

10.3.1.4 British Overseas Citizens and Others

By s 26, any CUKC who became neither a British Citizen nor a BDTC becomes at commencement a British Overseas Citizen. This status can also be acquired by the registration of minors (s 27) and of married women (s 28). A fourth category is British subjects without citizenship (Part IV); a fifth is British Protected Persons (s 38).

10.3.1.5 Discussion

Persons in all the categories mentioned are British nationals for the purposes of international law. All except British Protected Persons are Commonwealth citizens and thus owe allegiance to the Queen and, if resident in the UK, may vote and sit on juries. No one has a right to a British passport, though in practice British Citizens, BDTCs, and British Overseas Citizens will be issued with appropriate documents and will be granted British consular protection while overseas. Only British Citizens have right of abode in the UK. BDTCs do not necessarily have such a right in the territory with which they are connected, and British Overseas Citizens do not by virtue of their status have right of abode in any British territory. An alien is a person who is neither a Commonwealth citizen nor a British Protected Person nor a citizen of the Republic of Ireland (s 50(1)).

The *British Nationality Act 1981* has been vehemently criticised.⁷² It is said, for example, to be permeated with racism and sexism; symbolically, at least, it abandons people whose connection is with a portion of the former British Empire rather than with the United Kingdom; it creates second class and third class categories of citizenship. Hong Kong people in 1981 were in general, it seems, alarmed and dismayed by the Act and were deeply suspicious of the motives behind it; the fact that it became law less than a year before negotiations began for the Joint Declaration has not gone unnoticed. And the law's intricacies do the British legislature little credit. There cannot be another nationality code anywhere in the world that is so complex and obscure that not only will ordinary people not be able to ascertain their status or what is involved in it but the legal profession will be perplexed and unable to advise with certainty how a particular person will be treated.⁷³

So far as Hong Kong is concerned, it cannot be said that the Act significantly affected the rights of its 'citizens'. People born here are still, for the time being, 'British'; they remain Commonwealth citizens; they can as before obtain a 'British' passport and receive consular protection while in a foreign country (except in China if they are of Chinese race). Their unrestricted right of entry into the United Kingdom was lost in 1962. They have not become stateless; there is a territory — Hong Kong — which will take them in. But the extent to which they have 'a place to call home' depends on Hong Kong law, and this is considered below in Section 10.3.4.

⁷² See, eg, WS Clarke, 'Hong Kong and the Law of British Nationality' (1983) 13 HKLJ 1.

⁷³ MDA Freeman, *The British Nationality Act 1981* (London: Sweet & Maxwell, 1982) introduction.

10.3.2 *The Joint Declaration and the Hong Kong Act*⁷⁴

Nationality and citizenship are incidents of sovereignty. A necessary consequence, therefore, of the resumption of sovereignty by China in 1997 is the loss of British Dependent Territories citizenship by those who acquired it by virtue of a connection with Hong Kong.⁷⁵ Special arrangements have however been made on behalf of Hong Kong BDTCs. The United Kingdom memorandum exchanged with the Chinese memorandum when the Joint Declaration was signed states that Hong Kong BDTCs will cease to be such from 1 July 1997 but will be eligible to 'retain' an 'appropriate status' and continue to use passports issued by the UK government. They must hold or be included in a British passport before the termination of British sovereignty. BDTC status by virtue of a connection with Hong Kong may not be acquired on or after 1 July 1997, and no one born on or after that date will acquire the new status. Chinese Hong Kong former BDTCs holding UK travel documents will be entitled to UK consular protection in third countries but not in the Hong Kong Special Administrative Region or in 'other parts of China'.⁷⁶

All this was 'subject to the completion of the necessary amendments to the relevant United Kingdom legislation'. The Schedule to the *Hong Kong Act 1985* empowered the Queen by Order in Council to provide that Hong Kong BDTCs may 'acquire a new form of British nationality the holders of which shall be known as British Nationals (Overseas)'. Accordingly, the Hong Kong (British Nationality) Order 1986 was made, coming into force on 1 July 1987.⁷⁷ The essence of the Order is contained in cl 4(2):

Any person who is a British Dependent Territories citizen by virtue (wholly or partly) of his having a connection with Hong Kong and who, but for his having a connection with Hong Kong, would not be such a citizen shall be entitled before 1st July 1997 (or before the end of 1997 if born in that year before that date), to be registered as a British National (Overseas) and to hold or be included in a passport appropriate to that status.

10.3.3 *Chinese Nationality Law*

The Chinese memorandum accompanying the Joint Declaration declares that 'all Hong Kong Chinese compatriots, whether they are holders of the

⁷⁴ See Robin M White, 'Nationality Aspects of the Hong Kong Settlement' (1988) 20 *Case Western Reserve Journal of International Law* 225.

⁷⁵ Johannes Chan concludes his discussion of the effect of territorial change on nationality by submitting that 'upon change of sovereignty, all persons who have a genuine and effective link with the new State will automatically acquire the nationality of the new State', though of course residents whose nationality is not that of the predecessor state will not be affected: *The Right to a Nationality as a Human Right: The Current Trend Towards Recognition* (1991) 12 *HRLJ* 1 at 12-13.

⁷⁶ Paragraph 65 of the explanatory notes in the White Paper of 26 September 1984.

⁷⁷ See also the British Nationality (Hong Kong) Regulations 1986 and the Status of British National (Overseas) (Deprivation) Rules 1986.