Britain and Kenya's citizenship law: a conflict of laws?

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Introduction

An earlier article (*I&NL&P Vol 6 No 2 pp 35–39*) dealt with the interaction of British and Kenyan laws with regard to nationality in general, with a passing reference to a controversial 1985 amendment to Kenya's citizenship laws. It is proposed to examine the latter in detail here. The issue is of direct relevance to British immigration laws: it affects eligibility for quota vouchers as well as the right of certain stateless persons to register as British nationals.

The original provisions

Section 2 (later renumbered and hereafter referred to as section 89) of the original independence constitution of Kenya was as follows:

'Every person born in Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth:

Provided that a person shall not become a citizen of Kenya by virtue of this section if at the time of his birth–

(a) neither of his parents is a citizen of Kenya and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Kenya; or

(b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country.'

Clearly what was intended was that the *jus soli* principle was to apply so that every person born in Kenya after independence was to become a citizen of Kenya by virtue of birth alone, with certain exceptions as noted above, irrespective of the place of birth or nationality of the parents. It is the exceptions that we need to study further.

Proviso (b) was based on pre-existing models in other parts of the Commonwealth and elsewhere and nothing turns on it here.

While proviso (a) was broadly aimed at excluding the children of foreign diplomats from acquiring Kenyan citizenship at birth it also had two elements (see example paragraphs (3) and (4) below) which were somewhat unusual and tempered the effect of such exclusion. Even so for some 20 years no difficulties were experienced in the interpretation of the section as a whole or of proviso (a) in particular until the Kenyan authorities began to misconstrue these, as we shall see.

If proviso (a) had ended after the opening words 'neither of his parents is a citizen of Kenya' then the whole section would have taken on an entirely different meaning, because in that event the qualification for citizenship by birth after independence would have depended on whether (at least) one of the parents of the person concerned was her/himself a citizen of Kenya at the time of such person's birth.

The fact however remains that the mention of the citizenship of the parents was linked to the diplomatic status of one of them, i.e. the father, so that the proviso only came into play when the father was an accredited foreign envoy. The crucial word there was 'and' after the opening words quoted above. The operation of the proviso can best be illustrated in the following example.

(1) Every child born in Kenya after 11 December 1963 was to become a citizen of Kenya unless (2) below applied at the time of birth.

(2) If however the child's *father* was an accredited foreign diplomat then the child would not become a citizen of Kenya unless (3) below applied.

(3) Even if the child's father was an accredited foreign diplomat the child would nevertheless become a citizen of Kenya if its mother was herself a citizen of Kenya, whether she was married to the father or not.[1]

(4) If the child's mother however were an accredited foreign diplomat in her own right, then the child would still become a citizen of Kenya regardless of her nationality and status, provided the father was not such a diplomat.

In other words, the fact that neither of the child's parents was a citizen of Kenya at its birth did not prevent the child from becoming a citizen of Kenya *unless* the child's father was a foreign diplomat accredited to Kenya at the time of the birth. Put another way, proviso (a) only operated when both the parents were non-citizens of Kenya *and* in addition the father enjoyed diplomatic immunity. The most sensible way of construing the proviso was to read it as if for 'neither of his parents is a citizen of Kenya' there were substituted the words printed in italic below:

'Provided that a person shall not become a citizen of Kenya by virtue of this section if at the time of his birth–

(a) *both his parents are non-citizens of Kenya* and his father possesses (diplomatic) immunity . . .'.

Thus a child born, say, to an ordinary (i.e. non-diplomatic) expatriate couple became a citizen of Kenya notwithstanding that neither of them was a citizen of Kenya.

As far as paragraph (3) in the example above was concerned it is reasonable to suppose that the draftsmen did envisage the possibility that a foreign diplomat might have an affair with a local woman (who was a citizen of Kenya) and father a child born to her and that it was therefore consciously intended that the child would become a citizen of Kenya at birth. It was immaterial that the parents of such a child were not married, for in this instance citizenship was not derived through descent but by birth.[1] With regard to (4) however its implication was probably not appreciated at the time, when there were far fewer women diplomats.

