

Modernising UK Nationality and Immigration Law

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1. INTRODUCTION

The author has written extensively on constitutional law.¹ In particular, he has pointed out that c. 300 snippets of *constitutional legislation* and c. 180 Crown Prerogatives ('CPs') could be consolidated into 6-7 Acts. Such could, then, be further consolidated into 3-4 Acts with a Constitution Act of c.100 ss.² This would save huge sums of money for the taxpayer - as well as remedy great inconvenience for judges, lawyers and civil servants. The same applies in respect of *UK legislation generally*. There were c.2666 general Acts of Parliament extant (as at the end of 2020). These could (easily) be consolidated into c. 80. And, there are c. 30-35k statutory instruments (SI's). These could be reduced to c. 100 SI's (of up to c. 800 ss) without difficulty.³

In short, our legal system is clinically obese.

The same applies with regard to UK nationality and immigration law. There is a large volume of legislation - including snippets of material *pre-1971*.⁴ However, it is a confused mass which inter-relates poorly.⁵ The purpose of this article is to consider the legal history of nationality and immigration law and to argue that the current '*dog's dinner*' can be (easily) rationalised by passing 2 pieces of legislation to consolidate all of this material *into*. a:

- Nationality Act; and a
- Nationality (Administration) Act.

The first piece of legislation can be very short since its purpose should be to simplify the *legal categories* of nationality (it may be noted that, for c. 850 years after 1066, there were only two for domestic purposes!).⁶ Also, to clear out obsolete CP's - as well as old nomenclature that only confuses. The second piece of legislation should gather together a veritable mountain of (excessive) administrative provisions governing nationality and immigration. It is '*excessive*' since much of the same results from a lack of consolidation and the need for constant cross-referral due to such. There is nothing difficult about such. Further, it would save the courts, immigration officials, the taxpayer *etc* huge sums as well as time. *Who is the culprit behind all this?* It is the government (in particular, the Home Office) due to its conspicuous failure to consolidate and streamline this area of the law since 1971. The resulting confusion has proved to be a mine for lawyers to exploit, for financial benefit.

2. WHY THIS ISSUE IS URGENT

Why the modernisation of nationality and immigration law is urgent may be simply stated:

- There are 15 countries which still retain the UK sovereign as *head of state*.⁷ It is inevitable that - in due course - some of these will dispense with that office. This is not only understandable; constitutionally, there is no problem with this. However, it is important that such countries remain Commonwealth countries;

¹ See *App A*.

² See, in particular, GS McBain, *Modernising the UK Constitution - Draft Legislation* (2022) Int. Law Research, vol 15, no 4, pp 110-209.

³ GS McBain, *The Collapse of the English Legal System - Who is to Blame? Part 1* (2022) Journal of Politics and Law, vol 15, no 4, pp 1-94.

⁴ See *App B*.

⁵ O Hood Phillips *et al*, *Constitutional and Administrative Law* (8th ed, 2001), p 503 quoted Fransmans' *British Nationality Law* (3rd ed, 1989), p viii 'British nationality law is probably more complex than that of any other country and, on its own, certainly more complex today than at any time in the past.' The same could be said today.

⁶ These were '*British subject*' and '*Foreign subject*'.

⁷ *viz.* Canada, Belize, Solomon Is., Australia, Grenada, St Kitts & Nevis, NZ, Jamaica, St Vincent & the Grenadines, Antigua & Barbuda, Papua New Guinea, Bahamas, St Lucia, Turks & Caicos and the UK.

- There are, also, 14 British Overseas Territories (BOT).⁸ It is, also, inevitable that, in time, some of these will either become independent, yet retain the UK sovereign as head of state. Or, they will become independent and not retain the sovereign as head of state. However, it is important that they, also, remain Commonwealth countries.

UK nationality and immigration law needs to provide for this. It also needs to simplify the categories of nationality which have become confusing and multitudinous when - for hundreds of years - they were very simple. Thus, the Nationality Act 1981 created the following, confusing, nomenclature (save for no 3 below which was created by the Hong Kong Act 1985):

- British citizen
- *UK overseas citizen* (for, otherwise, stateless citizens)
- *UK overseas (national) citizen* (for HK citizens)
- *Protected citizens* (for protectorate, protected and mandated citizens)
- BOT citizens (for British overseas territories citizens)
- Commonwealth citizens (for citizens of the Commonwealth, *post empire*)

while, also, retaining the categories of:

- *British subject*,⁹ and
- Foreign citizen¹⁰

However, all those categories which are *in italics* are, now, ‘closed’ categories. That is, no person in the future can be added to them (unless legislation were to additionally provide). And, the number of persons within each of them are (rapidly) declining due to death - as well as such persons removing themselves from the category (by choosing another nationality *etc*).

- As a result, to simplify things, all these categories should be abolished in a new *Nationality Act* and all these persons should, now, be moved to to the category of ‘*British citizen*’ - subject to certain restrictions.¹¹
- Further, what the Immigration Act 1971 and the Nationality Act 1981 conspicuously failed to deal with was the problem of persons acquiring two (or more) passports. The result is that British passports - like those of certain other countries - have become, almost, a ‘*fashion accessory*’. That is, with persons holding a British passport while, also, holding other passport(s). Or, permanently living in other countries and having no intention to permanently reside (that is, to ‘*fix their abode*’, in older terminology) in the UK which was the whole purpose of a person being a ‘*British subject*’ (or a foreign citizen who was naturalised) in olden times. This matter of dual passports must change since it is unsustainable. People should go back to holding a British passport and no other.

Thus, our nationality and immigration legislation is badly out of date. It needs to be consolidated and modernised.

3. THE SOLUTION

It may be useful to state the conclusion at the beginning:

- all nationality and immigration legislation should be consolidated into a: *Nationality Act* and a *Nationality (Administration) Act*;
- the confusion between the: (i) nationality of a person; and (ii) the right to live permanently in the UK, should end. The latter should only apply to ‘*British citizens*’ just as it did to a ‘*British subject*’ in olden times (the same being one who owed allegiance to the sovereign) - excepting certain British citizens deriving from closed categories (see below);
- ‘*closed categories*’ should be abolished (the numbers in them are, likely, now small in any case).¹² All should become ‘*British citizens*’¹³ **unless** such persons have in the meantime:

⁸ viz. Anguilla (15k), Bermuda (71k), British Antarctic Territory (BAT, npp), British Indian Ocean Territory (BIOT, npp), British Virgin Is. (BVI, 35k), Cayman Is., (66k), Falkland Is. (3.3k), Gibraltar (32k), Montserrat (5k), Pitcairn Is. (c 45), St Helena, Ascension & Tristan da Cunha (4.4k), South Georgia & South Sandwich Is. (npp), Sovereign Base Areas of Akrotiri & Dhekelia (c.18k), Turks & Caicos (56k). The populations are indicated in the brackets with ‘*npp*’ meaning no permanent population.

⁹ However, confusingly, it became used in a new sense in 1981, see n 91 (it made various persons who might otherwise be stateless, British subjects).

¹⁰ When the UK joined the EU there, also, arose the concept of an ‘*EU citizen*’. This reference now, for nationality and immigration purposes, should be to a ‘*foreign citizen*.’

¹¹ See 9, closed categories, (a)-(e).

¹² For example, the last British trust territory ended in 1964 (see 9(b)). Thus, such persons have had ample time to apply for residence in the UK (more than 58 years). Further, such persons will now be, at least, 74 years old (assuming not a minor). Citizens of Eire (Southern Ireland) would now be, at least, 86 years old (assuming not a minor) (see 9(a)). All the same (as well as other protected citizens, HK citizens and stateless persons) will - almost certainly - have taken other passports or other permanent residence elsewhere. Thus, the totality of all closed categories is likely to be small (probably, 50% less than estimates).

¹³ This is an increase in status, likely, improving consular access.

- (a) acquired a foreign (including a Commonwealth) citizenship; or
 - (b) a permanent residence not in the UK; or
 - (c) not lived in the UK in the last past 5 years;¹⁴ or
 - (d) renounced their previous (closed) category status;
 - (e) acquired the closed category status illegally.¹⁵
- there should be 2 categories of nationality: (a) British citizen; (b) foreign citizen;¹⁶
 - the Commonwealth should invite all BOT territories to become full members of the Commonwealth instead of just being allied to the same (i.e. with voting rights).¹⁷ All BOT citizens would, then, be Commonwealth citizens in fact,¹⁸ with some, also, being *British citizens* - but not if (a)-(e) in respect of closed categories (see above) also applied (having previously renounced their BOT status in the case of (d));¹⁹
 - obsolete CPs and obsolete terminology ('*alien*', '*place of abode*' etc) should be abolished and the latter replaced with more modern terms ('*foreign citizen*', '*permanent place of residence*' etc);
 - the granting of *permanent residence* to any category other than that of a '*British citizen*', should end;²⁰
 - the UK should start to phase out all dual passports - commencing with Commonwealth passport holders.²¹ It is dual passports which have contributed to the weakening of the immigration and nationality system worldwide;²²
 - the UK should clarify the position on naturalisation (confirming that such is not possible at common law).²³ Also, the grant of naturalisation should be (greatly) restricted, with reliance on *visitor* and *visa* access instead;
 - in the end, there should only be - in the UK for nationality purposes - 2 categories (as in former times) – (a) British citizen; and (b) foreign citizen.²⁴ As for BOT citizens, they should be treated as '*British citizens*' (as they presently are in most cases).

In conclusion, our nationality legislation should be up-dated. And, be made clear and simple. It is not difficult.

¹⁴ This 5 year rule for naturalisation is long established (see 1870 and 1914 Acts). Also, ECS Wade & G Phillips, *Constitutional Law* (1st ed, 1931), p 182 (5 out of the preceding 8 years, in the case of the 1914 Act) and AB Keith, *The Privileges and Rights of the Crown* (c. 1946), p 92 'Naturalisation is permitted, normally on the strength of five years' residence in British territory or service of the Crown and intention to continue residence or service.'

¹⁵ For example, by illegal entry, fraud or false representation.

¹⁶ This would be to dispense with '*EU citizen*' (as as a separate category of nationality, for UK purposes) since the UK is no longer part of the EU. Also, with '*Commonwealth citizen*' (as a separate category of nationality for UK purposes). This is not to say that visitor and visa arrangements cannot be different. It is simply to say that - for the categorisation of nationality for UK purposes - it is simpler to treat Commonwealth citizens as '*foreign citizens*' (many Commonwealth countries are republics anyway).

¹⁷ The merit of this is that, if some - or all - BOT vote (at some stage) for independence they would, still, remain Commonwealth countries. Those BOT states with a prospect of doing this in the near future include Turks and Caicos (which might join with the Bahamas), Anguilla and Montserrat.

¹⁸ All BOT citizens are, presently, called '*Commonwealth citizens*' in UK nationality law. However, they are not, actually, such since these territories are not separate states (nations), which the Commonwealth presently requires for membership.

¹⁹ For example, it seems only fair that a Turks & Caicos citizen (a BOT citizen) who, also, holds a US passport - or who has permanent residence there - should not, also, claim permanent residence (a '*right of abode*') in the UK. In the case of Pitcairn (45 people or less) many have permanent residence rights in Australia it seems (where they often go to work). Thus, the same should apply (it may be noted that few, if any, Pitcairn islanders, have expressed the desire to live in the UK anyway - not least because of the distance).

²⁰ Also, called '*unlimited stay*', this has caused real confusion.

²¹ By 1931 (Statute of Westminster) it seems clear that it was no longer possible to 'speak of the dominions as belonging to the UK.' See AB Keith, *The Constitution of England from Queen Victoria to George VI* (1940), vol 2, p 341. Today, it is not legally accurate to speak of the Commonwealth countries as being part of the UK in some way; they are separate legal jurisdictions and should be treated as such.

²² Pre-WW2 the system worldwide was, generally, very simple since all persons were the subjects (or nationals) of just one country (state).

²³ At common law the Crown had a prerogative to make a person a *denizen* (which prerogative is now obsolete and should be abolished) but not to *naturalise* a person.

²⁴ This will take time since, in time, BOT will either become independent of the UK or not (and, when independent, retain the sovereign or not). And Commonwealth countries (a number of which will no longer retain the sovereign) should be treated no different to foreign citizens for UK nationality purposes (albeit, they may be accorded greater visa rights to work and study in the UK). This seems inevitable.

4. FROM ANGLO-SAXON TIMES (1066) - 1765

(a) Anglo-Saxon Times

In Anglo-Saxon times the position as to nationality is not wholly clear.²⁵ And, it would have not been so until England was united under one sovereign - this being king Aethelstan (895-939 AD) in 928 AD. Even after this, there were 3 distinct laws prevailing in England, reflecting the national diversity.²⁶

- However, from the time of king Aethelstan - at least - there operated *tight system of police regulation*. All free born²⁷ males (i.e. free men) over the age of 12 were required to bear arms for the purpose of forming the shire armies;
- Also, they were grouped into units of ten ('*tithings*')²⁸ in which every man was responsible for the conduct of the others and he was liable to a fine (or worse) if any other man in the tithing broke the '*king's peace*' (that is, the criminal law).²⁹ If a male person was not in such a grouping, he would either have been an *outlaw* (a term now obsolete) or a *foreigner* (the latter word deriving from the Anglo-Saxon, *feorbuend, fremd*).³⁰

(b) Norman Times

Regardless of Anglo-Saxon law, at the Norman Conquest (1066), a legal event occurred which is still with us. William the Bastard, Duke of Normandy, was declared king of England. William I (1066-87) as he became, then, declared that he owned all England. That is, that all the land in England, legally, belonged to him.

- Much of this land William I parcelled out to c. 1500 of his principal followers who had helped him win the Battle of Hastings and secure the throne. Thus, as in continental *post-Roman* times, English land was allocated to these '*tenants in chief*' - in return for their performing a feudal service to the sovereign (whether military, clerical or agricultural);
- Also, all these followers swore an oath of fealty (loyalty) to William I recognising him as their '*lord*' (making him their '*lord paramount*'). These tenants-in-chief, then, allocated some of the land allocated to them by the sovereign to their followers who, in turn, swore an oath of fealty to them (the former being intermediate lords - each becoming a '*lord mesne*' as a result);³¹
- Besides this oath of '*fealty*' (*fidelitas*) - which was, effectively, a promise to serve in return for being granted title to land³² - there was an oath of *allegiance* given by all subjects to William I as their sovereign (their over-lord or lord paramount)³³ and a promise given in return. This type of fealty was superior to that above;
- Thus, the '*liegeman*' (the vassal, subject) gave a promise to his '*liege lord*' (the sovereign) to serve and obey him. In return, the sovereign gave a promise to protect (defend) his vassal (subject).³⁴ Thus, allegiance (unconditional

²⁵ The Roman administration left Britain c. 210 AD. Thereafter, the country began to decline - exacerbated by the invasion of Germanic tribes from Saxony and they had subdued much of the country c. 534-54 AD. The earliest Anglo-Saxon code is c. 616 AD. See generally, GS McBain, *Modernising the Law: Breaches of the Peace and Justices of the Peace* (2015), Journal of Politics and Law, vol 8, no 3, pp 1588-71.

²⁶ i.e. the law of Wessex, the law of Mercia and the Danelaw (Viking law, the Vikings having invaded from c. 866 AD).

