

NATIONALITY, CITIZENSHIP AND THE MEANING OF NATURALISATION: BRUBAKER, THE UNITED KINGDOM, EU CITIZENS, THIRD-COUNTRY NATIONALS AND THE EUROPEAN UNION

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INTRODUCTION

The law on nationality or citizenship² (in the sense of “state membership”) has produced a limited amount of theory.³ Brubaker’s *Citizenship and Nationhood in France and Germany*,⁴ however, provides a rich and thought-provoking example. He argues that “nation-states” use nationality or (his preferred term, therefore used hereafter) citizenship⁵, to exclude non-members and thereby legitimise themselves. Control over citizenship is “an essential attribute of sovereignty”.⁶ Indeed, given erosion of control of immigration through membership of the European Community, “[i]n the European setting, citizenship is the last bastion of sovereignty”.⁷

Most people become citizens at birth, so central citizenship questions revolve around the *jus soli* and *jus sanguinis*.⁸ However, the last fifty years have seen significant migration within Europe. This raises questions of acquisition after birth, that is, change of immigrants’ citizenship by naturalisation. In the United Kingdom, important discussion has recently

¹ This article started life as a paper to the newly-formed Immigration & Refugee Law Group of the SPTL at the Annual Meeting in Glasgow in September 2001, and formed the subject of a Dundee Law Department staff seminar in January 2002: my thanks to those who commented. I am also grateful to Prof Emeritus HUIJ d’Oliveira (Ministry of the Interior, Amsterdam), for his comments on a draft. I bear all responsibility for the final product.

² These two terms are equiparated here. Distinctions are sometimes drawn between them. However, the *European Convention on Nationality* (ETS 66 (1997)) does not: para 23 of the “Commentary on the Articles. . .” in the “Explanatory Report. . .” observes “. . . with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous”. Nor do UK or Irish citizenship law: the half-dozen *British Nationality Acts* of the last half-century created a large number of statuses almost called “citizenships”; and the Irish Acts are called *Irish Nationality and Citizenship Acts*.

³ The earlier work of Parry, more recently of Anderson, Bauböck, Cohen, Closa, Rubio-Marín and now Hansen, are well-known, and the lesser-known Favell, *Philosophies of Integration* Macmillan (1998) which addressed issues raised by Brubaker, deserves mention.

⁴ Harvard UP (1992) (hereafter “*Brubaker*”).

⁵ He also equiparates the two terms: see *eg* p 50 “In French and American English, *nationalité* and *citoyenneté*, ‘nationality’ and ‘citizenship’, are rough synonyms” and “are used interchangeably to designate the quality of state-membership”. (It is not thought that the “American” before “English” is significant).

⁶ *Brubaker* p 180.

⁷ *Ibid.*

⁸ That is, the principles that a child’s citizenship at birth is wholly or largely determined by the territory of birth, or parents’ citizenship, respectively.

been generated about naturalisation and nationhood, expressed in White Papers, legislation and elsewhere. In the European Community as a whole, the non-naturalisation of immigrants has also generated discussion, which recently produced a Draft Directive to give a special status to “long-term resident third-country nationals”.

This article therefore outlines Brubaker’s thesis; tests it against UK experience; and considers current UK naturalisation, EU citizenship and “third country national” issues within the framework provided by Brubaker.

Brubaker’s thesis in general

Brubaker’s general thesis can be simply sketched. Firstly, citizenship is a means of social closure of great significance. “There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners”.⁹ Thus “[o]nly citizens have a right to enter (and remain in) the territory of the state [and] suffrage and military service are normally restricted to citizens”.¹⁰ Further, it is not the “state” but the “nation-state” which is regarded as the primary political entity. Any state “claims to be the state of, and for, a particular, bounded citizenry [and further, it] claims legitimacy by claiming to express the will and further the interests of that citizenry”,¹¹ and this citizenry is “usually conceived as a nation. . .”.¹² Thus “citizenship” reflects and defines “nationhood”.

Secondly, however, “traditions of nationhood” differ. (“Tradition” is important, for Brubaker observes that “[t]radition is a constructed, not a purely objective property”¹³ expressed in “cultural idioms”, including “idioms of nationhood”, which “constitute interests as much as they express them”¹⁴). He considers the “two core states of continental Europe”,¹⁵ France and Germany, which have markedly different traditions of nationhoods, the one “political”, the other “ethnocultural”.¹⁶ These differences, he argues, flow from differences of political history. In brief, in France, state preceded nation and therefore “[i]n the French tradition, the nation has been conceived in relation to the institutional and territorial frame of the state. . .”.¹⁷ Nationhood (and citizenship) are thus viewed as “unitarist, universalist and secular. . . [with] an essentially political understanding. . . centrally expressed in the striving for cultural unity”.¹⁸ This crystallised in the French Revolution, of which “[m]odern national citizenship was an invention”.¹⁹ On the other hand, in Germany, nation preceded state and therefore “the German

⁹ *Brubaker* p 21.

¹⁰ *Ibid* p 23.

¹¹ *Ibid* p 21.

¹² *Ibid*.

¹³ *Ibid* p186, invoking Hobsbawm & Ranger *The Invention of Tradition* Cambridge U.P. (1983).

¹⁴ *Ibid* pp 1, 16-17, 162-163 (emphasis in original).