The 1985 amendment

Be that as it may, the legal position remained unchanged until 1985 when a constitutional amendment was rushed through Parliament. Its purpose, according to the explanatory memorandum appended to the Bill, was 'to repeal section 89 . . . which [had] been found to be incompatible with the policies of the Government'. It was proposed therefore to 'clarify the matter'. The actual text of the Act is as follows:

THE CONSTITUTION OF KENYA (AMENDMENT) ACT, 1985

No. 6 of 1985

Date of Assent: 11th July, 1985
Date of Commencement: 19th July, 1985

An Act of Parliament to amend the Constitution

ENACTED by the Parliament of Kenya as follows:–

Short title (marginal note)

1. This Act may be cited as the Constitution of Kenya (Amendment) Act, 1985.

Replacement of section 89 (marginal note)

2. Section 89 of the Constitution is repealed and replaced by–

Persons born in Kenya after 11th December, 1963 (marginal note)

89. Every person born in Kenya after 11th December, 1963 shall become a citizen of Kenya **if at the date of his birth one of his parents is a citizen of Kenya**; except that a person shall not become a citizen of Kenya by virtue of this section if at the date of his birth–

(a) his father possesses immunity from suit and legal process as is accorded to the envoy of a foreign state accredited to Kenya; or

(b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country.'

It will be seen that the words with emphasis supplied introduced a new and additional requirement for acquisition of Kenyan citizenship at birth, something that was not present in the original section 89.

Background to the Act

The official justification for the Act was, of course, that section 89 was found to be 'incompatible' with government policy. What that meant was that the government had decided to shift to the *jus sanguinis* principle in relation to acquisition of citizenship at birth. That would have been perfectly in order (after all the British Nationality Act of 1981 had made a similar change) but for the background to the measure, the methodology employed to bring it about and its operation in practice.

There was apparently very little informed public discussion about the matter. The Bill seeking to amend the Constitution was published in the Kenya Gazette on 10 May 1985. A brief report in the Nairobi Weekly Review of 17 May 1985 stated that according to sources in the Immigration Department and the Attorney-General's Chambers 'part of the provisions [of the old section 89] had been misinterpreted to mean that it did not matter if neither of the person's parents was a Kenyan citizen as long as the father was not a diplomat'. This was a curious distortion of what had in fact already been happening for some time, which was that the immigration authorities had taken to denying the claim to Kenyan citizenship of those born after independence unless they could show that one at least of their parents was a citizen of Kenya at the time of the birth, contrary to the view expressed on behalf of the Attorney-General in a formal letter dated 28 August 1984 that

'after December 11, 1963, Kenyan Citizenship by birth is attributed to every person born in Kenya subject only to the two exceptions respecting the child of a foreign diplomatic envoy and the child of an enemy alien born in a place under hostile occupation . . . [and] . . . that there [was] no third exception apart from the foregoing two exceptions'.

This was consistently ignored by the immigration authorities – whose hands were subsequently much strengthened by the passing of the 1985 Act.

The Act received the Presidential assent on 11 July 1985 and became operative as from 19 July 1985 (under section 46(4) of the Constitution, see 11. below). In form therefore it was prospective. What the Act did however was to repeal the old Section 89 and replace it with a new one in such a way that by its express wording every person born in Kenya after 11 December 1963 became subject to it. It thus purported to alter or put at risk the status of people already born, exposing many of them to statelessness. In this sense it was retrospective in effect. An

extraordinary consequence of this was that while on 18 July 1985 it was possible to argue that a child born say on 10 July 1985 would under the old section 89 be a citizen of Kenya, irrespective of its parents' citizenship, the Act *at its face value* operated to change the position: as from 19 July 1985 (the date of its commencement) the same child could not qualify to be a citizen of Kenya unless one of its parents was such a citizen at its birth. This is precisely how the Kenyan immigration authorities have been interpreting the Act, though as we have seen they were doing so (quite wrongly) even before it anyway.

Areas of British concern

It would be an understatement to say that the Act has given rise to confusion and injustice. We need however focus only on two specific areas of British concern, one of which was indirectly identified in the Nairobi Weekly Review of 17 May 1985 (op cit) which had gone on to suggest that 'many of those affected [by the alleged misinterpretation of sec 89] [were] said to be children of Asians born in Kenya after December 11, 1963, who have, since attaining the age of 21, sought to be registered as Kenya citizens according to the original provisions of section 89 . . . '. The reference to 'sought to be registered' should have read 'sought to be recognised' and to 'attaining of the age of 21' had to be understood in the context of the prohibition against dual citizenship under Kenyan law.