²⁷ There were, also, slaves a category which died out by the 12th century. Also, peasants (*villeins*) a category which no longer existed after the early 17th century.

²⁸ See generally, GS McBain, *Modernising the Law: Breaches of the Peace and Justices of the Peace* (2015) Journal of Politics & Law, vol 8, no 3, pp 158-222.

²⁹ See e.g. FL Attenborough, *The Laws of the Earliest English Kings* (1963), p 159 (*laws of Aethelred*).

³⁰ J Bosworth, *A Compendious Anglo-Saxon and English Dictionary* (1868), *fremed* (foreign, alien, strange); *feorbuend* (far dwelling, a stranger). The latin '*alienigenus*' (a stranger, foreigner, alien) was also used. See CT Lewis & C Short, *A Latin Dictionary* (1890).

³¹ For the norman system of land tenure (from the latin '*tenere*', to hold) see generally, GS McBain, *Modernising English Land Law - Part 2* (2019) Int. Law Research, vol 8, no 1, pp 85-131, especially, pp 88-92. Thus, there was a pyramidal structure of lord paramount ('*paramount*' meaning superior), lord mesne and tenant paravail ('*paravail*' meaning inferior or subordinate).

³² G Bowyer, *Commentaries on the Constitutional Law* (1846), p 400 'Under the feudal system...there was a mutual or confidence subsisting between the lord and the vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted to him; and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies.' Bowyer quoted W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1st ed, 1765-9, Univ. of Chicago Press, rep 1979), vol 1, pp 354-5 (writing in 1765, he noted that the oath of allegiance was required of all persons above the age of 12 including resident aliens; in early times it would not have been required of the latter).

³³ AJ Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925), p 239, *The Ten Articles of William I* (c. 1192-3) 'we have decreed that all freemen shall affirm by covenant and oath, both in and out of England, they will be loyal to king William [I], and along with him uphold his lands and honour with the utmost loyalty, and defend them before him against his enemies'. This was likely exacted in 1068. See, also, *Willelmi Articuli Retractati*, Ibid, pp 245, 249 (probably, a re-statement of the 10 Articles)

³⁴ Bowyer, n 32, p 400, 'when the acknowledgment was made to the absolute superior himself, who was vassal [subject] to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear to his sovereign lord in opposition to all men, without any saving or exception - *contra omnes homines fidelitatem fecit*.'

homage) was not land related as such.³⁵ It was direct obedience and service to the sovereign in return for protection (both military protection and protection accorded by the criminal law).

The effect of this was that all people in England became, legally, the subjects of William I (his 'English' subjects). Those in England who swore no such allegiance were 'foreigners' (aliens). As a result, from 1066-1948, at least, nationality - and the means of determining it under English law - was remarkably simple. For the purposes of English law, all persons everywhere were either:

- (a) English (later British) subjects;³⁶ or
- (b) Foreigners (also, called aliens or foreign citizens).

Further, because William I owned all the land in England, he could exclude anyone whom he did not like.³⁷ They were trespassers. Indeed, William (and his successors) frequently did so and no one (including the royal courts) disputed this Crown Prerogative ('CP').³⁸ If a person was declared an outlaw, they could be summarily expelled by order of the sovereign (if not previously executed, as were most of those who rebelled against the authority of the sovereign, being called 'traitors').³⁹

- as for foreigners, they had to get written permission to enter England - this being in the form of a 'letter of safe conduct';⁴⁰
- further, the permitted duration of the residence of foreigners in England was, generally, very short (even for foreign traders it tended to be 40 days).⁴¹

Also, there was a considerable difference between the above two categories since - although foreigners were under the personal protection of the sovereign while in England⁴² - they did not have the same status as *subjects* who had sworn allegiance to the sovereign and who - as a correlative right - had an enhanced protection (including a 'right of abode' - that is, a right to permanent residence - in England).⁴³ Therefore, foreigners could be expelled at will from the realm (there was no legal redress for the same since this was an unchallenged CP).⁴⁴ As Feilden noted:⁴⁵

Although aliens before the Norman Conquest [1066] were under the king's protection, they were for long regarded in England with peculiar jealousy e.g. in 1258, 1404, 1571 and 1575, they were expelled from the realm; they were subject to higher rates of taxation, and the 'alien tax' was often imposed, e.g.

³⁵ WR Anson, *The Law and Custom of the Constitution* (ed AB Keith, 4th ed, 1935), vol 2, pt 2, p 286, n 1 'The oath of fealty required by the norman kings of their subjects was independent of all conditions of tenure, or of fealty due to another, and thus 'ligaunce' or 'allegiance' came to mean the fealty due to the king.'

³⁶ Wales became part of England (as part of the Crown in 1283). In 1706, the realms (Crowns) of England and Scotland were united, forming Britain. In 1800, the realms (Crowns) of England and Ireland were united, forming the United Kingdom (the 'UK').

³⁷ From this developed the legal proposition that aliens could not hold land under English law (because they were not liegemen, not having given an oath of allegiance). See TFT Plucknett, *Taswell-Langmead's English Constitutional History* (1960), p 678 and F Pollock & FW Maitland, *History of English Law before the Time of Edward I* (reissued SFC Milsom, 1968, rep 1984), vol 1, pp 461-3 (providing a slightly different take on this).

³⁸ The royal courts, in Norman times, would have been very deferential to the sovereign, being chosen by the same and the judges, mainly, comprising Normans.

³⁹ They were traitors because they had committed *traison* (that is, treason, betrayal) against the sovereign by breaking their oath of allegiance to the same.

⁴⁰ See G McBain, *Abolishing Obsolete Crown Prerogatives relating to the Military* (2011) Nottingham LJ, vol 20, pp 23-25. The issue of such letters stemmed from the Crown prerogative of the sovereign to make war and peace. Ibid, p 24. For an early safe conduct in Norman times, see HWC Davis, *Regesta Regum Anglo-Normannorum 1066-1154*, vol 1, p 78 (safe conduct issued in 1088).

⁴¹ See Magna Carta 1215, c 41. Also, Plucknett, n 37, p 83.

⁴² This seems to have also been the position under Anglo-Saxon law, see Robertson, n 33, p 127 (laws of king Aethelred, the sovereign acting as kinsman and protector to strangers). This was repeated in the so-called *Leges Henrici Primi* (ed LJ Downer), c. 1113, p 109 'The king must act as kinsman and protector to all ...strangers' (*alienigenis*).'

⁴³ The basic legal position was protection (militarily and through the courts) in return for allegiance (supporting the sovereign, including coming to the military defence of the same). S De Smith & R Brazier, *Constitutional and Administrative Law* (8th ed, 1998), p 420 'At common law, one who owes allegiance to the Crown is entitled to the Crown's protection; allegiance and protection are said to be correlative duties.'

⁴⁴ Up until the 17th century (time of James I (1603-25)) the courts did not seek to challenge CP's. See e.g. Blackstone, n 32, vol 1, p 230 'the limits [ambits] of the king's prerogative. A topic, that in former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii*. ... Elizabeth [1588-1603]...made no scruple to direct her parliaments to abstain from discoursing on matters of state...'

⁴⁵ H Feilden, *A Short Constitutional History of England* (1911), p 235. Feilden failed to note the expulsion of c. 2000 Jews from England by an edict of Edward I (1272-1307) on 18 July 1290. See also D Chalmers & C Asquith, *Outlines of Constitutional Law* (1922), p 32.

1439, 1442, 1449, 1453, 1483... Aliens were frequently subjected to repressive legislation. In 1380 (3 Ric II c 3), they were forbidden to hold benefices;⁴⁶ in 1414, to hold land, or engage in retail trade; in 1484, and 1523, to have foreign apprentices; and in 1540, to take any shop or dwelling on lease.⁴⁷

Further, it was difficult for a foreigner to become a British subject. There were only two ways:

- ***Becoming a Denizen***. At common law, this was only possible by the legal process of being made a *denizen*.⁴⁸ This was a more limited category than that of naturalisation - a person being subject to greater restrictions than in the case of the latter. Although this process still (technically) exists, this CP became obsolete by 1870 when the Naturalisation Act 1870 (which removed various restrictions on naturalised persons) rendered it redundant.⁴⁹ Therefore, this CP should be abolished;
- ***Naturalisation***. As an alternative to becoming a denizen, it was possible for a foreigner to be *naturalised*. However, this could only be effected by legislation.⁵⁰ In earlier times, this was by way of a private Act of Parliament in most cases.⁵¹ This legal process of naturalisation was, relatively, rare up until the Nationality Act 1870. And, usually, it was only given to specific individuals and not to groups of people.

In conclusion, from 1066-1765, English law on nationality was simple. A person was a British subject with a 'right of abode' – (that is - a right to permanent residence) in the UK. Or, a person was a foreigner with a right to enter the UK only with the licence (i.e. the express permission) of the sovereign (usually granted by a letter of safe conduct) and with no 'right of abode'.

(c) ***Blackstone (1795) until 1844***

Blackstone, one of the foremost English legal writers - in his magisterial *Commentaries on the Laws of England* (1765-9) - summarised the legal position on nationality in 1765, confirming that which had prevailed from the earliest of times:

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England, that is, within the *ligeance*, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.⁵²

After Blackstone wrote - in the period 1765-1820 - further legislation was passed to deal with foreigners. Thus, the legal writer Feilden noted:⁵³

In 1793, in consequence of the alarm existing at the influx of large numbers of French refugees, Lord Grenville's Alien Act [1793] was passed, subjecting them to most strict regulations;⁵⁴ it was subsequently re-enacted as occasion demanded until 1826.⁵⁵ [a fn adds An Alien Bill was passed in 1905 (5 Ed VII c 13) to exclude diseased and criminal aliens, and to expel undesirable aliens].⁵⁶ In 1827, and 1836, measures were adopted for the registration of aliens; in

⁴⁶ See also Blackstone, n 32, vol 4, p 111. Also, vol 2, pp 249-50 (descent *etc*), pp 274 & 293.

⁴⁷ See also Chalmers (writing in 1936), n 45, p 321 'At common law they [foreigners] could be expelled at the royal pleasure, this prerogative right being last exercised in 1575. [expulsion of the German merchants of the Steelyard who had had a presence in England since Anglo-Saxon times]. He also observed (in a fn) 'It is quite easy to expel aliens from the realm today, under the Alien Immigration Acts, for any or no specified reason.' For earlier legislation on aliens, see *Statutes at Large*, vol 10 (*Appendix*)(aliens). For that by 1844, see Bowyer, n 32, pp 404-7. Also, Plucknett, n 37, p 679.

⁴⁸ For this see GS McBain, *Modernising the Constitution: British Territories and Foreign Relations Act: Part 1*, ILR (2022), vol 11, no 1, pp 175-9.

⁴⁹ Ibid, p 178. See also Anson, n 35, vol 2, pt 1, p 288 'The Crown can confer a quasi- naturalisation by letters patent. The person so privileged is called a denizen... He is since 1870, in no better position practically, than an alien, and the practice though still possible is probably obsolete'. Today, it would be pointless seeking to become a denizen as opposed to being naturalised and, in practice, it would not be granted.

⁵⁰ FW Maitland, *The Constitutional History of England* (1950), p 427 'it seems to have been established at an early time... that the king without Parliament could not turn an alien into a subject for all purposes'. Blackstone, n 32, vol 1, p 362 (in 1765) 'Naturalisation cannot be performed but by act of Parliament...'. See also the Foreign Protestants (Naturalisation) Act 1708 (pursuant to which c 12k came to the UK from the continent, mainly French protestants (hugenots)), which Act was largely repealed by the Naturalisation Act 1711. See also the British Nationality Acts 1730 and 1772.

⁵¹ For a list of earlier legislation on naturalisation see *Statutes at Large*, vol 10 (*Appendix*)(naturalisation). See also *The Report to Parliament of the Inter-Departmental Committee on the Naturalisation Laws*, 24th July 1901. Also, Plucknett, n 37, pp 679-80.

⁵² Blackstone, n 32, vol 1, p 354. It may be noted that the law of treason developed the concept of a local allegiance owed by foreigners. That is, while living (resident) in the realm, they owed sufficient allegiance to the sovereign to be subject to the Treason Act 1351 (and other treason legislation). It is suggested this is a late legal development, c. 18th century. See generally, GS McBain, *Abolishing the Crime of Treason* (2007) Australian Law Journal, p 122. Cf. the use of an Act of Attainder to deal with the doubtful case of Mary, Queen of Scots (1542-87). Ibid.

⁵³ Feilden, n 45, p 236. Also, Plucknett, n 37, pp 678-81.

⁵⁴ Chalmers (1st ed, 1922), n 45, p 33 'During the wars with France in the eighteenth and nineteenth centuries aliens were placed from a time under severe restrictions, but these gradually disappeared after Waterloo [in 1815].'

⁵⁵ Plucknett, n 37, p 680 'in 1793 the suspicion that some of the political refugees who came over in great numbers at the time of the French revolution were in league with democratic associations in England in conspiracies against the government led to the passing of an Alien Act...placing all foreigners under strict surveillance, and empowering the secretary of state to remove any who were suspected out of the realm'.

⁵⁶ See also Keith, n 21, pp 350-1 and Chalmers (writing in 1936), n 45, pp 3-4.

1844, Mr Hutt's Act [i.e. the Aliens Act 1844] increased the facilities for naturalisation, and extended the consequent privileges.⁵⁷

These Alien Acts including the Aliens Act 1844 (also, called Hutt's Act) - *did not change the basic categories of British subject or foreign subject for the purpose of determining nationality* (thus, these Acts are not dealt with further). For his part the legal writer on Crown prerogatives, Chitty, in 1820, stated:

Alien friends may lawfully come into the country without any licence [permission]⁵⁸ or protection from the Crown, though it seems that the Crown, even at common law, and by the law of nations, (and independently of the powers vested in it by the Alien Act, (55 G 3 c 54) [1815] which extends even to foreign merchants) possesses a right to order them out of the country, and prevent them from coming into it, whenever [HM] thinks proper... The Alien Act [1815]⁵⁹... was passed for the purpose of vesting extraordinary powers in the king and magistracy, in order that the country might be protected against aliens; it contains various wholesome provisions for that purpose.⁶⁰

(d) Nationality Act 1870

In 1870, the Nationality Act 1870 (which amended that of 1844, see above) was important since it further simplified the process of naturalisation. Also, it removed more disabilities (restrictions) imposed on foreigners (including any restriction on their inheritance of real property within the realm).⁶¹ This Act of 1870, also, rendered obsolete the CP in respect of making a foreigner a *denizen*.

(e) British Nationality and Status of Aliens Act 1914

The 1870 Act was, itself, repealed by the British Nationality and Status of Aliens Act 1914 (see below).⁶² However, no legislation in (a)-(d) above changed the 2 basic categories of nationality under UK law - these still being that all persons were either categorised as a:

- British subject; or a
- foreign citizen (also, called a foreigner or an alien).⁶³

Further, the only way under English law - after the Nationality Act 1870 - for a foreigner to become a British subject was by the legal process of naturalisation (the legal process of making a person a *denizen* being rendered obsolete by that Act).

In conclusion - from 1066-1870 - the law on nationality remained simple viz. a British subject or a foreign citizen. The Nationality Act 1870 - which was repealed by the British Nationality and Status of Aliens Act 1914 - laid down provisions on the naturalisation of foreigners. It made any transition from being a foreigner to becoming a British subject only legally possible pursuant to that Act (which Act, also, made the legal process of becoming a denizen obsolete).