¹⁵ *Ibid*.

¹⁶ This approach is not novel. It is closely pre-figured, for example, in Namier “Nationality and Liberty” in Namier *Vanished Supremacies* Hamish Hamilton (1958) (hereafter “*Namier*”).

¹⁷ *Brubaker* p1.

¹⁸ *Ibid*.

¹⁹ *Ibid* p 35.

understanding [of nationhood] has been *Volk*-centered and differentialist” and not “linked to the abstract idea of citizenship”. It is “an organic cultural, linguistic or racial community” making “nationhood an ethnocultural, not a political fact”.²⁰ Moreover, there was “no pivotal event...no moment of crystallisation remotely like the French Revolution”.²¹ Thus also, unlike in France, “formal state membership, participatory citizenship, and ethnocultural nation-membership are designated by distinct terms”.²²

Thirdly, these traditions of nationhood express themselves in French and German law on acquisition of citizenship, which are “assimilatory” or “exclusionary” respectively.²³ This is clear in attribution of citizenship at birth. France accepts a role for the *jus soli*²⁴ (thereby making “second-generation immigrants”²⁵ nationals). Germany traditionally cleaves to the *jus sanguinis* (and thus failed to make even “third generation immigrants”²⁶ nationals),²⁷ yet “[w]hile the citizenry is defined restrictively *vis-à-vis* non-German immigrants, it is defined expansively *vis-à-vis* ethnic Germans”.²⁸ (Thus, East Germans were considered “Federal Germans” before reunification and those of German origin in Eastern Europe descended from settlers are similarly considered, at least if expelled.)²⁹

Fourthly, these traditions express themselves equally in acquisition after birth. In principle, a more restrictive naturalisation law expresses itself as a

²⁰ *Ibid* p 1.

²¹ *Ibid* p 50.

²² *Ibid*: *i.e.*, “*Staatsangehörigkeit*”, “*Staatsbürgerschaft*” and either “*Nationalität*” or “*Volkszugehörigkeit*” respectively. The first “exactly captures” the legal concept of “citizenship” as Brubaker uses it (p 51).

²³ Brubaker never quite fixes on two adjectives to express the manifestation in citizenship law of the two traditions of nationhood, but this pair seem to express his meaning accurately.

²⁴ Application of *jus soli* has changed somewhat since: see *Nascimbene* (ed) *Nationality Laws in the European Union* (1996) (hereafter “*Nascimbene*”) p 315, and Council of Europe *European Bulletin on Nationality* September 2001 (DIR/JUR (2001) 2) (hereafter “*EBN*”) p 82; but this change does not seem to affect Brubaker’s general argument.

²⁵ There is, of course, no such thing as a “second generation immigrant”: a *fortiori* with “third generation immigration”.

²⁶ See previous note.

²⁷ Application of *jus sanguinis* has changed significantly since: see *EBN* p 89 discussing the “Act to Amend the Nationality Act” (Gesetz zur Reform des Staatsangehörigkeitsrechts) of 15 July 1999. This introduces from 01/01/2000 a form of *jus soli*, whereby a German-born child, either or both of whose parents has 8 years German residence and is settled, acquires German citizenship, but at 18 must elect between it and any other citizenship held. As Brubaker wrote “[i]f a *jus soli à la française* is unimaginable in Germany. . .” (p 177), it must be a matter of speculation how he would incorporate this change into his theory.

²⁸ *Brubaker* p 82: policy is “exclusionary” in relation to ethnocultural considerations, rather than generally.

²⁹ *Ibid* pp 83-84: see also Krajewski & Rittstiegl in *Nascimbene*, pp 360, 365-366, and 371: *EBN* does not mention either issue expressly, but see the somewhat obscure opening sentence of para 3 (p 93), and the first three unnumbered paragraphs on p 94.

“purely discretionary decision”, which “cannot be appealed”, is seen as “anomalous and infrequent”, with “procedure which is long and complex” and may have “a dissuasively high fee”.³⁰ A less restrictive one is the reverse. In practice, assimilatory France would permit ready naturalisation, while exclusionary Germany would not.

Brubaker’s thesis in relation to naturalisation

Recent changes in UK naturalisation law and impending EC law on “long-term resident third-country nationals” make Brubaker’s conclusions on naturalisation especially interesting. His general thesis would suggest different propensities to naturalise in France and Germany. This appears to be true. He asserts on the basis of data for the 1980s that “Italians naturalize at rates five times higher, Spanish at rates ten times higher in France than in Germany. And Tunisians and Moroccans in France naturalize at rates nearly ten times higher than that of Turks in Germany”.³¹ He concludes that “[o]f the nearly three million foreign residents from the core immigrant groups in Germany, fewer than 5,000 acquire German citizenship each year, and nearly half of these are Yugoslavs. France, on the other hand, gains more than 53,000 new citizens each year from a slightly smaller core immigrant population”.³² (However, the status of ex-East Germans, and those of German origin returned from other parts of Eastern Europe, should not be forgotten).