It will be recalled (*I&NL&P Vol 6 No 2* op cit) that at independence a large section of Kenya's ethnic Asian population retained British nationality. Children born to those of them who were citizens of the UK and colonies themselves became such citizens by descent, under section 5 of the British Nationality Act 1948. This was so until the commencement of the present BNA 1981 on 1 January 1983 when most of these citizens of the UK and colonies became British overseas citizens. The Kenyan 1985 Act has created anomalies which affect these people in a variety of ways, the most important of which concerns the working of the Special Voucher scheme (also *I&NL&P Vol 6 No 2*).

Although otherwise eligible for a Special Voucher (QV), a British Overseas Citizen over the age of 18 resident in Kenya is nevertheless disqualified if he/she has another nationality. If an applicant for a QV was born in Kenya before 19 July 1985, the date of commencement of the 1985 Act, (and those currently facing this problem would have been born circa 1969–1974) then the British view is that the person concerned is a citizen of Kenya as well as a British Overseas Citizen, notwithstanding that the Kenyan authorities may refuse to recognise such person to be a citizen of Kenya under the 1985 Act. The only way round this obstacle is for the applicant to wait until the age of 23 and then rely on the provisions of section 97(1) of the Kenyan Constitution. According to this provision a person who upon attaining the age of 21 is a citizen of Kenya and also a citizen of some other country ceases to be a citizen of Kenya on the specified date unless she/he has renounced such other citizenship and taken an oath of allegiance to Kenya, the specified date in this connection being the attainment by that person of the age of 23. People in this position are thus put in a most invidious situation. They are not regarded as citizens of Kenya and indeed are expected to 'regularise' their immigration status by the Kenyan authorities (which in many cases may amount to no more than simply being allowed to remain in Kenya on sufferance) while at the same time they are expected to wait for up to, if not at least, five years before being granted Special Vouchers for entry into the UK.

The other scenario where the issue of the retrospective operation of the 1985 Act could arise is in relation to the provisions for reduction of statelessness in the British Nationality legislation. The following examples may be given:

Example 1 – child born in Kenya in 1980 to citizen of the UK and Colonies mother with right of abode in UK on ground of five years' ordinary residence and British Protected Person father;

Example 2 – child born in Kenya in 1984 to British Overseas Citizen parents;

Example 3 – child born in Kenya in 1980 to British Protected Person parents.

In each of these three examples, it would be possible for the child to be registered as a British Citizen, British Overseas Citizen or British Protected Person (under paragraphs 5 and 4 of Schedule 2 to BNA 1981 and Article 7 of the BPPs etc. Order 1982, SI 1982 No 1070 respectively) if it could be shown that the child *is* (at the time of application for registration) *and has always been stateless*, and further in the second and third examples if certain residential qualifications are satisfied. In each case the person concerned was born before the passing and indeed commencement of the 1985 Act, but the Kenyan authorities would not regard them as being citizens of Kenya. As stated above however the British view is that the Kenyan authorities are wrong in their interpretation of the effect of the 1985 Act. It must follow therefore that the application in each case must fail.

Is the 1985 Act retrospective? The issues considered

We turn now to the crucial question whether the Kenyan immigration authorities are justified in operating the 1985 Act retrospectively or, in other words, whether the British view is correct. It may be best to approach the matter on the basis of the following points.

1. Surprisingly the issue has not been the subject of legal proceedings in Kenya so far (whether before or after the passing of the 1985 Act) and there is no known judicial authority on it. 'Surprisingly' because the conundrum of the Act does not concern just the

ethnic Asian community of Kenya (who may be reluctant to resort to court action) but affects or can affect the status of many other people as well.

2. That does not of course mean that the question may not arise or be determined in an English court. This could happen if the aggrieved applicant for a QV or for registration in any of the three examples given above were to seek judicial review here. In that event the court would have to determine whether the 1985 Act so operated as to deprive the person concerned of Kenyan citizenship retrospectively and *ab initio* ('is and has always been stateless') on the assumption that the applicant did not qualify for citizenship of any other country either.