5. BRITISH NATIONALITY AND STATUS OF ALIENS ACT 1914

At the outset, it should be noted that the legislation about to be discussed - which is still extant and which dates from 1914-64 - *should have been* repealed and re-stated (where necessary) in the Immigration Act 1971 (the '1971 Act') which Act was poorly drafted (see also 8). The result of the 1971 Act not doing this created a marked lack of clarity in nationality and immigration law ever since. As it is - today - all nationality legislation previously discussed in ss 2-4 has been repealed. Thus, it need not be further considered apart from one section of the Act of Settlement 1700 (s 3) which imposed a restriction on denizens and foreigners, which is now discussed.

(a) Restriction on Foreigners - Act of Settlement 1700

Presently, this Act, s 3 states:

⁵⁷ Chalmers (1st ed, 1922), n 45, p 33 'In 1844 aliens obtained certain advantages under Hutt's Act, which enabled them (*inter alia*) to be naturalised under a certificate of the Home Secretary on taking an oath of allegiance, but they could not become members of Parliament or of the privy council, neither could they enjoy rights excepted by the certificate.' Maitland, n 50, p 384 'In 1844 a general statute [Hutt's Act] was passed giving power to the Home Secretary to grant certificates of naturalization: thus recourse to parliament was rendered unnecessary.'

⁵⁸ The requirement of letters of safe conduct seems to have been applied with less rigour in times of peace, possibly, from the time of Elizabeth I (1588-1603) but foreigners still being excluded in time of war or social need. Thus, the CP was in abeyance but not extinguished (it could only be by legislation).

⁵⁹ See 55 G 3 c 54.

⁶⁰ J Chitty, *Treatise on the Prerogatives of the Crown* (1820), p 49. For the legal position *re* aliens from 1802-1848, see Plucknett, n 37, p 680. See also Wade, n 14, p 179 'The present law is governed by the Aliens [Restriction] Acts, 1914 and 1919, and regulations made thereunder by Order in Council [i.e. SI] on the advice of the Home Secretary.' See also Chalmers, n 45 (5th ed, 1936), pp 324-6.

⁶¹ Feilden, n 45, p 236 'By the Naturalisation Act of 1870... an alien may acquire, hold, and dispose of real and personal property, with the exception of British ships, like a natural-born subject, and has all the rights and privileges of a British-born subject, except the franchise, and the power of holding municipal or parliamentary office. An alien, by obtaining a certificate of naturalisation from the Secretary of State, acquires all political as well as all civil rights.' The 1870 Act was, also, important since the basic criteria for establishing whether a person was a British subject or not was: (a) place or birth; and (b) nationality of the father.

⁶² See also Plucknett, n 37, p 681. See also the Naturalisation Act 1895 (rep, s 1 provided for the naturalisation of British subjects resident abroad).

⁶³ As C Sweet, *A Dictionary of English Law* (1st ed 1882) (*alien*) succinctly put it 'An alien is a person who is not a British subject...'

no person born out of the kingdoms of England Scotland or Ireland or the dominions thereunto belonging (*although he be made a denizen* (except such as are born of English parents) shall be capable to be
of the privy council or
a member of either house of Parliament⁶⁴ or
to enjoy any office or place of trust either civil or military or
to have any grant of lands tenements or hereditaments from the Crown to himself or to any other or
others in trust for him... (*italics supplied and wording divided for ease of reference*)

This section is now very out of date and the context in which it was enacted in 1700 should be adverted to:

- First, as to its being *out of date*, the wording relating to being a denizen (*in the first italics*) should be repealed since there have been no denizens created since 1870 (thus, no one is alive to whom it might apply);
- Second, the reference to any Crown grant of land (*in the second italics*) is no longer relevant since the sovereign, since 1702, has not been able to alienate (i.e. transfer title to) the Crown land to others.⁶⁵ Further, after 1800, it was clear that no Crown land was held personally by the sovereign (since it would, then, have been governed by the Crown Private Estate Act 1800);⁶⁶
- Third, the limitations in respect of: (a) being a member of the privy council (*it has been suggested the same be abolished, in previous articles*); (b) being an MP or a peer in the House of Lords (the ‘HL’); and (c) holding a civil (or military) office; are all subject to exceptions, today.

As to *why* this section came about, William III (1688-1702) was a foreign king, being a dutchman (the Prince of Orange). He became king of England in 1688, after James II (1685-8) fled the realm and was declared to have abdicated in the Bill of Rights 1688 - pursuant to which legislation William was elected sovereign, along with Mary (the daughter of James II), his wife. William III was notorious for giving away large amounts of Crown land (especially, in Ireland) to fellow dutchmen - as well as giving civil and military appointments in England to the same. To stop this, s 3 above was enacted, as the legal writer Feilden (in 1911) noted:

By the Act of Settlement, 1701 [1700], owing to the jealousy with which the foreign favourites of William III [1688-1702] were regarded, it was enacted that no alien, even though naturalised or a denizen - unless born of English parents - shall be capable of sitting in Parliament, or holding any office or place of trust, or have any grant of land from the Crown. Although this enactment was sometimes relaxed by special Acts of Parliament in favour of particular individuals, it was confirmed on several occasions, e.g. 1740, 1749. In 1774, it was provided that no Bill for naturalisation should pass, unless it contained a clause deferring the immunities and indulgences of natural-born subjects until after seven years' residence.⁶⁷

In conclusion, this section - being out of date - should be repealed and re-stated (where required) in a new *Nationality Act* (see *App C*). Indeed, this section 3 of the Act of Settlement 1700 *should* have been re-stated in the British Nationality and Status of Aliens Act 1914 (the ‘1914 Act’, see below), of which there are 3 sections still extant. These, also, need to be re-stated in a new *Nationality Act*. As to these:

(b) Restriction on Foreigners - Capacity of Foreigners as to Property

Section 17 states:

Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a British subject: provided that this section shall not operate so as to -

- (1) confer any right on an alien to hold real property situate out of the [UK]; or
- (2) qualify an alien for any office or for any municipal [i.e. local], parliamentary, or other franchise;⁶⁸ or
- (3) qualify an alien to be the owner of a British ship;⁶⁹ or
- (4) entitle an alien to any right or privilege as a British subject, *except such rights and privileges in respect of property as are hereby expressly given to him; or*

⁶⁴ This was longstanding. E Coke, *Institutes of the Laws of England*, vol 4 (1641, W Clarke & Sons 1817 ed, rep. Law Book Exchange) (2004), p 47 ‘An alien cannot be elected of the Parliament, because he is not the king’s liege subject.’

⁶⁵ See the Crown Lands Act 1702. Also, GS McBain, *Modernising the Constitution: Crown Estate and Sovereign’s Private Estate* (2023) Int, Law Research, vol 12, no 1, pp 20-1

⁶⁶ The same applies to land held by the duchies of Cornwall and Lancaster.

⁶⁷ Feilden, n 45, p 236. See also Plucknett, n 37, p 679.

⁶⁸ This word is too indistinct and relates to *pre*-Victorian legislation which modernised local government.

⁶⁹ Cf. *R v Arnand* (1846) 19 QB 806 (a company registered in the UK could own a British ship although all its members were aliens). See also Merchant Shipping Act 1894 s 1 and the Merchant Shipping Act 1995, s 1 (*British ship*).

(5) affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before [12 May 1870], or in pursuance of any devolution by law on the death of any person dying before that day.

Much of this s 17 should be repealed for the following reasons:

- **Real & Personal Property.** It may be that, in 1914, there was still some uncertainty as to whether foreigner could hold real or personal property in the UK and whether it could be passed down (i.e. inherited). Today, 108 years after this Act, this is not an issue. Thus, the opening section (*in the first italics*) is no longer required (it is asserted). Nor ss 17 (1), (2), (4) or (5) (*where in italics*). As for ss (4), this should be repealed since it is so uncertain in its purport. As for ss (3), this is retained anyway in the Merchant Shipping Act 1995, s 1 and, thus, need not be repeated). And ss (2) should be clarified. Thus, no foreign, Commonwealth or BOT citizen should be capable (save where a SI expressly provides otherwise) of:
 - (a) being an MP (i.e. member of the House of Commons ('HC') or a *peer in the HL*;⁷⁰
 - (b) holding an office, or employment, in the HC or HL;
 - (c) being a member of the Cabinet or the *Privy Council*;⁷¹
 - (d) being a minister of State;
 - (e) holding a public office - including being a civil servant;⁷²
 - (e) holding a public office in local government;
 - (f) holding an office in the royal household.

Why it is important to clarify this, today, is due to the nature of various dictatorships around the world (including China, Russia, Iran, Syria, Venezuela) and their clear attempts to seek to undermine Western democracy. Thus, it would be of great use to them to infiltrate any of the above organs of the UK in order to spy on, and weaken, the same. Indeed, that was a good part of the reason *why* the British Nationality and Status of Aliens Act 1914 came to be enacted, at the time of the Great War (WW1) - when the UK (suddenly) woke up to the fact that it was in danger of German infiltration and sabotage. Today, one would suggest that the British government has become very naïve in respect of this matter, to the endangerment of the general public. Thus, s 17 should be modernised.

In conclusion, no foreign, Commonwealth or BOT citizen should be able to hold any public position in UK central or local government so as to help prevent foreign - and other - nations spying on, or interfering in, UK government.

(c) Restrictions on Foreigners - Trial of an Alien

Section 18 of this Act provides that:

An alien shall be triable in the same manner as if he were a British subject.

This was simply a matter of clarification. However, such a section is (probably) worth retaining today, although it has never been seriously doubted as a legal proposition, it appears.

As well as these restrictions contained in the 1914 Act, an Act of 1919 contains some further restrictions; these being as follows:

(d) Aliens Restriction (Amendment) Act 1919, s 3 - Crime

Section 3 (*incitement to sedition etc*) of this Act states:

- (1) If an alien attempts or does any act calculated or likely to cause sedition or disaffection amongst any of [HMs] forces or the forces of [HMs] allies, or amongst the civilian population, he shall be liable on conviction on indictment to penal servitude for a term not exceeding [10] years, or on summary conviction to imprisonment for a term not exceeding [3] months.
- (2) If an alien promotes or attempts to promote industrial unrest in any industry in which he has not been *bona fide* engaged for at least [2] years immediately preceding in the [UK], he shall be liable on summary conviction to imprisonment for a term not exceeding [3] months.

This antiquated wording has been considered in a prior article.⁷³ It was designed to deal with Bolshevik infiltration and fomenting of unrest *post*-WW1 (1914-18). However, it should be modernised. The crime of '*sedition*'

⁷⁰ Previous legal articles by the author have asserted that the HL should be abolished. See e.g. GS McBain, *Modernising the Constitution - A Parliament Act* (2021) Int. Law Research, vol 10, no 21, pp 101-3.

⁷¹ This was relaxed by the Naturalisation Act 1870, s 7. But this was only impliedly, see *R v Speyer* [1916] 2 KB (who was an American born financier made a privy councillor in 1909). This turned out to be unwise, since Speyer was deprived of his privy councillorship in 1921. Previous legal articles have asserted that the privy council should be abolished. See GS McBain, *Modernising the Constitution - A Government Act* (2021) Int. Law Research, vol 11, no 1, pp 82-4.

⁷² The Act of Settlement 1703, British Nationality and Status of Aliens Act 1914, s 17, Aliens Restriction (Amendment) Act 1919, s 6 and Aliens' Employment Act 1955, s 1 have all made a rather '*cack handed*' attempt to deal with this issue. It should be re-stated in simple terms in a new *Nationality Act*. There is nothing difficult about it.

⁷³ See GS McBain, *Modernising Various Crimes Against the State* (2014), pp 19-21.

generally has been abolished. Thus, it means little in this context. Further, the reference to 2 years' *bona fide* service in (2) means nothing. More importantly, today, a more effective remedy would be the immediate revocation of the visa of the alien in question - as opposed to have the same languishing in a British prison at the taxpayers' expense.

In conclusion, this criminal offence should be modernised, but placed in criminal legislation.

(e) Aliens Restriction (Amendment) Act 1919, s 6 - Civil Service

Section 6 of this Act (*appointment of an alien to the Civil Service*) states:

After the passing of this Act no alien shall be appointed to any office or place in the civil service of the state.

This wording (likely) was due to the uncertainty of the wording in the Act of Settlement 1700, s 3 and the 1914 Act referred to above. It should be retained. However, this wording was amended by the Aliens' Employment Act 1955, s 1 (*provisions for the employment of aliens*) which stated:

(1) Notwithstanding anything in [the Act of Settlement, s 3] or [the 1919 Act, s 6, see above], an alien may be employed in any civil capacity under the Crown -

(a) if he is appointed in any country or territory outside the [UK], the Channel Islands and the Isle of Man and employed in any such country or territory in service of a class or description which appears to the responsible minister to be appropriate for the employment of aliens; or

(b) if a certificate in respect of his employment, issued by the responsible minister with the consent of the treasury, is for the time being in force under this [s]; or

(c) he is a relevant European and he is not employed in a reserved post;

[and so much of the said [s 3] as imposes disability for employment in any such capacity shall cease to have effect in relation to British protected persons. (obs)]

ss (2)-(4) deal with the certificate.

The provision in (c) should be repealed since it only dealt with the situation when the UK was a member of the EU. The provision in (b) would, also, seem far too wide and inappropriate. Further, this legislation dates from 1955. Since then a huge amount of government and public functions have been privatised or devolved. Thus, the situation is completely different from the time of this Act when (b) was designed to deal not with the central core functions of government but with more peripheral ones (such as in the transport and forestry sectors *etc*).

In conclusion, all UK public appointments should be of UK citizens. It is not the job of foreigners to run UK government.

(f) Aliens Restriction (Amendment) Act 1919, s 8 - Juries

Section 8 (*provisions as to aliens on any juries*) states:

No alien shall sit upon a jury in any judicial or other proceedings if challenged by any party to such proceedings.

Today, there would seem to be no good reason for any foreigner sitting on a British jury, due to there always being British subjects available.⁷⁴ Also, a foreigner (likely) lacks the language skills, a knowledge of British culture and customs *etc* and a basic understanding as to the nature of judicial proceedings.⁷⁵ Therefore, it is suggested that this section be amended to **prohibit** foreigners from sitting on juries. Finally, s 13 (*offences and penalties*) states:

(1) If any person acts in contravention of or fails to comply with the provisions of this Act, he shall be guilty of an offence against this Act. (2) If any person aids or abets any person in contravention of this Act or knowingly harbours any person whom he knows or has reasonable ground for believing to have acted in contravention of this Act, he shall be guilty of an offence against this Act...

(4) A person who is guilty of an offence against this Act shall be liable upon summary conviction to a fine not exceeding [level 3 on the standard scale][£100] or to imprisonment, *with or without hard labour*, for a term. (*italics supplied*)

This section could only, realistically, apply to s 3 and it is unnecessary. The words in italics are obsolete.

In conclusion, this Act should be repealed and ss 3, 6 and 8 re-stated.

The overall conclusion to s 5 is that restrictions on foreigners should be re-stated in modern terms in a new Nationality Act and, in some cases, tightened up in order to deal with modern dictatorships.