But in both states “foreign workers were recruited in large numbers in the 1960s and early 1970s in response to labor shortages” while “[o]rganized recruitment was suspended in 1973-74” for reasons common to both.³³ Further, “[i]mmigrants in both countries have become dramatically more visible in everyday life during the last two decades”³⁴ and “[i]n both countries immigrants comprise a substantial fraction of the manual working class and are over-represented in [low grade] occupations”.³⁵ Moreover, “[d]iscourse about immigration and immigrants follows similar patterns in both countries” and there are “striking similarities in immigration policies”³⁶ of both. Given these “similar migration processes, comparable immigrant populations, and converging immigration policies”,³⁷ the difference in the rate of naturalisation becomes counter-intuitive. The traditions of nationhood are evidently strong.

How, then, are these traditions expressed in naturalisation to produce this counter-intuitive outcome? It is odd that, having mentioned discretion, appeals, procedure and fees as factors in restrictiveness, Brubaker actually examines renunciation of previous citizenship and minimum length of residence. (One could also consider criteria such as good character, the ability to speak the relevant language, and oath of allegiance, although

³⁰ *Ibid* p 33.

³¹ *Ibid* p 78: see Tables 1 & 2 (pp 79-80).

³² *Ibid* p 82: see Table 3 (p 83).

³³ *Ibid* p 75.

³⁴ *Ibid*.

³⁵ *Ibid* p 76.

³⁶ *Ibid*.

³⁷ *Ibid* p 77.

perhaps he regarded these as constants.)³⁸ In any event, French naturalisation law, Brubaker observes, required five years' residence and no renunciation of previous nationality,³⁹ while German law required 10 years residence and renunciation of any previous nationality.⁴⁰ Beyond simple ease of naturalisation, he considers general differences in attitudes to naturalisation are significant emanations of tradition. In France, he suggests, naturalisation is regarded as "a normal and desirable outcome of settlement" for it "alone in Continental Europe has a tradition of immigration. . .",⁴¹ while Germany "lacks a political culture supportive of naturalisation",⁴² expressed particularly in the assertion that "the Federal Republic is not a country of immigration".⁴³ Yet further, immigrants' own attitudes towards naturalisation are important. Brubaker suggests that in France, many immigrants have "adopted a more instrumental 'desacralized' understanding of citizenship" and "divorced the legal question of citizenship from broader questions of political loyalty and cultural belonging".⁴⁴ Low German naturalisation rates, however, "may reflect different understandings of what naturalisation means", for there, naturalisation "is perceived as involving not only a change in legal status, but a change in nature, a change in political and cultural identity, a social transubstantiation. . .".⁴⁵

Yet detailed examination of differences may obscure an underlying fact. Naturalisation is linked to immigration. It is the way in which immigrants become citizens. This reveals "a circular quality to closure based on citizenship", for "[o]nly citizens enjoy free access to the territory, yet only residents have access to citizenship" which thus "permits nation-states to remain. . . relatively closed and self-perpetuating communities".⁴⁶ Brubaker is right to relate, but distinguish between, immigration policies and

³⁸ In broad terms, both Lagarde (on France) and Krajewski & Rittstieg (on Germany) in *Nascimbene* (pp 317-318 and pp 368-369) and the EBN entries (pp 83-84 on France and pp 90-91 on Germany) might support such a conclusion, but none mentions an oath of allegiance (though in Germany the applicant must identify with the principles of freedom and democracy, a requirement rather running contrary to Brubaker's general thesis), and neither entry on Germany mentions a language requirement.

³⁹ *Brubaker* p 77: see also Lagarde in *Nascimbene* pp 317-318, who shows that only two years are required where there are "liens familiaux avec un Français"; "mérites personnels"; and "liens particuliers avec la France": also EBN pp 83-84.

⁴⁰ *Brubaker* p 77: see also Krajewski & Rittstieg in *Nascimbene* pp 368-370. However, *EBN* p 91 asserts that until 1999 the period of residence was 15 years, but that the legislation introducing elements of the *jus soli* also reduced the period to 8 years. Also, although requirement to relinquish previous nationality remains, there are exceptions, and "[w]ith the aim of European integration in mind Germany plans to create incentives for foreigners to acquire German nationality; to this end, the principle of avoiding multiple nationality is waived in the case of reciprocity [*scil.* within the EU]".

⁴¹ *Brubaker* p 77.

⁴² *Ibid.*

⁴³ *Ibid* and p 174: translating and quoting *Einbürgerüngerichtslinien* (administrative guidelines on naturalisation) no 2.3, printed in Groth *Einbürgerüngeratgeber* Alfred Metzner (1984) p 88.

⁴⁴ *Ibid* p 78.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* p 34.

nationality policies. The former, he points out, are instrumental: “who we let in”; the latter symbolic: “who we are”.⁴⁷ But he does not fully explicate this “circular quality”. How does the non-citizen get “let in” and become resident? If immigration policies create the pool from which naturalisation applicants exclusively come, immigration decisions determine naturalisation ones. A residence requirement means “who we are” is influenced “who we let in”, or rather (since many may enter only temporarily, whether as visitors, workers or otherwise), “who we let in permanently”.⁴⁸ Incidentally, while no right attaching to citizenship is *a priori* more important than any other, and while the modern literature (and indeed, the *British Nationality Act 1981*) sometimes seem to reduce nationality law to a mere adjunct of immigration law,⁴⁹ Brubaker does note the significance in a world of territorially bounded states of the fact that “the state may not deny entry to its own citizens”.⁵⁰

Applying Brubaker’s thesis to the UK

Brubaker’s political-assimilatory/ethnocultural-exclusionary distinction cannot simply be an elegant device applying just to France and Germany, but must be a thesis about “citizenship and nationhood” generally.⁵¹ How does it apply to the UK?