3. In the recent case of *Dubai Bank Ltd v Galadari & Others (No 5)* (reported only in *The Times* 26 June 1990, *the Independent* 14 July 1990 and *the Financial Times* 27 June 1990) it was held, in line with established principles, that while an English court would not entertain an action the sole object of which was to determine the constitutionality of foreign legislation, it could pronounce on the constitutionality of a foreign law where in the course of an action that was an issue raised which required resolution by the court. Notwithstanding the use of the expression 'constitutionality of a foreign law' in the report of the case, what, in essence, was at stake there was whether there was any basis for official or ministerial certificates issued by some designated persons or agencies of the Dubai government as to the effect of certain legislative measures and administrative acts having a bearing on the legal status and capacity of the Plaintiff bank. The court took the view that it was not bound by those certificates and that any issue as to the constitutionality of a foreign law arising in English proceedings was ordinarily a 'matter to be decided by the English court having regard to expert evidence of that foreign law adduced before it' and that it could therefore and did determine such issue after hearing expert evidence and considering the provisions of the foreign law in question.

4. The principle is thus clear. If the issue as to whether any of the persons in the foregoing illustrations was or was not a citizen of Kenya were to arise in the context of proceedings brought in an English court in circumstances discussed above then the court could reach its own conclusion on the matter irrespective of an official certificate, if there be one, from the Kenyan authorities as to the status of the person concerned. The object of such litigation would not be to determine the validity of the 1985 Act per se but rather to establish the applicant's rights, if any, under British law.

5. But for the fact that section 2 of the Interpretation and General Provisions Act (IGPA) of Kenya categorically excludes the Constitution from its ambit, the issue could be resolved quite simply by reference to section 23(3) which as far as is relevant provides that:

'Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not–

[. . .]

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under [it]

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.'

6. Section 22 of IGPA is also relevant. Under it where a written law is repealed and replaced by another, 'the repealed written law shall remain in force until the substituted provisions come into operation'.

7. Notwithstanding section 2 of IGPA (added by way of an amendment in 1968 following the decision of the High Court of Kenya in *Madhwa & Others v City Council of Nairobi* (1968) EA 406, involving issues of non-discrimination and fundamental rights) both the spirit and the letter of the Act could still be invoked by an alternative route.

8. The derivation of section 23(3) IGPA is rooted in the English common law criteria or canons of construction of statutes which themselves were codified in the Interpretation Act 1889 – upon which the IGPA as a whole is modelled.

9. Under Kenya's Judicature Act of 1967 the courts there are enjoined to exercise their jurisdiction in accordance with the Constitution and other written laws and subject thereto

'the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary'.

10. There can be little doubt that the Interpretation Act 1889 was a statute of general application in force in England on 12 August 1897 and for that reason alone the rules of construction enshrined in it would apply. The provisions of IGPA, section 23(3) are a mirror image of sections 11 and 38 of the Interpretation Act 1889 (since consolidated and re-enacted in the Interpretation Act 1978). Quite apart from that, the incorporation of 'the substance of the common law' of England into the law of Kenya necessarily imports its essential characteristic of a continually evolving system of jurisprudence, reflecting and responding to social changes and embracing the ordinary person's notions of elementary or natural justice as developed over the centuries, and indeed that is how the courts in Kenya have always applied it in practice. On that footing also therefore it would be reasonable to hold that a repealing statute is not

to be so construed as to deprive a person of an accrued status, particularly one as fundamental as that of citizenship, unless the contrary intention of the legislature is clearly expressed.

11. The text of the Act, reproduced above, shows its date of commencement as 19 July 1985. This was under section 46(4) of the Constitution which provides: 'A law made by Parliament shall not come into operation until it has been published in the Kenya Gazette, but Parliament may postpone the coming into operation of any such law and, subject to section 77 . . . [which is not relevant for our purposes], may make laws with retrospective effect.' Section 9 of IGPA contains similar provisions. In the case of the 1985 Act its date of commencement was thus fixed by the publication of the Kenya Gazette issue containing it on 19 July 1985.

12. If Parliament had intended that the 1985 Act was to have retrospective effect then that should have been spelt out in clear terms, as is habitually done in the annual Finance Acts or more importantly as, for example, happened in relation to the Constitution of Kenya (Amendment) (No 2) Act 1974 which was passed and published on 12 July 1974 but which contained a declaration in section 1(2) thereof to the effect that it was to be 'deemed to have come into operation on the 5th July, 1974'.

13. Section 47 of the Constitution deals with alterations to it but its main feature is the requirement for a vote of at least 65 per cent of the members of the National Assembly on the second and third readings of the Bill seeking to amend the Constitution, with provision being made for certain other steps also. Apart from these procedural differences however an Act of Parliament amending the Constitution is not much different from any other Act, whether in format, language or other aspects of the legislative process. While the Constitution has of course to be respected as the very foundation of the nation's existence, it is nevertheless a working document to which effect has to be given, not in isolation but within the framework of the rule of law under the Judicature Act 1967. It is in that context that some sense has to be made of the 1985 Act.