6. BRITISH NATIONALITY AND STATUS OF ALIENS ACTS 1914-64

There are a number of Acts which amended the 1914 Act - itself repealed by the British Nationality Act 1948 (the '1948 Act') with savings - as well as amended the 1948 Act. A few sections of these Acts are still extant - creating uncertainty and confusion.⁷⁶ As to the same:

⁷⁴ Countries such as China, Russia and Iran would treat with complete astonishment (puzzlement) the idea that any foreigner be involved in their judicial process at all, far less sit to decide a criminal case.

⁷⁵ A considerable amount of our criminal law is still derived from common (i.e. customary) law.

⁷⁶ As Phillips, n 5, p 504, noted (in 2001) the 1914-43 'Acts were almost entirely repealed by the [1948 Act], but they are still of practical importance for they determine whether any person born before 1949 was a British subject, so as to retain British nationality under the transitional provisions of the Act of 1948.'

(a) Amending Acts

- **1918 Act.** The British Nationality and Status of Aliens Act 1918 (the ‘1918 Act’):
 - s 1 amends the 1914 Act, s 7 (1) (*revocation of a certificate of naturalisation*) and s 7A (*effect of such*);
 - s 2 amends the 1914 Act;
 - s 3 makes provisions as to a certificate of naturalisation.
- **1922 Act.** The British Nationality and Status of Aliens Act 1922 amends the 1914 and 1918 Acts *re* the definition of a natural born British subject;
- **1933 Act.** The British Nationality and Status of Aliens Act 1933 amends the 1914 Act, s 10 (*status of married women*);
- **1943 Act.** The British Nationality and Status of Aliens Act 1943 has the following sections:
 - ss 1-3 deal with the British nationality of certain persons born abroad. Thus, s 1 (*British nationality by registration*); s 2 (*British nationality of persons born in foreign countries where [HM] exercises jurisdiction*); s 3 (*British nationality of posthumous children*);
 - ss 4-5 deal with the naturalisation of aliens. Thus, s 4 (*special power to grant naturalization certs. to French nationals serving in [HM's] forces*); and s 5 (*special certs. of imperial naturalization granted in dominions*);
 - ss 6-7 deal with the loss of British nationality. Thus, s 6 (*requirements as to the assertion of nationality by persons having British nationality by registration*); and s 7 (*provisions as to declarations of alienage*);
 - s 8 amends s 19 of 1914 Act. And, s 9 makes provision as to the registration of births in time of war.
- **1948 Act.** The British Nationality Act 1948, s 3 (*limitation of criminal liability of citizens mentioned in s 1(3) [rep] and Eire. Status of citizens of Eire and British protected persons*) relates to criminal liability. It would seem obsolete;
- **1958 Act.** The 1948 Act was amended by the British Nationality Act 1958. The latter makes provision in relation to the Federation of Rhodesia and Nyasaland⁷⁷ and to Ghana, by extending the provisions for registering persons as citizens of the UK and colonies. Also, for the discharge of the functions in Commonwealth countries of UK High Commissioners. Most of this Act is spent since 1948 Act has been repealed - save as to s 3 (see above), a section, itself, no longer required;⁷⁸
- **1964 Act.** The British Nationality Act 1964, s 1 deals with the resumption of citizenship. And, s 2, with the renunciation of citizenship;
- **1964 (no 2) Act.** The British Nationality Act (no 2) Act 1964, s 1 deals with additional grounds for citizenship by registration; s 2 deals with additional grounds for citizenship by birth, s 3 deals with the late registration of birth for the avoidance of statelessness, s 4 deals with restriction on the deprivation of citizenship; and s 5 deals with British protected persons.
- **1965 Act.** The Southern Rhodesia Act 1965 reiterates that the same was part of the HM's dominions (see also, the 1958 Act above). It has been repealed, as such, since Rhodesia, later, became the Republic of Zimbabwe (in 1980).

(b) Repealing Amending Acts

As previously mention, it was something of a tragedy that all the above material in (a) was not dealt with in the 1971 Act (especially, the definition of a ‘*British subject*’). However, today, it is asserted that all of this should be repealed as spent. Much relates to the 1914 Act and the same, now, could only apply to any person who is, today, 124 years old (108 years old, if a minor), a situation somewhat unlikely. Further, there are no longer any British protected states *etc.* Thus, all this legislation should be repealed - with any savings being made in a new *Nationality Act* only where essential.

7. BRITISH NATIONALITY AND STATUS OF ALIENS ACTS 1914-64

In 1971, the Immigration Act 1971 was passed. However, it was a poor piece of work⁷⁹ and it is the source of many current problems due to the confusion surrounding UK nationality law because it failed to:

- consolidate prior English nationality legislation (see ss 5-6 above);
- abolish obsolete CP's relating to entry - and exit - from the realm;
- re-state the age old concept of a ‘*British subject*’;⁸⁰
- deal adequately with the transition of nationality from empire to Commonwealth;
- deal with dual passports;
- place *administrative* material on nationality (enforcement, appeals *etc.*) in a separate Act - this, for ease of reference.

⁷⁷ Between 1953-1963, Southern Rhodesia was joined with Northern Rhodesia and Nyasaland into the Federation of Rhodesia and Nyasaland.

⁷⁸ The Commonwealth Immigrants Act 1962 should be noted as well as Commonwealth Immigrants Act 1968, both repealed by the Immigration Act 1971.

⁷⁹ De Smith, n 43, p 407 politely observed that: ‘The consequence [of the 1971 Act] was that citizenship under the 1948 Act no longer clearly indicated who was free to settle in the [UK].’

⁸⁰ The latter should have been altered to the more neutral term ‘*British citizen*’.

Also, employed in the 1971 Act, s 1 was really ‘woolly’ drafting and outdated terms. Some of the above flaws were left to the Nationality Act 1981 (the ‘1981 Act’) to rectify. Some has not yet been done. As to the 1971 Act:

8. IMMIGRATION ACT 1971

This Act contained the following Parts:

- | | | |
|-----------|---|-------------|
| ○ Part 1 | Regulation of Entry into and Stay in UK | (ss 1-11B) |
| ○ Part 1A | Electronic Travel Authorisations | (ss 11C-D) |
| ○ Part 2 | Appeals | (ss 15-23) |
| ○ Part 3 | Criminal Proceedings | (s 24-28L) |
| ○ Part 3A | Maritime Enforcement | (ss 28LA-Q) |
| ○ Part 4 | Supplementary | (ss 31-7) |

Only Part 1 needs be considered for inclusion in a new *Nationality Act* since the other material is administrative and should be placed in a new *Nationality (Administration) Act* (see *App D*).

(a) General Principles

The 1971 Act, s 1 (*general principles*) stated:

(1) All those who are in this Act expressed to have a right of abode in the [UK]⁸¹ shall be free to live in, and to come and go into and from, the [UK] without let or hindrance⁸² *except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.*⁸³ (*italics supplied*)

(2) Those not having that right may live, work and settle in the [UK] by permission and subject to such regulation and control of their entry into, stay in and departure from the [UK] as is imposed by this Act; *and indefinite leave to enter or remain*⁸⁴ *in the [UK] shall, by virtue of this provision, be treated as having been given under this Act to those in the [UK] at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).*⁸⁵

As may be seen, these two ‘*core provisions*’ were badly stated - being unclear in description and uncertain in purport. As for the following two sub-sections, they are not really ‘*general principles*’.

(3) Arrival in and departure from the [UK] on a local journey from or to any of the Islands (that is to say, the Channel Islands and the Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the [UK] on so arriving, except in so far as any of those places if for any purpose excluded from this [ss] under the powers conferred by this Act; and in this Act the [UK] and those places, or such of them as are not so excluded, are collectively referred to as ‘*the common travel area*’.⁸⁶

(4) The rules laid down by the [Secretary of State, the ‘SS’] as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the [UK] of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependents of persons lawfully in or entering the [UK].

Section 2 (*statement of right of abode in the [UK]*) (as amended by the 1981 Act) states:

(1) A person is under this Act to have a right of abode in the [UK] if - (a) he is a British citizen; or (b) he is a Commonwealth citizen who (i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the [UK] by virtue of [s] 2(1)(d) or [s] 2(2) of this Act as then in force [i.e. in 1971]; and (ii) has not ceased to be a Commonwealth citizen in the meanwhile.

(2) In relation to Commonwealth citizens who have the right of abode in the [UK] by virtue of [ss] (1)(b), of this Act, except this [[s], [s] 5(2) and [s] 25], shall apply as if they were British citizens, and in this Act (except as aforesaid) ‘*British citizen*’ shall be construed accordingly.

This s 2 ‘*grandfathered*’ the right given to some Commonwealth citizens who had been accorded, prior to 1971, the right to abode (permanent residence). However, this was clumsily done in, then, treating the same as ‘*British citizens*’ for the purposes of the 1971 Act, when the same were Commonwealth citizens but with a right of abode (i.e. permanent residence).

- In order words, conflating the two concepts (British citizen and Commonwealth citizen) simply provided for confusion. More correctly, s 2 should have retained the former description but separately dealt with the distinct issue of the right to live in the UK (whether permanently or for a period of time);

⁸¹ ‘*Right of abode*’ means the right to live permanently in the UK and modern wording should have been employed.

⁸² This should have dealt with the obsolete CPs’ s on entry and exit. Also, the word ‘*freely*’ should have replaced ‘*let or hindrance*’.

⁸³ This is ‘*woolly*’ wording of indeterminate nature and scope.

⁸⁴ This is, in practice, the same as a right of abode, see n 81.

⁸⁵ This failed to deal with dual passports.

⁸⁶ This needs to be modernised to deal with Ireland now being an EU state and reference to the same not now needing to be specifically provided for.

- Further, while s 2 of the 1971 Act excluded Commonwealth citizens in ss (1) who had ceased to be such, from such ‘grandfathering’; s 2 failed to deal with dual passports. Nor with the case where such Commonwealth citizens had secured permanent abode elsewhere. Nor with illegal entry. Such Commonwealth citizens, in all these cases should *not* have been included;

Finally, in 1971, attempts should have been made to determine all those who fell within s 2(1)(b) above, such as requiring registration within 5 years (this. in order to establish a ‘*closed category*’). This would have spared the ‘*Windrush generation*’ much anguish later on (see **10(b)**).⁸⁷ For its part s 2A (*deprivation of right of abode*) of the 1971 Act states:

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen -

(a) he shall not enter the [UK] unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) *he may be given leave to enter the [UK] (or, when already there, leave to remain in the [UK] either for a limited or for an indefinite period; (italics supplied)*

(c) if he is given limited leave to enter or remain in the [UK], it may be given subject to all or any of the following conditions, namely - (i) a condition restricting his work or occupation in the [UK]; (ia) a condition restricting his studies in the [UK]; (ii) a condition requiring him to maintain and accommodate himself, and any dependents of his, without recourse to public funds; (iii) a condition requiring him to register with the police. (iv) a condition requiring him to report to an immigration officer or the [SS]; and (v) a condition about residence.⁸⁸

(8) When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is.

(9) A person seeking to enter the [UK] and claiming to have the right of abode there shall prove it by means of- (a) a [UK] passport describing him as a British citizen, (b) a [UK] passport describing him as a British subject with a right of abode in the [UK], or (e) a certificate of entitlement.

This section 2A (1)(b) undermines the older clear distinction between a ‘*British subject*’ - who had a right to permanently live in the UK due to allegiance - and a ‘*Foreign citizen*’ who could only stay for a limited duration. As for other sections of this 1971 Act:

s 3	makes general provisions for regulation and control
s 3ZA	<i>deals with Irish citizens (italics supplied)</i> ⁸⁹
s 3A	makes further provision as to leave to enter
s 3B	makes further provision as to leave to remain
s 3C	provides for the continuation of leave pending a variation decision
s 3D	provides for the continuation of leave following revocation
s 4	provides for the administration of control
s 5	establishes the procedure for, and further provisions as to, deportation
s 6	makes recommendations by a court for deportation
s 7	makes exemption from deportation for certain existing residents
s 8	makes exemptions for seamen, aircrews and other special cases
s 8A	provides for persons ceasing to be exempt
s 8B	provides for persons to be excluded from the UK under certain instruments
s 9	makes further provisions as to a common travel area
s 10	provides for entry otherwise than by sea or air
s 11	provides for the construction of references to entry, and other phrases relating to travel
s 11A	provides for working in UK waters
s 12	provides for offshore workers (requirements to notify arrival and entry dates <i>etc</i>).

(b) How the 1971 Act should have been drafted

As noted, the 1971 Act was conspicuously poor in its drafting - in that it failed to consolidate prior legislation and it employed ‘*old style*’ terminology. It also failed to anticipate how Commonwealth countries would evolve. Finally, it confused the basic definition of a ‘*British subject*’ - who for hundreds of years was accorded a right of

⁸⁷ That is, in 1971, all those who came from the Caribbean in the period 1948-1971 should have been *registered*, to avoid them being liable to potential deportation at a later date, which was most unfair.

⁸⁸ S 3(2) deals with rules laid down to administer the Act; ss (3) with variation on the leave to remain; ss (4) with the lapse of leave to enter or remain, ss (5), (5A) & 6 with liability to deportation; and ss (7) prohibited non-British citizens from embarking to the UK.

⁸⁹ S 3ZA(1) provides that, generally, an Irish citizen does not require leave to enter or remain in the UK subject to certain exceptions. However, since Ireland is a EU state, this should be dovetailed with general provisions governing EU entry into the UK.

abode (i.e. permanent residence) in return for allegiance - by applying such to Commonwealth citizens when it was obvious that increasing numbers of Commonwealth countries would become republics, establishing their own passport and permanent residence regimes.

All this jumble could have been avoided if Commonwealth citizens generally had been treated as 'foreign citizens' for the purpose of nationality categorisation⁹⁰, yet, provision being made for some to have permanent residence (in the case of the *Windrush* generation, where registered). This would have avoided 'twisting' the original dual categorisation of: (a) British citizen (subject); and (b) a foreign citizen, which had worked so well for so long.

9. BRITISH NATIONALITY ACT 1981

The 1981 Act sought to remedy some of the faults of the 1971 Act. However, it, also, has not proved adequate - requiring endless tinkering with. In particular, the 1981 Act should have wholly replaced the 1971 Act (and prior legislation). However, it failed to do so - making the situation even more complex since it created the multiple categories referred to in 2. Thus, the 1981 Act contained Parts on:

Part 1	British Citizenship	(ss 1-14)
Part 2	BOT citizenship	(ss 15-25)(see 11)
Part 3	British Overseas citizens	(ss 26-29)
Part 4	British Subjects	(ss 30-35)
Part 5	Miscellaneous and Supplementary	(ss 36-53)

One shall now look at these Nationality Act 1981 categories, starting with the original one that had existed for centuries. That of a 'British subject' (not the same as the old definition - something which is, often, overlooked).