“social closure”

Clearly, citizenship acts as a form of social closure in the UK. There are rights and obligations which turn upon it, including “an unqualified right to enter. . . [and]. . . suffrage and military service”,⁵² though which form of UK citizenship must be discussed below. (An interesting avenue Brubaker does not explore, therefore largely ignored here, is whether the forms and extent of social closure differ as between France and Germany).

“traditions of nationhood”

Brubaker’s prime criterion for determining whether the tradition of nationhood is political-assimilatory or ethnocultural-exclusionary is whether state preceded nation or *vice versa*. This is rather difficult to determine in the UK case: what state, what nation?

⁴⁷ *Ibid* pp 179-189 generally, especially p 182 “The central question is not ‘who gets what?’ but rather ‘who is what?’” (emphasis in original).

⁴⁸ There were, for instance, 86.4m entrants to the UK in 1999, of whom 80% were visitors: see *Control of Immigration Statistics: United Kingdom, 1999* CM 4876.

⁴⁹ Parry *Nationality and Citizenship Laws of the Commonwealth and Ireland* (2 vols 1957 and 1960) (hereafter “Parry”) barely mentions immigration in the whole 1285pp: it was not an issue then. It is now, and Fransman, *British Nationality Law* (2nd ed 1998) (hereafter “Fransman”), gives “right of abode” a whole column of references in the index. The “right of abode” is the only right attaching to citizenship mentioned in the *British Nationality Act 1981* (which is the whole point of the Act): see s 39.

⁵⁰ Brubaker p 25.

⁵¹ Namier, though with different fish to fry, looked at Hungarian, Italian, Polish, Swiss and other examples.

⁵² *Ibid* p 23: see *Immigration Act 1971* s 2, *Representation of the People Act 1983* s 1, *Act of Settlement 1700* s 3, and *Army Act 1955* s 21.

what state? - Anglo-Saxon attitudes⁵³

The United Kingdom of Great Britain and Northern Ireland presumably came into existence in either 1922⁵⁴ or (if secession did not change its nature) 1801.⁵⁵ However, it is common to consider it did so in 1707 (presumably on the ground that Ireland was simply incorporated into an existing state),⁵⁶ or even earlier. This is the constitutional orthodoxy, teleologically eliding the differences between the UK, Great Britain, and England, and treating Ireland, Scotland and Wales as bolt-on modifications. Thus Bradley and Ewing's *Constitutional and Administrative Law* has a section entitled "The historic structure [of the UK]" with subsections on Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man, but none on England.⁵⁷ The nearest there is to a pivotal event is probably the "Glorious Revolution" of 1688 which did not co-incide with any of the amalgamations producing the UK.

This is also the citizenship lawyers' orthodoxy. Parry mentions Scotland and Ireland, the 1603 Personal Union (and the Dutch and Hanoverian ones, despite which, 1688 and 1714 pass with no more mention than 1603), and the 1707 and 1801 Unions, but as complications in the steady flow of English law.⁵⁸ Thus, he traced twentieth century *jus soli* and *jus sanguinis* from a thirteenth century English case and a fourteenth century English statute respectively,⁵⁹ without wondering why the former should bind UK courts, or the latter have any force after the English Parliament ceased to exist in 1707.⁶⁰ Fransman is better, noting that in 1707 "English subject" became "British subject" and referring to the situation at common law of "[c]hildren

⁵³ Carroll, *Through the Looking Glass* ch 7.

⁵⁴ *Irish Free State (Agreement) Act 1922* (see also *Irish Free State (Constitution) Act 1922* and *Irish Free State (Consequential Provisions) Act 1922*), expressing the Anglo-Irish Treaty and 1922 Irish Constitution: Bradley & Ewing *Constitutional and Administrative Law* (12th ed 1997) (hereafter "*Bradley & Ewing*") p 43 "[the Treaty] recognised the emergence of the Irish Free State, on which Westminster conferred what was then described as the status of a self-governing dominion". Strictly speaking, however, the title was not changed until the *Royal and Parliamentary Titles Act 1927*.

⁵⁵ (*GB*) *Union with Ireland Act 1800*, and corresponding legislation of the Irish Parliament (Casey *Constitutional Law in Ireland* (3rd ed 2000) pp 1-2 coyly but unspecifically observes that "... the necessary legislation was passed by [the Irish Parliament] by May 1800 . . ."). The tercentenary of the UK passed without any official jollification at all.

⁵⁶ The precise status of Ireland *vis-à-vis* England, and later Great Britain is, of course, difficult to state in simple terms, given *Poyning's Law* of 1494, the *Declaratory Act* of 1720, etc.

⁵⁷ Pp 38-48: admittedly it and other texts mention *McCormick v Lord Advocate* 1953 SC396 and *McCormick* "Does the United Kingdom have a Constitution?" (1978) 29 NILQ 1 in discussion on Parliamentary Sovereignty.

⁵⁸ Parry pp 45-47, 57-60.

⁵⁹ *Elyas de Rabayn* (1290) Bracton f 427b and *De Natis Ultra Mare* 1351 25 Edw 3 st 1 (pp 30-31).