14. As of 31 December 1985, Kenya had not acceded to the UN Convention on the Reduction of Statelessness (New York 1961), but had (on 1 May 1972) ratified the International Covenant on Civil and Political Rights (ICCPR) (New York 1966) though not the Optional Protocol thereto enabling individuals to complain of violations of its provisions. In any case it is doubtful if Article 24.3 of ICCPR ('Every child has the right to acquire a nationality') could be regarded as relevant to the Kenyan Act of 1985. No reliance could be placed on the African Charter on Human and Peoples' Rights (Nairobi, 1981) either, not least because Kenya did not appear to have ratified it by 31 December 1985. Moreover, in Kenya, just as in Britain, treaties do not have the force of law unless and until their provisions are enacted in domestic legislation.

The answer

We thus fall back on first principles. There is a presumption against retrospection – see *Halsbury's Laws 4th Ed Vol 44 on Statutes para 922*, also *para 921* (Meaning of 'retrospective'), 'Contrary intention' has to be ascertained by reference to the express wording of the statute or by necessary implication. Applying these to the Kenyan Act of 1985, the only factors which could be said to favour its retrospective operation are first the stark omission from it of any provision for preserving the status of persons born before its commencement and secondly the equally mischievous device of 'repeal and replacement' of the old section 89 by a new one which however retains the same historical date of 11 December 1963. It is submitted however that these are not sufficient to displace the presumption against retrospection, for they are far outweighed by the considerations discussed at length above.

The conclusion that we then arrive at is that the Kenyan authorities are wrong to apply the 1985 Act so as to deprive persons born before 19 July 1985 of their Kenyan citizenship if they would have become citizens of Kenya under the old section 89 and that consequently the British view is correct.

Potential for conflict

There nevertheless remains a potential for conflict between the British and the Kenyan positions in this regard, with possible embarrassing consequences for both countries. We have seen that so far the issue has not been determined in a Kenyan court; nor has it been in an English court. But what if a Kenyan court were to decide that the 1985 Act does have retrospective effect? This could conceivably happen in cases where there is no British connection as such. For example, say X was born in Kenya in 1971 of Ugandan parents, both refugees and that in 1992, aged 21, he was convicted of a serious offence and faced deportation on the recommendation of a court. In that event, the question of his citizenship would have to be determined if raised. In these circumstances, it is quite possible that the court might be persuaded that the new section 89 of the Constitution has to be read literally, with no account being taken of the antecedents and other implications generally of the 1985 Act, and that X was not therefore a citizen of Kenya. This would have a bearing on any proceedings in an English court (point 4. above) because the English court would then have to evaluate the evidence of experts (on Kenyan law) whose primary duty is to state the law as it is rather than perhaps as they would like it to be. While the court would be entitled to scrutinise the materials placed before it by the experts, especially if there was a difference of opinion between them as to the interpretation to be placed on such materials, and to come to its own conclusion thereon (see *Halsbury's Laws 4th Ed Vol 8 Conflict of Laws paras 794–800*) the task of everybody concerned would be made rather difficult if they were confronted with a

judicial authority of an appeal court or a high ranking judge, even if it were perceived as perverse or irrational.

The present state of play between Britain and Kenya with regard to the 1985 Act therefore continues to be locked in at the low-key level of a mere difference of opinion and administrative policy. While the logic of the British view can hardly be faulted, it has nevertheless not been properly tested so far. On the other hand, the Kenyan practice has gone unchallenged for so long that it has become almost inviolable. This could however change if there were to be court proceedings, either in Kenya or in Britain, and depending on their outcome the Kenyan government might have to bring in further legislation to put the matter right, as happened in Ghana (see Fransman's *British Nationality Law* (1989) pp 411/412) though there the underlying considerations and legal provisions were far more complex. Be that as it may, the final word on this subject has yet to be said.

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NOTE

1. Unlike the provisions of BNA 1948, s 32(2) and BNA 1981, s 50(a), there are no comparable definitions of child, parent, father, mother etc. in the Kenyan citizenship laws (and such as there are in the IGPA are not of much assistance either). It is submitted therefore that only natural relationships are contemplated and that the doctrine of legitimacy has no place in the Kenyan citizenship scheme.