(a) Closed Category - British Subject

At the outset it should be noted that the 1981 Act, unwisely, used the expression 'British subject' in a new sense. One, quite different to its former use since 1066 (when it was indubitably linked to permanent residence).⁹¹ Thus, Phillips (in 2001) stated, as to this new definition:

British subjects cannot possess any other citizenship. They are persons who were British subjects under the 1948 Act who failed to acquire citizenship when the country in which they lived adopted its own nationality laws. This too is a *transitional status, destined to disappear*.⁹² (*italics supplied*)

The 1981 Act referred to the 1948 Act - and to the Nationality Act 1965 (the '1965 Act') - in order to 'grandfather' persons who had been granted the status of 'British subject' in earlier nationality and immigration legislation. Thus, the 1981 Act, s 30 (*continuance as British subjects of existing British subjects of certain descriptions*) states:

A person who immediately before commencement was - (a) a British subject without citizenship by virtue of [s] 13 or 16 of the 1948 Act [these ss were repealed by the 1981 Act]; or (b) a British subject by virtue of s 1 of the British Nationality Act 1965 (*registration of alien women who have been married to British subjects of certain descriptions*), shall as from commencement [of the 1981 Act] be a British subject by virtue of this [s].

Section 31 (*continuance as British subjects of certain former citizens of Eire*) states:⁹³

(1) A person is within this [ss] if immediately before [1 Jan 1949] he was both a citizen of Eire [Southern Ireland] and a British subject.

(2) A person within [ss] 1 who immediately before commencement was a British subject by virtue of [s] 2 of the 1948 Act (*continuance of certain citizens of Eire as British subjects*) shall as from commencement [of the 1981 Act] be a British subject by virtue of this [ss].

(3) If at any time after commencement a citizen of the Republic of Ireland who is within [ss (1)] but is not a British subject by virtue of [ss 2] gives notice in writing to the [SS] claiming to remain a British subject on either or both of the following grounds, namely - (a) that he is or has been in Crown service under the government of the [UK]; and (b) that he has associations by way of descent, residence or otherwise with the [UK] or with any [BOT], he shall from that time be a British subject by virtue of this [ss].

⁹⁰ Obviously, Commonwealth citizens (although being categorised as foreign citizens) could be given more beneficial visitor and visa arrangements.

⁹¹ Phillips, n 5, p 506 (writing in 2001) 'confusion can be caused unless it is realised that, for example, British subject is used in the new law in an entirely different sense from that in which it was formerly used.' Thus, the old concept of 'British subject' is (actually) equivalent to the 1981 definition of 'British citizen'. Ibid, p 507 'British citizenship is the only type of citizenship under the 1981 Act which confers a legal right to live in, and to come and go into and from, the [UK] by right'. Confusingly, the 1971 Act used the terms 'patrials' and 'non-patrials' - terms not now used.

⁹² Ibid, p 511 (in 2001) 'British subjects are believed to number about 50,000 and reside mainly in Sri Lanka, India and Pakistan.' Today (21 years later) one imagines that the figure will be a 10th of this, since many will have died, taken another nationality or permanent residence or have not been interested in residing in the UK.

⁹³ As noted by AB Keith, n 21, p 342 the intention of the Constitution of Eire [and Act no 1 of 1922 giving force of law to the Constitution] was to deprive the citizens of Ireland of British nationality and to give them the status of Irish nationals throughout the world. See also AB Keith, *Letters on Imperial Relations 1916-35* (1935), pp 150-6. See also the Irish Nationality and Citizenship Act 1935 which de Valera asserted ended any allegiance of Irish citizens to the Crown. See also Anson, n 35, vol 2, pt 1, p 285.

(4) A person who is a British subject by virtue of [ss] (2) or (3) shall be deemed to have remained a British subject from [1st Jan 1949] to the time when (whether already a British subject by virtue of the said [s] 2 [of the 1948 Act] or not) he became a British subject by virtue of that [ss].

Section 32 (*registration of minors*) states:

If while a person is a minor an application is made for his registration as a British subject, the [SS] may, if he thinks fit, cause him to be registered as a British subject.

This category of a '*British subject*' is now a '*closed category*' of nationality since the persons defined within it, cannot be added to. They can only diminish by death and many of these persons will now be elderly (indeed, many very elderly since one is looking back to 1949). Further, this links in with s 35 (*circumstances in which British subjects are to lose that status*):

A person who under this Act is a British subject otherwise than by virtue of [s] 31 shall cease to be such a subject if, in whatever circumstances and whether under this Act or otherwise, he acquires any other citizenship or nationality whatever.

This provision was designed to deal with applications from persons who had acquired a foreign nationality (including those with a dual passport). Given the above, the (obvious) solution is to abolish this category in a new *Nationality Act* and to elevate all the people remaining in it to the status of a '*British citizen*' but to **exclude** the following, persons who have:

- (a) acquired a new nationality (or citizenship)(i.e. s 35, see above);⁹⁴
- (b) renounced the status of '*British subject*'; (i.e. s 34, see n 95);⁹⁵
- (c) acquired a permanent residence other than in the UK;
- (d) not resided in the UK in the last 5 years;⁹⁶
- (e) had - or should have had - their status as a '*British subject*' revoked.⁹⁷

Such would simplify things for immigration officials - but with no one losing out in this category - *save for those who have had no desire to avail themselves of this status anyway* (since they would, otherwise, have sought to acquire permanent residence in the UK a long time ago).

- As it is, by reason of age, there are likely to be very few persons still in this category anyway. For example, a person who was both a citizen of Eire (Southern Ireland) and a British subject (i.e. within s 31) will, now, be 90 years old (if not a minor)⁹⁸ and had 74 years to work out whether they wish to avail themselves of the category of '*British subject*' and permanently reside in the UK or to undertake (a)-(d)(in particular to stay in Southern Ireland and to take up that nationality, as opposed to being a '*British subject*');
- Also, it appears that the above in the 1981 Act ss 30-32 are now the **only** people who can claim to be '*British subjects*' - all others, now, being treated as '*British citizens*'.

In conclusion, this closed category should be abolished in a new Nationality Act and any persons (save for those excluded) treated as 'British citizens' (avoiding statelessness). This will simplify things. Not least since - while they remain British citizens until their death - there shall be no right to permanent residence in the UK unless they have resided in the UK in the last 5 years, which seems reasonable.

(b) Closed Category - British Protected Persons

For the purpose of British nationality, certain persons are treated as British protected persons. Thus, the 1981 Act, s 38 states:

- (1) [HM] may by order in council [i.e. by SI] made in relation to any territory which was at any time before commencement-
- (a) a protectorate or protected state for the purposes of the 1948 Act; or
 - (b) a [UK] trust territory within the meaning of that Act,

declare to be **British protected persons** for the purposes of this Act any class of persons who are connected with that territory and are not citizens of any country mentioned in [sch 3, i.e. Commonwealth citizens] which consists of or includes that territory.⁹⁹

⁹⁴ This was the same under the 1914 Act, s 13.

⁹⁵ s 34 (*renunciation*) states: 'The provisions of [s] 12 [of the 1981 Act] shall apply in relation to British subjects and the status of a British subject as they apply in relation to British citizens and British citizenship'. Under the 1870 Act (s 4) and the 1914 Act (s 14) a person could renounce their nationality.

⁹⁶ This 5 year rule for naturalisation is long established, see n 14.

⁹⁷ The 1914 Act provided that a naturalised subject (as opposed to a British subject) could be deprived of his nationality if he had obtained it by false representation or fraud or by concealment of material facts or if he had proved himself by act or speech disloyal. See Anson, n 35 vol 2, pt 2, pp 290-1. This should apply to the closed categories. For example, a person cannot expect to become a '*British citizen*' if the same has become a British subject by false representation. It may be noted that the 1981 Act, s 40 contains such provision in respect of a '*British citizen*'.

⁹⁸ Such a person would have been 16 in 1948/9 and 74 years have passed since (i.e. 1948-2022).

⁹⁹ Ss (2) deals with the making of the SI.

This category of ‘*British protected person*’ is, also, a closed category of (diminishing) persons for the following reasons:

- British ‘*trust territories*’ were few and all ended by 1964;¹⁰⁰
- British ‘*protectorates*’ ended by 1978 (the last was the Solomon Islands in 1978);
- British ‘*protected states*’ were few and all ended by 1984 (the last was Brunei in 1984).

These persons are not treated as a ‘*British subject*’ or as a ‘*Commonwealth citizen*’.¹⁰¹ Today, there are very few persons likely to fall within this category and the same have had - since 1964, 1978 or 1984 (or long before) - the opportunity to seek permanent residence in the UK. Thus, as with the category of ‘*British subject*’, this category should be abolished. And, all of such remaining should be elevated to the status of a ‘*British citizen*’ (avoiding statelessness) **excluding** the following persons in this category who have:

- (a) acquired a new nationality (or citizenship);
- (b) renounced the status of ‘*British protected person*’;
- (c) acquired permanent residence other than in the UK;
- (d) not resided in the UK in the last 5 years;
- (e) had - or should have had - their status as a ‘*British protected person*’ revoked.

That is, the above being subject to the same exclusions as in (a).

In conclusion, this closed category should be abolished in a new Nationality Act. And, any persons (save for those excepted) treated as a ‘British citizen’. This will simplify things. Not least since - while they remain British citizens until their death, there is no right to permanent residence unless they have resided in the UK in the last 5 years.

(c) Closed Category - British Overseas Citizens (BOC’s)

The 1981 Act, s 26 (*citizens of UK and colonies who are to become British Overseas citizens at commencement*) states:

Any person who was a citizen of the [UK] and colonies immediately before commencement [i.e. the commencement of the 1981 Act] and who does not at commencement become either a British citizen or a British overseas territories [BOT] citizen shall at the commencement [of the 1981 Act] become a British overseas citizen.

This was a ‘*catch all*’ residual category, to prevent certain persons being stateless.¹⁰² Section 27 provides for the registration of minors¹⁰³ and s 29 for renunciation.¹⁰⁴ It has been asserted that c. 10-12k BOC’s hold British passports (2020 data) and enjoy consular protection.¹⁰⁵

- However, this is a ‘*guesstimate*’ and there may be far fewer in reality - given the distant countries in which they presently reside;¹⁰⁶
- Further, in the case of some - such as applicants under the Princess Sophia Naturalisation Act 1705 (rep 1948)¹⁰⁷ - the actual number of persons applying were, always, tiny and, today, any applicants would be very old in any case.

¹⁰⁰ British *trust territories* under UN mandate comprised: (a) British Cameroon (North Cameroon became part of Nigeria in 1960 and South Cameroon joined Cameroon in 1961); (b) Tanganyika Territory. It was granted independence in 1961 and federated with the former British protectorate Zanzibar in 1964 to form Tanzania; (c) British Togoland. It merged with the British colony of the Gold Coast, which was granted independence as Ghana in 1957.

¹⁰¹ The 1981 Act, s 37 (*Commonwealth citizenship*) states: (1) Every person who - (a) under the British Nationality Acts 1981 and 1983 or the British Overseas Territories Act 2002 is a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas citizen or a British subject; or (b) under any enactment for the time being in force in any country mentioned in [sch 3] is a citizen of that country, shall have the status of a Commonwealth citizen... (4) After commencement no person shall have the status of a Commonwealth citizen or the *status of a British subject* otherwise than under this Act.’ (*italics supplied*)

¹⁰² As Phillips noted, n 5, p 511 (in 2001) ‘This status was conferred on citizens of the [UK] and Colonies who did not, when the 1981 Act came into effect, acquire British citizenship or British Dependent Territories Citizenship. It is a transitional and residual status. They may at the same time hold another citizenship’. Also, ‘This category includes East African Asians in India and East Africa and certain classes of inhabitants of Malaysia’. It was designed to prevent statelessness. However, since 1981 (40 years ago) most of these persons will have secured the nationality of another country (or permanent residence elsewhere) or British citizenship.

¹⁰³ S 27(1) ‘If while a person is a minor an application is made for his registration as a British Overseas citizen, the [SS] may, if he thinks fit, cause him to be registered as such a citizen.’

¹⁰⁴ S 29 ‘The provisions of [s] 12 shall apply in relation to British Overseas citizens and British Overseas citizenship as they apply in relation to British citizens and British citizenship’.

¹⁰⁵ See *Wikipedia* (*British Overseas citizen*).

¹⁰⁶ Kenya, Aden (Yemen), Straits Settlements of Penang and Malacca, Malaysia, Cyprus.

¹⁰⁷ Sophia, Electress of Hanover (the grand-daughter of James I (1603-25)) became heir to the throne of England on the demise of Queen Anne (1702-14). She was naturalised by an Act of 1705 (making her a British subject) which Act, also, applied to her issue. This Act was repealed by the 1948 Act, but not retrospectively. Thus, non-catholic lineal descendents of Sophia can still avail themselves of the Act if born *pre*-1948. See e.g. *A-G v HRH Princes Ernest of Hanover* [1957] 1 AE 49. Such would, today, become BOC but with no right of abode. This exemption should be abolished (it would only apply to applicants who are, at least, 74 years old in any case).

- It should be noted that BOC's do not have the right to permanently live (i.e. a 'right of abode') in the UK.

The Nationality, Immigration and Asylum Act 2002 (the '2002 Act') allowed BOC's to register as 'British citizens.' As with the category of 'British subject', this category should be abolished and all those remaining elevated to the status of a 'British citizen' (preventing statelessness) but exclude the following, persons who have:

- acquired a new nationality (or citizenship);
- renounced the status of BOC;
- acquired permanent residence other than in the UK;
- not resided in the UK in the last 5 years;
- had - or should have had - their status as a BOC revoked.

That is, the above being subject to the same exclusions as in (a).

In conclusion, this closed category should be abolished in a new Nationality Act. And, any persons (save for those excluded) treated as a 'British citizen' until their death. This will simplify things. It may be noted that BOC have no right to permanently live in the UK.

(d) British National (Overseas)(BN(O)s)

This category relates to Hong Kong ('HK') prior to the handover of HK to China in 1997. The status was created by the Hong Kong Act 1985. It was acquired by voluntary registration by individuals with a connection to the territory who had been British Dependent Territories Citizens ('BDTCs') before the handover in 1997. This category is now closed (and it cannot be transferred by descent). There are said to be c. 2.9m BN(O)'s with c 680,000 holding British passports. They do not have an automatic right of abode in the UK. It is said that 315,000 people opted for renewal of their BN(O) in 2020. A BNO citizen may apply to become 'British citizen' after residing in the UK for more than 5 years and possessing an ILR for more than 1 year. The UK has allowed BN(O)'s - and their dependent family members - to apply for 5 year residence visas since 31 January 2021 - given that the Chinese and HK governments have not allowed BN(O) passports for immigration clearance since 31 January 2021. Present legislation relating to HK people comprises the:

- British Nationality (Hong Kong) Act 1990;¹⁰⁸
- Hong Kong War Wives and Widows Act 1996;¹⁰⁹
- *HK (Overseas Public Servants) Act 1996*;¹¹⁰
- British Nationality (Hong Kong) Act 1997;¹¹¹

As with other closed categories, all those who have renewed their BN(O)s in 2020 should have their status elevated to the status of a 'British citizen' but to exclude the following, persons who have:

- acquired a new nationality (or citizenship) apart from Chinese nationality;
- renounced the nationality of 'British subject';
- permanent residence other than in UK;
- not resided in the UK in the last 5 years.
- had - or should have had - their status as a 'British subject' revoked.

(e) Conclusion

All these closed categories of diminishing numbers of people should be abolished in a new *Nationality Act* since people in those categories had a long time to make alternative arrangements and, doubtless, large numbers did then - and have done so by now - such that potential numbers in those categories are much lower than might be guessed at (perhaps, even half).¹¹² The effect of making such 'British citizens' - but without any right of permanent residence in the UK (cf. BOC's) - simplifies things and gives those few remaining a higher status (including greater access to consular facilities).