⁶⁰ Another example is listing the English Act of Union (6 Anne c 11), but not the Scots (1701 c 7) and (p 58), observing that the English Act "should have put an end to the tendency towards the preservation of a separate Scottish nationality. . ." without explaining why the converse was not equally true.

born outside the dominions to an English (or British) ambassador”,⁶¹ but repeats the same general analysis. It was also evident in the Parliamentary debates on the *British Nationality Act 1981*.⁶²

what nation? - “the Norman Conquest was a Good Thing, as from this time onwards England stopped being conquered and was thus able to become Top Nation”⁶³

Similar difficulties bedevil debate on nationhood. These islands plausibly contain English, Irish, Scots and Welsh nations, each with its idioms of nationhood. However, it is the nation which the putative nation-state reflects which counts for citizenship purposes. So which nation legitimises the UK? There is no adjectival form of “United Kingdom”, and the ambiguous “British” is usually used instead.⁶⁴ Confusingly, especially in England, “British” and “English” are often seen as synonyms⁶⁵ (as indeed is “Anglo-Saxon”)⁶⁶ and popular “British histories”, even when written by professional historians, tend to ignore Ireland, Scotland and Wales unless they impinge upon England.⁶⁷

But it is difficult to see how any British identity could precede 1707. *Calvin’s Case*⁶⁸ neatly demonstrates the point. The issue was whether a Scottish subject of James VI, born after 1603, was also an English subject of James I. How could the question arise unless Scots and English subjects were separate beasts? Colley’s influential book, *Britons – forging a nation 1707-1837*,⁶⁹ takes as its very title and theme the creation of a “British national identity” (her phrase) in the 18th and early 19th centuries, out of war and religion, intermingled with trade.

⁶¹ *Fransman* p 154: see also the generous n 9 on p 4 and n 1 on p 153.

⁶² E.g., Mr Hattersley, Shadow Home Secretary, referred in Committee to the limitation of the *ius soli* as proposing “a change after 700 years of practice” (since *Elyas de Rabayn’s Case?*), which takes one half a millennium before the creation of the UK: see *OR Standing Committee F* First Sitting, Tuesday 10 February 1981, col 9.

⁶³ Sellar & Yateman *1066 And All That* Methuen (1930) p 25.

⁶⁴ The individualised form “Britisher” is impossibly Rider Haggard, and “Brit”, a recent coining, expresses embarrassed post-modern irony. Also, why are the international UK car licence plate initials “GB” and the £ sterling often rendered as “GBP”?

⁶⁵ Paxman *The English: a portrait* (revised edition 1999) p 58, observes that “One of the characteristics of the English which has most enraged the other races who occupy their [*sic*] island is their thoughtless readiness to muddle up ‘England’ with ‘Britain’” (though that very sentence shows that he may not have taken his own lesson to heart).

⁶⁶ The Anglo-Saxons were, of course, the original immigrants who “swamped” British culture.

⁶⁷ See e.g., Schama *A History of Britain* (2000). A good analysis of this historiographical phenomenon by another professional historian is Davies, *The Isles: a history* (1999), Introduction.

⁶⁸ 7 Co Rep 1a, Jenk 306, Moore 790, 2 St Tr 559. For a comprehensible account of this case, see Galloway *The Union of England and Scotland* (1986) pp 148-152 who notes the *postnatus*’ name was actually Colville (altered presumably on the ground that all Scots were Calvinists).

⁶⁹ Pimlico (1992) (hereafter “Colley”).

state before nation? – “the British are coming!”⁷⁰

If Colley is right, clearly state in fact preceded nation. However, Brubaker insists that, rather than historian’s analysis, it is the tradition of nationhood, expressed in the idioms of nationhood, that counts. The orthodox idiom is probably that, whatever name it is currently trading under, the state is really “Greater England”, continuously developing from millennium-old roots, to which the Celtic fringe has been safely gathered in (or not). The nation is similarly a primordial English, to which the Celtic cousins have been admitted.⁷¹

This does not fit readily into Brubaker’s framework. However, it is not difficult to conclude that the UK tradition of nationhood is a “political” one, “conceived in relation to the institutional and territorial framework of the state”, and not an “ethnocultural” and “*Volk*-centred” one of a people seeking fulfilment through creation of a state. It is closer to the French position, which would predict an assimilatory citizenship policy. However, the ambiguous “British” conceals two important perspectives, the Irish and the imperial.

the Irish dimension - John Bull’s Other Island⁷²

Does the Irish dimension alter these conclusions? Clearly, Brubaker offers no direct assistance,⁷³ but we can note that, as states, Ireland and the UK have had mutually defining effects, and no “British-Irish nation” ever properly evolved to legitimise the original UK.⁷⁴ Modern Brito-Irish history has been almost entirely expressed through competing assertions about mutually exclusive nationhoods.⁷⁵ So the island of Ireland of presents a prime example of “citizenships” expressing “nationhoods”, and Partition encapsulates the issue of legitimacy, the issue of “who we are”.

