that the operation of the section was not to be restricted to adults.

27. It is therefore a fact that section 9(1) of the India’s Citizenship Act, 1955 is unqualified that where “any citizen of India” acquires a foreign citizenship by naturalization or registration, loss of Indian citizenship is automatic and immediate. This is supported by the ruling of the Supreme Court of India cited previously.

¹⁴ Home Office IND letter, 7 September 2004, reference: 98 170/1080/1

¹⁵ SI 1986/2175 British Nationality (Hong Kong) Regulations 1986

28. Further, the fact that there is no distinction between adults and minors for the purposes of section 9(1) of India's Citizenship Act, 1955 is reinforced by the wording of a 28 May 2003 Note Verbale of the Indian Ministry of External Affairs¹⁶ and a 28 October 2003 letter of the Indian High Commission, London¹⁷. No reference is made to different treatment for adults and minors in either of those documents, presumably because no provision for separate treatment exists under Indian law.
29. Furthermore, it is clear from the application form for an Indian passport¹⁸ used by the Indian High Commission in London that acquiring British nationality does affect a minor's claim to citizenship of India. The declaration in respect of minors at section H(iv) of the form states: "I hereby declare that the child/children born in the UK has/have not applied for or acquired UK citizenship/travel document. Should I approach the British authorities for such a travel document, I undertake to inform the High Commission of India, London immediately so that Indian travel document may be withdrawn". If making an application to acquire British nationality by registration and holding a British passport has no effect on a minor's citizenship of India, then this declaration would have no purpose and there would be no reason for the Indian passport to be withdrawn upon a minor acquiring British nationality. The wording of the Indian Government's passport application form is further evidence that the Home Office reasoning is flawed and its position is incorrect.

V. Applications under the 1997 Act may have been unlawfully denied

30. Under Section 1 of the 1997 Act, the Secretary of State is required to register as a British citizen a person who makes an application for such registration and meets the requirements set out in the 1997 Act.
31. Because of the misguided interpretation of India's Citizenship Act, for the past seven years a number of BN(O) passport holders of Indian descent who were minors on

¹⁶ Note Verbale from Indian Ministry of External Affairs to British High Commission (ref: T-432/3/2003)

¹⁷ Letter to Home Office Nationality Division from Indian High Commission (ref: Lon/Cons/408/2/2003)

4 February 1997 appear to have been unlawfully denied their right to acquire British citizenship. It was erroneously believed that they did not meet the requirement to be solely British. They had in fact lost their Indian citizenship in consequence of their registration as British Nationals (Overseas).

32. The Home Office can immediately rectify this situation. An entitlement either exists or does not exist on the date of any application under the 1997 Act and if a mistake is made in handling the facts or papers which results in an improper refusal, the refusal is void. If the applicant met the requirements for registration on the date of application, British citizenship can be granted on the basis of the original application. It would be perfectly proper for the Home Office to take steps to grant these applications if it has now emerged that they should have been originally granted.

33. It should be noted that in raising the issues discussed herein, no sympathetic treatment or additional benefit is being sought beyond existing statutory entitlements. It is merely being highlighted that the prevailing policy for implementing the 1997 Act is flawed and that the policy needs to be rectified to give proper effect to the 1997 Act.

Submitted by

The Lord Avebury

Tameem Ebrahim

Email: bnhka1997@yahoo.co.uk

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¹⁸ Application for New Passport or Additional Booklet, of the Indian High Commission, London