¹⁰⁸ This Act, s 1(1) allowed the Secretary of State to register as 'British citizens' up to 50,000 HK persons. However, the category closed after 30 June 1997. See also De Smith, n 43, p 409, 410 (asserts that this was to prevent statelessness).

¹⁰⁹ S 1 (*acquisition of British citizenship*) '(1) The [SS] may, on an application made for the purpose, register as a British citizen any woman who, before the passing of this Act, was the recipient or intended recipient of a UK settlement letter if - (a) she has her residence, or principal residence, in [HK] (b) where she is no longer married to the man in recognition of whose service the assurance was given, she has not remarried; and (c) the [SS] is satisfied that she is of good character. (2) In this section 'UK settlement letter' means a letter written by the [SS] which - (a) confirmed the assurance given to the intended that, in recognition of her husband's service, or her late or former husband's service, in defence of [HK] during [WW2], she could come to the [UK] for settlement at any time; and (b) was sent by the [SS] to the [HK] Immigration Department for onward transmission to the intended recipient (whether or not she in fact received it).

¹¹⁰ This now, effectively, only deals with pension arrangements for overseas public servants.

¹¹¹ This enabled (s 1) the SS to register as a British citizen any person ordinarily resident in HK who satisfied certain requirements before the handover of HK in 1997.

¹¹² One would suggest that BN(O)'s may now be less than 250k given that so many tend to seek citizenship in countries such as the US, Canada, Australia or other Far East countries.

10. COMMONWEALTH CITIZENS

(a) Reflecting Modern Realities

It was not inappropriate for the British Nationality Act 1981 to change the term ‘*British subject*’ to ‘*British citizen*’. Not least, since most countries around the world use the term ‘*citizen*’ - or foreign language equivalent.

- What the 1981 Act got wrong was to incorporate all Commonwealth citizens who - at that time - had the right to permanent residence into the UK, into the term ‘*British citizen*’ - clouding the issue;
- Further, the 1981 Act failed to apply s 31 of the Act (which dealt with a ‘*British subject*’ not being treated as such if they had dual nationality) to ‘*British citizens*’ or to Commonwealth and BOT citizens - allowing the same to acquire permanent residence in the UK even though they: (a) had dual passports; or (b) permanent residence elsewhere. This has allowed, generally, British passports to become something of a ‘*fashion accessory*’ (to be used ‘in case of need’) and not what the status of a British subject, once, was. That is, one who had the right to permanent residence in the UK because, in return, the same provided protection to the owner of all the land, the sovereign (i.e. in return for allegiance).

Thus, all Commonwealth citizens *should* have been excluded from being treated as ‘*British citizens*’ in 1981 if they had:

- (a) acquired a new nationality (or citizenship) (including that of another Commonwealth country);
- (b) renounced the nationality of their Commonwealth country;
- (c) acquired permanent residence other than in UK;
- (d) not resided in the UK in the last 5 years;
- (e) had - or should have had - their status as a national of their Commonwealth country revoked.

(b) Windrush Generation

After WW2, there was a great shortage of labour in the UK. Thus, a large number of people came to the UK to work from the Caribbean between 1948-1971. No accurate numbers are known. Thus, at best, any figures are guesstimates.¹¹³

- It is said that Commonwealth migrants arriving in this period may have been *in toto* c. 524k;
- With those from the Caribbean (principally, Jamaica and Trinidad and Tobago) out of this total figure being, perhaps c. 15k persons who were not, later, treated as British citizens;
- However, the above figures are simply guesstimates since many such persons in 1948 (mainly males who would now be between 90 years old and 74 years old, the latter if minors) may well have died. Or, returned to the Caribbean and retired there. Or, acquired passports - or permanent residence - in other foreign countries. Or, they comprised persons who had (for one reason or another) had no desire to live in the UK permanently.

By September 2021 only c. 3k of the eligible 15k Windrush generation appeared to have come forward, to seek British citizenship in circumstances where it was not otherwise clear that they had a right to the same. One would suggest that this figure is, actually, unlikely to be exceeded. Today, the sensible (and fair solution) would seem to be to treat such as ‘*British citizens*’ unless the exclusions otherwise mentioned in the case of closed categories (a)-(e) otherwise apply.

11. BOT CITIZENS

In 1981, the number of BOT (British Overseas Territories) was larger than it is now. Today, it only applies to 14 territories, some of which have no one living there.¹¹⁴

(a) BOT Nationality

The 1981 Act deals with BOT nationality. Thus:

- | | |
|--|---------------------------------|
| (a) acquisition after commencement of the 1981 Act | (ss 15-8); ¹¹⁵ |
| (b) acquisition after commencement of the 1981 Act | (special cases); ¹¹⁶ |
| (c) acquisition at commencement of the 1981 Act | (s 23); |
| (d) renunciation and resumption | (s 24); and |

¹¹³ Home Office landing cards were destroyed in 2010 (which was remarkably foolish).

¹¹⁴ See n 8.

¹¹⁵ e.g. s 15 (acquisition by birth or adoption), 16 (acquisition by descent), s 17 (acquisition by registration; minors), 17A (registration, remedying inability of mothers to transmit citizenship), 17B (registration: unmarried fathers; the general conditions); 17C (person unable to be registered under other provisions of this Act); 17D (person unable to become citizen automatically after commencement); 17E (citizen of UK and colonies unable to become citizen at commencement); 17F (other person unable to become citizen at commencement); 17G (ss 17B to 17F: supplementary provisions), 17I (acquisition by registration: special circumstances), 18 (acquisition by naturalisation).

¹¹⁶ e.g. s 19 (right to registration by virtue of residence in British overseas territory); s 20 (registration by virtue of marriage); s 21 (right to registration by virtue of father’s citizenship etc); s 22 (right to registration replacing right to resume citizenship of UK and colonies); s 23 (citizens of UK and colonies who are to become British overseas territories citizens at commencement).

(e) supplementary

(s 25, meaning of a BOT citizen by descent).

The British Overseas Territories Act 2002 made some amendments to the 1981 Act:

- thus, s 3 (*conferral on British overseas territories citizens*) provided that a BOT citizen became a 'British Citizen' (save for those in the sovereign base areas of Akrotiri and Dhekelia);
- also, a BOT citizen became a British citizen by descent if the same was a BOT citizen by descent - and, if at the time he was a British citizen as well as a BOT one, he became a British citizen by descent;
- also, provision was made for the *Illois* (this related to people in the Indian Ocean territory).

(b) The Future - BOT Nationality

BOT citizens are, often, treated as Commonwealth citizens although they are not, strictly, so, BOT not being separate states. However, it seems inevitable that a number of BOT, in due course, will become Commonwealth states. And, in any case, it is not inappropriate to treat them as such for nationality purposes. Thus, the provisions relating to Commonwealth citizens as stated above, should also apply to the same. That is, a BOT citizen should lose 'British citizen' status if he (she):

- (a) acquires a new nationality (or citizenship);
- (b) renounces their BOT nationality;
- (c) has a permanent residence other than in the BOT in question;
- (d) has not resided in the BOT in the last 5 years;
- (e) had - or should have - their status as a BOT citizen revoked.

Finally, it should be noted that the precursor to the concept of a 'BOT citizen' was a British Dependent Territories Citizen ('BDTC') which status carried no right of permanent residence in the UK.¹¹⁷ In the case of BOT, however, most are now accorded with British citizenship (e.g. Falkland islanders in 1983 and Gibraltarians in 1981). Thus, in the case of BOT which, in the future, become independent (i.e. republics) - or no longer have the sovereign as their head of state - the same should apply as with Commonwealth citizens.¹¹⁸ They should become foreign citizens. The result is to revert to 2 categories of nationality which worked so well in the past - British citizen and foreign citizen.

In conclusion, a new Nationality Act should consolidate the law on BOT citizens and align the law relating to them with that relating to British citizens.

12. CONCLUSION - SECTIONS 10 & 11

The 1971 and 1981 Acts made a (very) poor job of clarifying the law on nationality. However, it is perfectly possible to simplify it - and to rectify past injustices - as well as accept the reality that a number of Commonwealth states and BOT are (likely) to become republics in the future (dispensing with the sovereign as head of state). The means to do this is simple:

- **Two Categories.** Return to the 2 category system *viz.* (a) British citizen; and (b) foreign citizen (which includes EU and Commonwealth citizens and will include BOT's that become republics or where they no longer retain the sovereign as head of state);
- **Closed Categories.** Abolish these and all those in them should become 'British citizens' unless excluded but without right of permanent residence in the UK - *unless* they have resided in the UK in the last 5 years (this applying to BOC citizens with an ILR only).

The above would not be unfair to anyone, but would simplify things (and avoid statelessness). This could be achieved in a short *Nationality Act*. Such an Act should, also, abolish the old CP relating to make a person a *denizen* (obsolete since 1870) as well as confirm that there was no CP to naturalise at common law. However, the above does not deal with the problem of dual passports. In part, this problem has been caused (since 1870) by enabling the process of naturalisation to become very simple and easy. Thus, the same is now considered.

13. NATURALISATION

In the period 1066-1870, it was difficult to be naturalised. The reason was a good one:

- the whole point of being a 'British subject' was due to a person wanting to come and live in England (later, the UK) permanently. That is, for the rest of their lives;
- it was *not* a process by which a person could 'pick up' a British passport - as a fashion accessory - and, yet, retain the nationality of another country or go and live permanently in another country. Such was (and is) an abuse of the nationality process. It creates 'shifting populations' of people with two, or more, passports who, actually, have no allegiance to any specific country and who 'manipulate' the passport system, to the overall detriment of the same.

¹¹⁷ As noted by De Smith, n 43, p 409 'It is, in essence, a colonial citizenship and carries no right of entry into the [UK].'

¹¹⁸ See *draft Nationality Act 1981, App C*.

Thus, the process for naturalisation should return to the position *pre-1870*. Which is when people only applied for it, because they, genuinely, wanted to spend their lives in the UK (i.e. to fix their ‘*abode*’ there). Further, to stop people mis-using the passport process - and to prevent ‘*shifting populations*’ - the process of granting naturalisation should be greatly restricted as it was in earlier times. Thus, persons should only be able to seek naturalisation if they:

- (a) intend to seek permanent residence in the UK;
- (b) have lived in the UK for the last 25 years;
- (c) will give up any other foreign nationality, foreign citizenship or permanent residence in a foreign country.

The result is that only genuine applicants will apply and that they will be few. At the same time, the granting of visas (for study and work) should be simplified (and, the latter based on demand).

14. BRITISH CITIZENS

Having looked at the closed categories, foreigners and legal restrictions relating to them and naturalisation, as to who is a ‘*British citizen*’ must be considered. The basis of this is the old concept of ‘*British subject*’ which was the bedrock of the concept of nationality up until 1948 at least. Thus, ‘*British subject*’ and ‘*British citizen*’ meant the same thing. It was only *post-1948* that the word ‘*citizen*’, generally, tended to become more in vogue and the same term was employed in the 1981 Act which contains sections relating to:

- Acquisition of British citizenship after commencement of the 1981 Act (ss 1-6);¹¹⁹
- Acquisition after commencement (ss 10-10A);¹²⁰
- Acquisition at commencement (s 11);
- Renunciation and resumption (s 12);
- Meaning of British citizen (by descent).

All these sections, simplified, should be placed in a Schedule to a new *Nationality Act*. So too, all provisions applying to a British citizen in the 2002 Act. Thus, there should be just one place where immigration officers, lawyers and others can determine who is a ‘*British citizen*’. Further, all old legislation dealing with this concept of British citizen (including the 1971 and 1981 Acts) should be repealed.

In conclusion, a new Nationality Act should consolidate the law on British citizens.

15. TOURIST, STUDY & WORK VISAS

In the case of *tourists*, there should be a fixed duration for the time that they may spend in the UK. One which applies in respect of every foreign country (save, perhaps, for sanctioned countries) and is not subject to extension. Say, 3 months. This creates certainty.

- In the case of a *study visa*, there should be a maximum number of years fixed for a basic (undergraduate) degree. And, the same for a postgraduate degree. As well as for all other forms of vocational training;
- As for *work visas*, the same should apply. Thus, the maximum period should be (say) 5 years. However, extensions should be allowed for (say) up to 5 times (i.e. 25 years) where it can be shown that there is a need for the person to remain in the UK. After 25 years a person who still wants to remain should be able to apply for naturalisation.

The above will simplify and regularise the playing field - to prevent people abusing the system.¹²¹ Also, it will reduce the cost to the taxpayer and to reduce a huge ‘*army*’ of immigration lawyers presently feeding off the system. There is nothing unfair or difficult about this. More particularly, the law should be quite clear. Thus:

- any person who overstays any of the above should be subject to automatic removal (expulsion) within one month, with no right of appeal. After all, all such persons are foreigners and some distinction must be maintained between them and British citizens, to prevent the present huge abuse of the system;

¹¹⁹ Thus, s 1 (acquisition by birth or adoption), 2 (acquisition by descent), 3 (acquisition by registration: minors), 4 (acquisition by registration: British overseas territories etc); 4A (acquisition by registration: further provision for British overseas territories citizens); 4B (acquisition by registration: certain persons without other citizenship); 4C (acquisition by registration: certain persons born before 1983); 4D (acquisition by registration: children of members of the armed forces); 4E (the general conditions); 4F (persons unable to be registered under other provisions of this Act); 4G (person unable to become citizen automatically after commencement); 4H (citizen of UK and colonies unable to become citizen at commencement) 4I (other person unable to become citizen at commencement); 4J (sections 4E to 4I – supplementary provision), 4K (acquisition by registration: certain British overseas territories citizens); 4L (acquisition by registration: special circumstances); 5 (acquisition by registration: British overseas territories citizens having connection with Gibraltar); 6 (acquisition by naturalisation).

¹²⁰ Thus, s 10 (registration following renunciation of citizenship and colonies), 10A (acquisition in connection with immigration rules Appendix EU).

¹²¹ One would suggest that there is huge amount of abuse of the system at present, especially with regard to mature students bringing their families.

- also, anyone who applies for any of these visas and who has made false representations in order to obtain the same - or who has entered into the country illegally - should be subject to automatic removal (expulsion). This, also, is fair and it observes the rule of law.

16. **COLLAPSE OF THE RULE OF LAW**

We are witnessing the collapse of the rule of law in the UK. For example, the decline of the criminal justice system means long delays in the processing of criminal cases such that, for many, there will be delayed justice or no justice at all. In other cases, people who act illegally are accorded priority (or benefits) before people who act legally. Such incentivises people to ignore the law. As for the law on nationality and immigration, at present, it is unnecessarily complicated and unclear, being a breeding ground for lawyers to feed off it. Also, there is unfairness to those caught up in the complex system. Further, in this area of law - by reason of a complete failure to consolidate the law and to set out the position incisively - *there has also been a complete failure to distinguish between some simple things that are essential to the maintenance of a consistent - and coherent - system of nationality - one that can be applied worldwide and which worked perfectly well pre-1870*. To achieve the latter, worldwide, countries need to get back to a simple system. One that does the following:

- Nationality. People should only have one nationality (passport) - and not dual passports, which are a licence for abuse;
- Right to Permanently live and work in a Nation. This should be the right of nationals only;
- Visas. These (visitor, study, work *etc*) should be given to foreigners and strictly defined, as well being limited in time;
- Naturalisation. This should be rare and only given to people who wish to spend the rest of their lives living and working in their new chosen country. It should not be given as a means for people to collect passports as a fashion accessory or on a 'in case of need' basis.