This seems to reinforce the conclusion that (despite 1922), in the UK, nation did not precede state (but indicates, interestingly, the reverse in the case of the state of Ireland) and has a political rather than ethnocultural tradition.⁷⁶

⁷⁰ Longfellow “Paul Revere’s Ride” in *Tales of a Wayside Inn* (1863)

⁷¹ Admittedly Colley, who is part Welsh (see p 9) observes (p 6) “. . . nor is [Great Britain’s] genesis to be and explained primarily in terms of an English ‘core’ imposing its cultural and political hegemony on a helpless defrauded Celtic periphery”: see also p 373 and ch 3 *passim*. The present writer, who is English, has relations who think being Scottish is an eccentric pastime, rather like morris-dancing.

⁷² GB Shaw (1904) (title of play): an incidental implication is that the First Island was John Bull’s, not Jock’s or Taffy’s.

⁷³ Something might be made of comparison with Algeria, which Brubaker does consider (pp 139-142).

⁷⁴ *Namier* observes (p 48) “in the adjoining island a similar mixture of Celt, Anglo-Saxon, and Norman has failed to evolve an Irish territorial identity”, and who can disagree?

⁷⁵ *Colley* ignores the creation of the United Kingdom: “British” relates only to Great Britain.

⁷⁶ *Namier* observed (p 47) that the British concept of nationality was “primarily territorial: it is the State which has created the nationality, and not vice versa”, also “[t]he political life of the British island community centres in its Parliament at

It is worth noting that the British Irish Agreement of 1998 (*alias* the Good Friday Agreement, or Belfast Agreement)⁷⁷ expressed its basic conclusions in terms of nationhood and citizenship. In Article 1(vi), the two Governments “recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as British or Irish, or both, as they may so choose, and accordingly affirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland”.⁷⁸

It is also worth noting that the social closures are less mutually exclusive than might be expected. In addition to the well-known territorial claim of the Irish Constitution, broadly speaking, Irish law regarded the inhabitants of the North as Irish Citizens.⁷⁹ The UK shows an interesting mirror-image. The *British Nationality Act 1948*, while excluding any “citizen of Eire” from British Subjecthood,⁸⁰ nevertheless specified that such a citizen was not an alien⁸¹; was in the same position as a British Subject for the purposes of extraterritorial jurisdiction;⁸² and was entitled to retain British Subjecthood by giving notice “at any time” to the Secretary of State, provided s/he fulfilled a simple condition (and such a person *still is entitled*).⁸³ (Indeed, astonishingly, those who so retained are now almost the only people who are actually correctly titled “British Subjects”).⁸⁴ Further, s/he might also register as of right as a Citizen of the United Kingdom and Colonies (and *still may register* for the successor status of British Citizen).⁸⁵ The explanation for this enduring policy is probably a desire less to ignore Irish independence than to apply the general principle of the 1948 Act that everyone who was a British Subject before the Act should be so after.

Westminster, which represents men rooted in British soil. This is a territorial, and not a tribal, assembly. . .”.

⁷⁷ Available at www.nio.gov.uk and www.irlgov.ie.

⁷⁸ See also Annex 2: note also the irredentist Articles 2 & 3 of the Irish Constitution (headed “The Nation”), have been amended, though remain drafted explicitly in terms of nationhood and citizenship.

⁷⁹ See particularly *Irish Nationality and Citizenship Acts 1956 and 1986* s 7(1): summarised in *EBN*.

⁸⁰ Section 1.

⁸¹ Section 32(1) *sub voc* “alien”.

⁸² Section 3.

⁸³ Crown service, or holding a UK passport, or “associations by way of descent, residence or otherwise with the United Kingdom, or with any [dependent territory]” (s 2, re-enacted without the second condition by s 31(2) of the *British Nationality Act 1981*).

⁸⁴ 1981 Act s 31: the term is no longer applied to British Citizens or citizens of other independent Commonwealth countries, being entirely replaced by “Commonwealth Citizen”: see 1981 Act s 37.

⁸⁵ S 6: replaced by 1981 Act s 4.

the imperial dimension - a fit of absent-mindedness⁸⁶

Although both France and Germany had empires, Brubaker says little about them. England had colonies before 1707, inherited by Great Britain. In the 18th century, Great Britain saw enormous imperial expansion. During the Seven Years War, Colley notes that “the British. . . conquered Canada. They drove the French out of most of their Indian, West African and West Indian possessions. They tore Manila and Havana from the Spanish”.⁸⁷ These acquisitions were, she considers, difficult intellectually and emotionally to absorb for reasons relating to “nationhood”. She suggests that “[t]he spoils of unprecedented victory unsettled. . . in part because they challenged longstanding British mythologies: Britain as pre-eminently a Protestant nation; Britain as a polity built on commerce; Britain as the land of liberty...”⁸⁸ The “Thirteen Colonies” were lost shortly thereafter, and arguably because they did not perceive themselves as part of the state (which the mother country would not tolerate), and only ambivalently part of the nation.⁸⁹ However, Colley concludes, the outcome “refurbished [British] unity”⁹⁰ by uniting Scotland and England more closely; removing “scruples and uncertainties” as to the morality of empire and thus “clarify[ing] and strengthen[ing] London’s control” over it; and creating “a far more consciously and officially constructed patriotism which stressed attachment to. . . [i]nt al] . . . the importance of empire”.⁹¹

In short, the state enlarged into empire, its inhabitants included into nation⁹². The primary link between UK and the other parts of the empire was simply that the UK had acquired them at various times, so it was the *British* Empire, and the state preceded this agglomeration of people, a position confirmed by *Donegani v Donegani*,⁹³ which decided that after the conquest of Canada, its inhabitants became British Subjects unless removing themselves. During the 19th Century, the UK acquired further massive territories in Asia, Australasia and Africa. While this may have been done in a fit of absent-mindedness, the mould was set, and conclusions on the priority of state over nation, and a political tradition of nationhood, not dislodged.