The need to simplify nationality and immigration should, also, be seen against the backdrop of dictatorships such as Russia and China (as well as Iran) seeking to flood the West with ever increasing numbers of economic migrants, in order to bring down Western nations (much as the Roman Empire fell). The means of preventing this, is to stop dual passports being issued and to impose economic sanctions on such dictatorships (which sanctions, clearly, work).

In conclusion, the UK (and other nations) should move back to a system of just one passport.

17. **ABOLISHING DUAL PASSPORTS**

The UK should (indeed, must) start to abolish dual passports. Thus, a new *Nationality Act* should make it impossible for a foreign citizen, in the future, to acquire British citizenship and, also, hold one or more other passports. This creates complete confusion as to their loyalty (allegiance) to their new nation(s).

A *Nationality Act* should, also - in due course - phase out British citizens holding dual passports, such as, for example, holding a Commonwealth passport and a British one, since these are now separate nation states. Or a British passport and an American or a EU one.

18. **ABOLISHING THE IMMIGRATION APPEAL TRIBUNAL**

Complicated law breeds lawyers, delay and people 'milking' the system. It, also, results in more tiers of appeal and - of course - judges and heads of tribunals who, then, need to justify their existence (and their salaries) by talking on marginal cases, to keep themselves in a job. It is suggested that there is a question with the present system whether it is sub-optimal. Also, whether the level of initial decision making by non-judges meets the highest standards of integrity, ability and impartiality which should be expected. Thus, it is suggested that it would be far better and less costly (and more fair) to re-integrate the immigration and asylum tribunal; system back into the court system by means of a *Nationality Court* - one staffed only with professional judges. And, with appeal from the same to the Court of Appeal (with no further appeal). This would re-integrate nationality and immigration matters into the UK court system, strengthening - and streamlining - it. It would also reduce costs, bureaucracy and cut out the excessive volume of case law.

- AAIC. The Special Immigration Appeals Commission (SAIC) should be abolished. Instead, any such appeal should go to the Court of Appeal (before a bench of three judges);
- General Appeals. Any appeal which is made by way of 'filter' - or to the High Court or the Court of Session (Outer House) in Scotland - at present, should be abolished and the same should now be made to the Court of Appeal (before a single judge);
- First Instance. Consideration should be given to the abolition of the First Tier immigration and asylum tribunal. Instead, there should be a *Nationality Court* (otherwise, called an *Immigration and Asylum Court*) - a court which is part of the High Court. One which should handle all migrant and asylum matters.

In conclusion, tribunals relating to immigration and asylum are sub-optimal. They should be replaced by a court with appeal to the Court of Appeal (and no further appeal).

19. CONCLUSION

Our legal system is a mess, costly and bureaucratic. This is due - in part - to a lack of consolidation of legislation and its modernisation. Further, the Immigration Act 1971 and the Nationality Act 1981 were poorly drafted pieces of work. The solution is a short *Nationality Act* - one which streamlines the categories of nationality and clarifies matters - as well as a more lengthy *Nationality (Administration) Act*, to deal with all the 'gubbins' (administrative matters). This simplification would be very helpful to immigration officers who, sitting at their desks in airports *etc*, simply need to know - in the vast majority of cases - the legal basis on which a person is seeking entry into the UK - i.e. whether as a British citizen (or variant) or as a foreign citizen. It should be noted that this article does not deal with the issues of asylum, illegal channel crossings *etc*. This will be discussed in a subsequent article.

As for the 15 countries which have the sovereign as their head of state and the 14 BOT it is suggested that they should be allowed to have referenda to determine their status *within the next 5 years*. Likely, most of the 15 countries and 14 BOT will give up the sovereign as their head of state and become republics, which is absolutely fine and it simplifies nationality law. *What will be left?*

- **15 Countries.** Canada, Belize, Solomon Is., Australia, Grenada, St Kitts & Nevis, NZ, Jamaica, St Vincent & the Grenadines, Antigua & Barbuda, Papua New Guinea, Bahamas, St Lucia, Turks & Caicos (*also, the UK*)
- **14 BOT.** Anguilla (pop 15k), Bermuda (71k), British Antarctic Territory (npp), British Indian Ocean Territory (npp), British Virgin Is. (35k), Cayman Is., (66k), Falkland Is. (3.3k), Gibraltar (32k), Montserrat (5k), Pitcairn Is. (c 45), St Helena, Ascension & Tristan da Cunha (4.4k), South Georgia & South Sandwich Is. (npp), Sovereign Base Areas of Akrotiri & Dhekelia (c.18k), Turks & Caicos (56k).

One would suggest that (perhaps) Anguilla, BVI, Montserrat and the Turk and Caicos islands will become republics and the remainder have small (or no) populations such that they could all be British citizens (assuming they have no dual passport) with a right to live and work in the UK (something people in Bermuda, BVI, Caymans and Pitcairn are unlikely to want and those in the sovereign base areas do not have anyway). Thus, 10 BOT (with c. 220k people). And, no 15 countries with the sovereign as head of state. However, all the above should remain (or become) full Commonwealth members. And the Commonwealth should expand, adding another 30 countries in the next 5 years. In this way, the Commonwealth will flourish as the last vestiges of the empire (head of state, governor generals *etc*) seamlessly pass away.

Further, within this 5 year period, the UK, EU, US, Commonwealth and G20 should all agree that *dual passports* should also end. People must choose and everyone have only one passport. In the case of totalitarian regimes, those fleeing them should not be give nationality in the West. Temporary visas yes; passports no. Further, everything should be done to bring down totalitarian regimes by a *Dictatorships Convention* in which sanctions, seizure of assets and exclusions are automatically applied. The UK should be at the forefront of this with a Dictatorships Act which is, then, replicated throughout the Commonwealth.

App A: Articles on Constitutional Law by Author

Constitutional Law

1. Expanding Democracy - Transferring the Crown Prerogative to Parliament. (2014) *Rev. of European Studies*, vol 6, no 1, 83-126.
2. Modernising the Monarchy - in Legal Terms. (2010) *King's LJ ('KLJ')*, vol 21(3), 535-60.
3. Modernising the Monarchy - in Legal Terms. Part 2. (2011) *KLJ*, vol 22(1), 95-118.
4. Abolishing Obsolete Crown Prerogatives relating to the Military. (2011) *Nottingham LJ*, vol 20, 14-37.
5. Abolishing some more Obsolete Crown Prerogatives. (2011) *Liverpool LR*, vol 32, no 1, 65-92.
6. The Religion of the Queen - Time for Change. (2011) *Queensland LR*, 1-48.
7. Abolishing some Obsolete Constitutional Legislation. (2011) *Coventry LJ*, vol 16, issue 1, 1-18.
8. Modernising the Monarchy in Legal Terms - Part 3. (2012) *KLJ*, vol 23, 1-25.
9. Modernising the Monarchy in Legal Terms - Part 4. (2012) *KLJ*, vol 23, 285-311.
10. Modernising the Monarchy in Legal Terms - Part 5. (2014) *KLJ*, vol 25, 440-66.
11. Liberties and Customs of the City of London - Are there any Left? (2013) *Int. Law Research ('ILR')*, vol 2, no 1, 32-95.
12. Time to Abolish the Duchy of Lancaster. (2013) *Rev. of European Studies*, vol 5, no 4, 172-93.
13. Time to Abolish the Duchy of Cornwall? (2013) *Rev. of European Studies*, vol 5, no 5, 40-58.
14. Abolishing Obsolete Crown Prerogatives relating to Martial Law, Conscription & Billeting. (2012) *ILR*, vol 1, no 1, 13-62.
15. Abolishing some more Obsolete Crown Prerogatives: Part 2. (2011) *Liverpool LR*, vol 32, 275-315 (Dec 2011, online).
16. The Case for Abolishing Manorial Franchises and Customs. (2013) *Coventry LJ*, vol 18, no 1, 43-68.
17. Modernising the Law of Prize. (2014) *Journal of Business Law*, no 6, 465-83.

18. The Charters of the Cinque Ports - Are they Still Needed? (2013) Rev. of European Studies, vol 5, no 2, 90-126.
 19. Abolishing Various Obsolete Courts. (2012) Coventry LJ, vol 17, no 1, 25-55.
 20. Abolishing Obsolete Offices. (2012) Coventry LJ, vol 17, no 2, 31-60.
 21. Modernising the English Court System. (2013) J of Politics & Law ('JPL'), vol 6, no 3, 17-44.

Draft Legislation - Articles

22. Modernising the Constitution - A Crown Act (2021) ILR, vol 10, no 1, 13-100.
 23. Modernising the Constitution - A Parliament Act (2021) ILR, vol 10, no 1, 101-184.
 24. Modernising the Constitution - A Courts Act (2021) ILR, vol 10, no 1, 195-248.
 25. Modernising the Constitution - Quangos (2022) ILR, vol 11, no 1, 1-61.
 26. Modernising the Constitution - A Government Act (2022) ILR, vol 11, no 1, 62-116.
 27. Modernising the Constitution - British Territories & Foreign Relations Act: Parts 1 & 2 (2022) ILR, vol 11, no 1, 117-61 & 162-96.
 28. Modernising the Constitution - An Armed Forces Act (2022) ILR, vol 11, no 1, 197-258.
 29. Modernising the Constitution - A Constitution Act (2022) ILR, vol 11, no 1, 259-325.

Final Articles

30. Modernising the Constitution: Crown Estate & Sovereign's Private Estate (2023) ILR, vol 12, no 1, 1-50.
 31. Modernising some Final Crown Prerogatives (2022) JPL, vol 15, no 3, 65-88.
 32. Optimising the UK and Commonwealth Constitutions (2022) JPL, vol 15, no 3, 37-53.
 33. Modernising the UK Constitution - Draft Legislation *** (2022) JPL, vol 15, no 4, 110-209
 34. The Collapse of the English Legal System – Who is to Blame? (2022) JPL, vol 15, no 4, 1-94.
 35. Abolishing the Office of Lord Chancellor (2023) ILR, vol 12, no 1, 51-60.

*** This re-states slightly all the draft legislation in 22-8, in light of having considered all the c. 182 Crown Prerogatives.

App B: Current Legislation

(a) Nationality & Immigration

(i) Pre-1971 (italics signifies repealed)

[*Aliens Act 1905*]

[*Aliens Registration Act 1914*]

Status of Aliens 1914 3 (*restrictions on aliens*)

*British Nationality and Status of Aliens Act 1918*¹²²

Aliens Restriction (Amendment) Act 1919 3

British Nationality and Status of Aliens Act 1922

British Nationality and Status of Aliens Act 1933

British Nationality and Status of Aliens Act 1943

British Nationality Act 1948 1 (*s 3, criminal liability, obs*)

Aliens' Employment Act 1955 2

British Nationality Act 1958 5

British Nationality Act 1964 2

British Nationality (No 2) Act 1964 5

Immigration Act 1971 45

(ii) Post-1971

British Nationality Act 1981 50

Asylum and Immigration Appeals Act 1993 5

Asylum and Immigration Act 1996 (*amends*)

Special Immigration Appeals Commission Act 1997 9

Immigration and Asylum Act 1999 170

¹²² Those in italics are effectively obsolete.

Nationality, Immigration and Asylum Act 2002	50
Asylum and Immigration (Treatment of Claimants <i>etc</i>) Act 2004	5
Immigration, Asylum and Nationality Act 2006	60
UK Borders Act 2007	65
Borders, Citizenship and Immigration Act 2009	20
Immigration Act 2014	70
Immigration Act 2016	90
Nationality and Borders Act 2022	84
(iii) <u>BOT & HK Material</u>	
British Nationality (Falkland Islands) Act 1983	4
British Nationality (Hong Kong) Act 1990	5
Hong Kong War Wives and Widows Act 1996	2
HK (Overseas Public Servants) Act 1996	5
British Nationality (Hong Kong) Act 1997	2
British Overseas Territories Act 2002	6
(iv) <u>Channel Tunnel Act 1987</u>	
(v) <u>Extradition Acts</u>	
Extradition Act 2003	220
Reparation of Prisoners Act 1984	15
Extradition (Provisional) Act 2020	2

App C: Draft NATIONALITY ACT

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1. Categories of Nationality

- (1) There shall be 2 categories to determine nationality:
 - (a) British citizen;
 - (b) Foreign citizen.
- (2) The term '*foreign citizen*' shall now be used for UK legal purposes as opposed to the older terms '*foreigner*' or '*alien*'.

2. Abolition of Closed Categories

- (1) The following categories ¹²³ of nationality are abolished:
 - (a) British National (Overseas) citizen;
 - (b) British Overseas citizen;
 - (c) UK trust territory citizen;
 - (d) British mandated territory citizen;
 - (e) British protectorate citizen;
 - (f) British protected state citizen;
 - (g) British subject.
- (2) Any person in 1 (a)-(g) shall now be treated as a British citizen unless *Sch 1* applies.

3. Meaning of British Citizen

- (1) A person is a British citizen in accordance with *Sch 2*.

4. Acquisition of British Citizenship

- (1) A person shall acquire British citizenship in accordance with *Sch 3*.

5. Renunciation and Resumption of British Citizenship

- (1) A person may renounce, and resume, British citizenship in accordance with *Sch 4*.

6. Deprivation of British Citizenship

- (1) A person may be deprived of British citizenship in accordance with *Sch 5*.

¹²³ They are '*closed*' because there can be no new entrants and only a declining number of persons in the category. The numbers of those in (b) to (g) will now be very small.

7. Meaning of BOT Citizen

(1) A person is a BOT citizen in accordance with *Sch 6*.

8. Acquisition of BOT Citizenship

(1) A person shall acquire BOT citizenship in accordance with *Sch 7*.

9. Renunciation and Resumption of BOT Citizenship

(1) A person may renounce, and resume, BOT citizenship in accordance with *Sch 8*.

10. Deprivation of BOT citizenship

(1) A person may be deprived of BOT citizenship in accordance with *Sch 9*.

11. End of BOT Status

(1) Where a BOT:

- (a) becomes an independent country; or
- (b) no longer has the UK sovereign as its head of state, its citizens shall be treated as foreign citizens for nationality purposes.

12. Right to Permanently Live and Work in the UK

(1) A British citizen has the right to permanently live and work in the UK unless:

- (a) he has renounced his citizenship according to s 5; or
- (b) legislation (including this Act) provides otherwise.

(2) A foreign citizen has no right to permanently live and work in the UK but only to live and work in accordance with the visa arrangements in s 15.

(3) The older expressions ‘*right of abode*’ in the UK or the ‘*right to permanently reside*’ in the UK shall be replaced by the more modern expression, the ‘*right to permanently live and work*’ in the UK and they shall no longer be used.

(4) From the date of the commencement of this Act, no person may be granted the right to permanently live and work in the UK unless ss (1) applies.

13. Right to Enter and Leave the UK

(1) British citizens have the right to enter and leave the UK subject to:¹²⁴

- (a) proving their identity to an immigration officer where required; and to
- (b) any UK legislation providing to the contrary.¹²⁵

(2) Foreign citizens have the right to enter and leave the UK subject to:

- (a) proving their identity to an immigration officer;
- (b) the terms of any arrangement in s 15; and to
- (c) any UK legislation providing to the contrary.