⁸⁶ “We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind” John Seeley (1833-1895) *The Expansion of England* [sic] (1883): quoted in Jay, *The Oxford Book of Political Quotations* (2nd ed 2001).

⁸⁷ Colley p 101.

⁸⁸ Colley p 103: the Empire had changed from something “small and homogeneous enough to seem reasonably compatible with the values that the British, and above all the English, believed they uniquely epitomised. . . predominantly Protestant and Anglophone” while the new acquisitions “included Quebec with its 70,000 French Catholic inhabitants, as well as large stretches of Asia which were manifestly neither Christian nor white” (p 101-2).

⁸⁹ Colley (pp 132-145) suggests that, the colonies having been founded by the Crown, not Parliament (which had largely ignored them for a century), the colonists saw themselves as in a direct relationship with the Crown and not subject to Parliamentary taxation: thus, in brief, the American War of Independence.

⁹⁰ Colley p 144

⁹¹ Colley p 145

⁹² Or did state part company with nation?

⁹³ (1834, 1835) 3 Knapp. 63: see discussion in *Parry* pp 72-73 and 431-436. Contemporary discussion used the term “English Subject”.

Empire also produced one fundamental fact of UK citizenship law, further confirming a political tradition of nationhood, but having its own significance. Until the *British Nationality Act 1948*, there was effectively only one British nationality status: British Subject (“BS”), a multi-racial, multi-cultural, multi-ethnic “common status”⁹⁴ for the entire Empire and Commonwealth, acquired according to UK law. As a compromise with the aspirations of independent Commonwealth countries who sought their own citizenships, the 1948 Act retained this common status, but permitted the alternative title of “Commonwealth Citizen” (“CC”: thus “BS/CC”) for the benefit of those countries not wishing to appear subject to Britain, and altered the method of acquisition. It was now acquired indirectly, by acquisition of a “gateway citizenship”,⁹⁵ that is the citizenship of a Commonwealth state. Thus one became a BS/CC by acquiring Australian Citizenship if connected with Australia, Indian Citizenship if connected with India, “Citizenship of the UK and Colonies” (“CUKC”) if connected with the UK, *etc.*⁹⁶

The *British Nationality Act 1981* continued this structure, subject to two changes. Firstly, it restricted the name of the common status to “CC” only, on the ground that “BS” had a dated air. Secondly, it split the UK gateway citizenship of CUKC into three, namely “British Citizenship”, “British Dependent Territories Citizenship” and “British Overseas Citizenship” (“BC/BDTC/BOC”)⁹⁷ on the ground of immigration concerns, as explained below in relation to “preservation by manipulation” of the *jus soli*. Neither change affected the existence or effect of the “common status”.

Three further post-imperial changes require mention.⁹⁸ Firstly, “British Dependent Territories” have become “British Overseas Territories”, and “BDTCs” consequently “BOTCs”.⁹⁹ Secondly, broadly, all present and future BOTCs become BCs as well.¹⁰⁰ Thirdly, it appears BOCs may be able to register as BCs as of right.¹⁰¹ Again, these will be explained below in

⁹⁴ Parry pp 85, 92-4

⁹⁵ Cmd 7326, quoted in Parry p 92

⁹⁶ *British Nationality Act 1948* s 1: decolonisation in the 1960s did not upset this compromise. Indeed, it confirmed it, for each newly-independent ex-colony’s citizenship became a new “gateway citizenship”, its inhabitants acquiring that, and losing CUKC, status (subject to exceptions).

⁹⁷ See *British Nationality Act 1981* Pts I-III, and relevant references in *Fransman*.

⁹⁸ Others changes relate to the Falklands Islands and Hong Kong (on which see, *e.g.*, “The Relationship of Immigration and Nationality” (1996) 1 *Contemporary Issues in Law* 25-45 (hereafter “White 1996”), at 14-45, but note more recent legislation, and for a fuller account, see White, *Nationality and Hong Kong: a tragedy in five Acts?* (1998) 6 *Asia Pacific Law Review* 23-65 (hereafter “White 1998”), and most recently, to the ex-inhabitants of the British Indian Ocean Territory (for which, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 2 WLR 1219 and *British Overseas Territories Act 2002* s 6).

⁹⁹ *British Overseas Territories Act 1992* ss 1, 2 (and see White Paper *Partnership for Progress and Prosperity* Cm 4264 (1999)): presumably the Government foresaw the possible confusion between “BOTC” and “BOC”, which remain separate statuses.

¹⁰⁰ *Ibid.*, ss 3, 4, 5 & Sch 1: there are presently irrelevant exceptions.

¹⁰¹ *HC Deb WA col 527W* (4th July 2002) promising amendment to the *Nationality, Immigration and Asylum Bill 2002*.

relation to the “preservation by manipulation” of the *jus soli*. Again, none affect the existence or effect of the “common status”.