[(3) Arrival in, and departure from, the UK on a local journey from, or to, any of the BDT or the Republic of Ireland

(a) shall not be subject to control under this Act,

(b) nor shall a person require leave to enter the UK on so arriving, except in so far as any of those places if for any purpose are excluded from this [ss] under the powers conferred by this Act; and in this Act the UK and those places, or such of them as are not so excluded, are collectively referred to as ‘the common travel area’.]¹²⁶

14. Legal Restrictions on Foreign Citizens when in the UK

(1) *Sch 10* shall apply to foreign citizens when in the UK.

15. Types of Visa

(1) The following types of visa may be granted to foreign citizens who wish to enter, study or work in the UK; a

- (a) visitor’s visa;
- (b) study visa;
- (c) work visa.

16. Duration of Visas

(1) The duration of the visas in s 13 are specified in *Sch 11*.

¹²⁴ This would enable the old CPs relating to leaving the realm, and being ordered to return, to be abolished, see s 18.

¹²⁵ This would include emergency legislation, prohibiting sanctioned persons from entering *etc*.

¹²⁶ This was contained in the 1971 Act. However, given that Southern Ireland is part of the EU and the UK has left the EU, it does not seem appropriate to retain.

17. Rules concerning Visas

- (1) Rules shall be made by the Secretary of State in respect of the visas in s 15. They may include a condition on a citizen:
- (a) restricting his work or occupation in the UK;
 - (b) restricting his studies in the UK;
 - (c) requiring him to maintain and accommodate himself, and any dependents, without recourse to public funds or to [the NHS];
 - (d) requiring him to register with the police;
 - (e) requiring him to report to an immigration officer or to the Secretary of State; or
 - (f) about residence.
- (2) Rules may, also, deal, *inter alia*, with:
- (a) any variation of any visa;
 - (b) the lapse of any visa;
 - (c) liability to deportation;
 - (d) the prohibition on non-British citizens from embarking to the UK.

18. Obsolete Crown Prerogatives

- (1) *The following are abolished, any Crown prerogative to:*
- (a) *issue a letter of safe conduct;*
 - (b) *prohibit a British subject from leaving the realm (including by means of the writ (ne exeat regno));*
 - (c) *order a British subject to return to the realm;*
 - (d) *make a person a denizen;*
 - (e) *naturalise a person (it is believed no such prerogative existed in any case).*

19. Process of Naturalisation

- (1) A foreign citizen may only apply to become a British citizen if that person:
- (a) intends to live and work permanently in the UK;
 - (b) has lived in the UK for the last 25 years;
 - (c) will give up any other foreign nationality, foreign citizenship or permanent residence in a foreign country as part of the process of becoming a British citizen; and
 - (d) satisfies the requirements of *Sch 12*.

20. Abolition of Special Immigration Appeals Commission (SIAC)

- (1) The SIAC is abolished and the legal jurisdiction of the same shall be assumed by a single judge of the Court of Appeal.
- (2) *Sch 13* shall apply.

21. First Tier Immigration and Asylum Tribunal (FTIAT)

- (1) The FTIAT is abolished and the legal jurisdiction of the same shall be assumed by a Nationality Court which court shall comprise a part of the High Court.
- (2) Rules of court shall be made for the [Nationality Court].

or

(1) Any appeal from a single immigration judge of the FTIAT shall now be to a single judge of the Court of Appeal and the following abolished, any:

- (a) *appeal for re-consideration to the FTIAT (the 'filter'); or to*
- (b) *the High Court or the Court of Session (Outer House) in Scotland.*¹²⁷

22. Interpretation

- 'BOT' means a British Overseas Territory as listed in *Sch 14*;
- 'BOT citizen' means the citizen of a BOT;
- 'BDT' means a British Domestic Territory, being the Channel Islands or the Isle of Man;
- 'Commonwealth citizen' means the citizen of a country listed in *Sch 15*;
- 'Foreign citizen' means a national or citizen who is not a British citizen;
- 'FTIAT' means the First Tier Immigration and Asylum Tribunal;

¹²⁷ i.e. it would seem much faster and more impartial for any immigration and asylum appeal to go to a single judge of the Court of Appeal.

's' stands for section, 'ss' for subsection and 'Sch' for schedule;
'SIAC' means the Special Immigration and Appeals Commission;

23. Repeals

(1) The legislation in *Sch 16* is repealed, as described.

24. Application

(1) This Act shall apply to the UK and to all BOT.

Sch 1: Closed Categories: Exclusion

1. A person in one of the closed categories listed in s 2(1) of the Act shall not be treated as a British citizen pursuant thereto if, prior to the commencement of this Act, that person has:

- (a) acquired a foreign nationality; or
- (b) a permanent residence not in the UK; or
- (c) not lived in the UK in the last past 5 years; or
- (d) previously renounced their closed category status; or
- (e) acquired their closed category status in manner which would result in deprivation pursuant to *Sch 5* if the same were a British citizen.¹²⁸

2. A person in one of the closed categories in s 2(1) of the Act who becomes a British citizen pursuant to s 1 thereto shall not acquire any right to permanently live and work in the UK unless that person:

- (a) has acquired such a right prior to the commencement of this Act;¹²⁹ or
- (b) the same was a British National (Overseas) Citizen who:
 - (i) has renewed his status in 2021; and
 - (ii) has lived in the UK in the last past 5 years; and
 - (iii) has a ILR visa; and
 - (iv) has applied for British citizenship.

Sch 2: Meaning of British Citizen

1. A person is only a 'British citizen' for the purposes of this Act if ss 2-22 below apply.

2-20. [This will set out the terms of the 1981 Act ss 15-25 as amended/supplemented by later legislation]

21. A person is a 'British citizen' if, immediately before the commencement of the 1981 Act:

- (a) he was a Commonwealth citizen having the right of abode (that is, having a right to permanent residence) in the UK by virtue of s 2(1)(d) or s 2 (2) of the 1981 Act as then in force; or
- (b) he was a British citizen pursuant to any of the legislation referred to in *Sch 16*; and s 22 does not apply.¹³⁰

22. No person may claim to be a British citizen pursuant to s 21 if such person has, as at the date of the commencement of this Act:

- (a) acquired a new nationality or citizenship other than that of a British citizen;¹³¹
- (b) renounced his status as a British citizen;
- (c) acquired a permanent residence other than in the UK;
- (d) had, or should have, their status as a 'British citizen' revoked where *Sch 5* would apply.

23. Any legal right of a person to apply to become a British citizen, or a British Overseas citizen, under the Sophia Naturalisation Act 1705 (repealed) is abolished.¹³²

Sch 3: Acquisition of British Citizenship

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 4: Renunciation and Resumption of British Citizenship

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 5: Deprivation of British Citizenship

¹²⁸ See also the 1981 Act, s 40(3). The practical effect of this is that all UK consulates would withdraw all closed categories passports - and only issue to the holder a new British citizen passport (but without right of permanent residence, save where sch 1(2) above applies) if 1 (a)-(e) do not apply. One suspects that the number of applicants will, actually, be very small due to death, or 1 (a) and (b), in particular, applying.

¹²⁹ This will have been through registration. Thus, *Windrush* applicants will not be excluded (one suspects that the total no, anyway, is likely to be closer to 4k than 15k due to death, having another passport, not wanting to live in the UK etc).

¹³⁰ See 1981 Act, s 39.

¹³¹ i.e. if a Commonwealth citizen has acquired US citizenship or that of another country, they cannot retain British citizenship (to prevent dual passports). So too, if a person has both Irish and UK citizenship under the 1948 Act (one assumes that the number of such will be few, being elderly in any case - at least, 74 years old if a minor and 90 if not).

¹³² This anomaly is, thus, abolished.

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 6: Meaning of BOT Citizen

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 7: Acquisition of BOT Citizenship

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 8: Renunciation and Resumption of BOT Citizenship

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 9: Deprivation of BOT Citizenship

[This will contain ss of the 1981 Act and later Acts dealing with the same]

Sch 10: Legal Restrictions on Foreign Citizens when in the UK

1. No foreign citizen or BOT citizen may:

- (a) be a Member of Parliament;
- (b) sit as a peer of the realm in the House of Lords;
- (c) be a minister of State;
- (d) be a member of the Cabinet *or the Privy Council*;
- (e) hold a public office in the UK, including that of a civil servant;
- (f) hold a local government office;
- (g) hold an office in the royal household.
- (h) be employed in the security services;
- (i) be employed as an officer in the armed forces;
- (j) sit on a jury, in any court proceedings.

3. For the avoidance of doubt a foreign citizen shall be triable in the same manner as if he were a British subject.

4. The following exceptions apply in relation to s 2

(a) In the case of s 2(e), a foreign citizen may be employed in any civil capacity under the Crown:

- (a) if he is appointed in any country or territory outside the UK and the BDT and employed in any such country or territory in service of a class or description which appears to the responsible minister to be appropriate for the employment of foreign citizens; or
- (b) if a certificate in respect of his employment, issued by the responsible minister with the consent of the treasury, is for the time being in force under this [s]; or
- (c) he is a relevant European and he is not employed in a reserved post; and so much of the said [s 3] as imposes disability for employment in any such capacity shall cease to have effect in relation to British protected persons

ss (2)-(4) deal with the certificate.¹³³

(b) [This will contain other exceptions to 1 (a)-(i)]

Sch 11: Duration of Visas

1. The maximum duration of a:

- (a) visitor's visa to the UK shall be [6 months];
- (b) study visa in respect of an undergraduate degree shall be [] years;
- (c) study visa in respect of a postgraduate degree shall be [] years;
- (d) work visa shall be [3] years.

2. A SI shall set out the terms for any:

- (a) extension,
- (b) reduction
- (c) cancellation,

of the above.

Sch 12: Process of Naturalisation

[Sets out any other requirements in respect of naturalisation]

Sch 13: Nationality Court

¹³³ This tracks the Aliens' Employment Act 1955, removing (1)(b) and (c).

[This will deal with the scope of the jurisdiction of a new Nationality Court]

Sch 14: BOT

The following comprise BOT: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands (inc. Henderson, Ducie and Oeno), St Helena, Ascension & Tristan da Cunha, South Georgia & South Sandwich Islands, Sovereign Base Areas of Akrotiri & Dhekelia, Turks & Caicos.

Sch 15: Commonwealth Countries

The following comprise Commonwealth countries [list the same].

Sch 16: Repealed Legislation

Repeal all the legislation referred to in *App A* (inc all legislation from 1914-1988) save where the same is administrative only, which shall go into a new *Nationality (Administration) Act*, see *App D*.

App D: Draft Nationality (Administration) Act

While a new *Nationality Act* will deal with the *categories of nationality*, this Act will deal with all the admin - such that both acts consolidate all prior legislation. Much of this material could, also, be placed in a SI.

- The *Draft Nationality (Administration) Act* ('**this Act**') will not cover any of the:
 - British Nationality Acts 1914, 1918, 1922, 1933, 1943, 1948, 1958, 1964, 1964 (no 2)
 - Aliens Restriction Amendment Act 1919
 - Aliens Employment Act 1955
 - Falklands (viz. British Nationality (Falkland Islands) Act 1983)¹³⁴
 - British Nationality (Hong Kong) Act 1990
 - Hong Kong War Wives and Widows Act 1996
 - HK (Public Servants) Act 1996
 - British Nationality (Hong Kong) Act 1997
 - Special Immigration Appeals Commission Act 1997

since these will be covered in the *Nationality Act*.

- As for the **Immigration Act 1971**, Pt 1 will be in the *Nationality Act*. However, the Pts 2-5 are administrative and will be in this Act *viz.*
 - Pt 1 (electronic travel authorisations)
 - Pt 2 (appeals)
 - Pt 3 (criminal proceedings)
 - Pt 4 (maritime enforcement)
 - Pt 5 (supplementary).
- As for the **Nationality Act 1981**, Pts 1-4 should be in the *Nationality Act*, but Pt 5 (*supplementary*) will be in this Act.
- The **Asylum and Immigration Appeals Act 1993** will be in this Act. So too, the **Immigration and Asylum Act 1999** all of which is administrative. It has:
 - Pt 1 (immigration: general)
 - Pt 2 (carriers' liability)
 - Pt 3 (bail)
 - Pt 4 (appeals)
 - Pt 5 (immigration advisers and service providers)
 - Pt 6 (support for asylum seekers)
 - Pt 7 (power to arrest, search and fingerprint)
 - Pt 8 (detention centres and detained persons)
 - Pt 9 (registrar's certificates: procedure)
 - Pt 10 (misc and supplemental).
- Also, the **Nationality, Immigration and Asylum Act 2002** will be in this Act. It has:
 - Pt 1 (nationality)

¹³⁴ This conferred British citizenship on inhabitants of the Falkland Islands born before 1 Jan 1983 who would otherwise be British Dependent Territories citizens by virtue of a link with the Falkland Islands (e.g. birth, naturalisation or registration). For persons born after 1 Jan 1983 British citizenship is accorded on persons born in the Falkland Islands who satisfy the equivalent sections of the 1981 Act *re* British citizenship. Provision is also made for the acquisition of British citizenship by registration and descent.

- Pt 2 (accommodation centres)
- Pt 3 (other support and assistance)
- Pt 4 (detention and removal)
- Pt 4A (inadmissible asylum claims)
- Pt 5 (appeals in respect of protection and human rights claims)
- Pt 6 (immigration procedure)
- Pt 7 (offences)
- Pt 8 (general).
- Also, the **Asylum and Immigration (Treatment of Claimants etc) Act 2004** will be in this Act (it deals with offences, treatment of claimants, enforcement powers, procedure for marriage, appeals, removal and detention, immigration services, fees and general).
- Also, the **Immigration, Asylum and Nationality Act 2006** will be in this Act (it deals with appeals, employment, information, claimants and applicants, miscellaneous).
- Also, the **UK Borders Act 2007** will be in this Act. It deals with detention at ports (ss 1-4), biometric registration (ss 5-15), treatment of claimants (ss 16-21), enforcement (s 22-31), deportation of criminals (ss 32-9), information (ss 40-47), border and immigration inspectorate (ss 48-56A) and general.
- Also, the **Borders, Citizenship and Immigration Act 2009** will be in this Act. It has:
 - Pt 1 (border functions)
 - Pt 2 (British citizenship)
 - Pt 3 (immigration)
 - Pt 4 (misc. and general)
- Also, the **Immigration Act 2014** will be in this Act. It has:
 - Pt 1 (removal and other powers)
 - Pt 2 (appeals)
 - Pt 3 (access to services)
 - Pt 4 (marriage and civil partnership)
 - Pt 5 (oversight)
 - Pt 6 (miscellaneous)
 - Pt 7 (s 72, financial provision).
- Also, the **Immigration Act 2016** will be in this Act. It has:
 - Pt 1 (labour market and illegal working)
 - Pt 2 (access to services)
 - Pt 3 (enforcement)
 - Pt 4 (appeals)
 - Pt 5 (support *etc* for certain categories of migrant)
 - Pt 6 (border security)
 - Pt 7 (language requirements for public sector workers)
 - Pt 8 (fees and charges)
 - Pt 9 (misc and general).

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