But what, beyond confirming the political tradition of nationhood, is the significance of this fundamental fact of a “common status” (to which other citizenships are “gateways”)? The answer is that, so far as the UK is concerned, it is to BS/CC (now just CC) status that “suffrage and military service”, two of Brubaker’s three prime criteria of “social closure”, and other standard incidents of nationality such as the right to stand for public office, have always, and still do attach.¹⁰² Only claims to diplomatic protection, entitlements to a passport and any right of entry attach to the “gateway citizenship” of BC (or, *mutatis mutandis* BOTC, as it now is, or BOC).¹⁰³ A warning is necessary. Firstly, the legal effect of BS status was a matter of local law, and not all colonies were as liberal as the UK was, so the common status meant little in some places.¹⁰⁴ Secondly, for all this period, the UK was a country of net emigration, which has a significance we reach later.

Acquisition at birth

If the UK tradition of nationhood is a political one, Brubaker’s thesis requires that UK nationality law should be assimilatory, not exclusionary, and adhere to a *jus soli*.

allegiance and jus soli

At common law, British Subjecthood flowed from allegiance, and the first general statutory regime, the *British Nationality and Status of Aliens Act 1914*, declared that all persons “born within His Majesty’s dominions and allegiance” were “deemed to be natural born British Subjects”.¹⁰⁵ In practice, this simply meant the *jus soli* applied, subject to insignificant exceptions. The common status of BS required this, so under common law and the 1914 Act, anyone born in Perth, Scotland had the same status as anyone born in Perth, Western Australia.

The *British Nationality Act 1948* compromise caused the UK to put the *jus soli* into explicit legislative form, so “every person born within the United Kingdom and Colonies” became a CUKC.¹⁰⁶ Thus, while those born in the two Perths now had separate gateway citizenships (as Australia was independent), those born in Kingston-upon-Hull, England and Kingston, Jamaica (as Jamaica was still a colony) still had the same gateway

¹⁰² *Representation of the People Act 1983* s 1, *Act of Settlement 1700* s 3, *Army Act 1955* s 21.

¹⁰³ BOTCs and BOCs claim diplomatic protection from the UK Government. BOTCs claim passports from the government of the territory through which they obtain the status, but BOCs claim them from the UK Government. BOTCs will normally have a right of entry to the territory through which they obtain the status, but notoriously BOCs have no right of entry at all (see “preservation by manipulation” below).

¹⁰⁴ See e.g., Huttenback, *Racism and Empire: white settlers and colored immigrants in the British self-governing colonies 1830-1910* (c1976).

¹⁰⁵ S 1.

¹⁰⁶ S 4: it vainly hoped all other independent Commonwealth countries would follow suit.

citizenship, CUKC, but all would remain BS/CC.¹⁰⁷ Such a policy could hardly be more assimilatory, and was certainly more so than the French.

mixed jus soli and jus sanguinis

However, although the common status/gateway citizenship compromise was retained by the *British Nationality Act 1981*, this simple and assimilatory *jus soli* provision was substantially altered. The 1981 Act (as originally drafted) stipulated that “[a] person born in the United Kingdom. . . shall be a British Citizen if at the time of his birth his father or mother is: – (a) a British Citizen; or (b) settled in the United Kingdom. . .”¹⁰⁸ Parental status is now an additional condition (although a “settled” alien parent can substitute for a national). This was a move away from assimilation, still no less generous than the French position, though begging the question of the position of BDTCs (now BOTCs) and BOCs.

preservation by manipulation

Subject to this last question, Brubaker seems vindicated. However, to regard the UK as simply assimilationist is counter-intuitive, and the tripartite BC/BDTC/BOC structure and changes to the status of BDTCs and BOCs both require interpretation, which comes by consideration of UK immigration legislation, which preserved the *jus soli* by manipulating it.

Firstly, the tripartite structure: the UK became a country of occasional net immigration and, though there were labour market considerations, UK immigration policy from the 1950s was primarily to limit “coloured immigration”, that is, reduce the propensity of BS/CCs from the West Indies, Indian Sub-Continent and Hong Kong to use the right of entry to the UK which they had always had, but rarely used till then. This aim was clearly ethnoculturally exclusionary. It is difficult to see the desire in the 1950s and 1960s to exclude English-speaking, cricket-playing, monarchy-respecting West Indians (including numbers of demobbed ex-servicemen) as motivated by them failing to accept British cultural norms.

This policy was effected by the *Commonwealth Immigrants Acts 1962* and *1968*. The precise operation of these Acts is complicated and ill-understood. Very briefly, the two Acts removed the right of entry to the UK from BS/CC as such. Indeed, they removed it not only from non-CUKC BS/CCs (as might have been defensible), but also from many CUKCs BS/CCs too (as was in fact their purpose). Indeed, they subdivided CUKC status into three classes: CUKCs with a right of entry to the UK (who were generally white); CUKCs with no right of entry to the UK, though normally with a right of entry to a colony (who were generally West Indian or Chinese); and CUKCs with no right of entry to the UK, nor to a colony, nor indeed to anywhere else (who were the “East African Asians”):¹⁰⁹ a tripartite distinction embarrassing in ECHR terms,¹¹⁰ and otherwise.

¹⁰⁷ By virtue of s 1.

¹⁰⁸ S 1(1) for BCs (but see now the changes wrought by the *British Overseas Territories Act 2002* ss 5 & Sch 1, and discussed below).

¹⁰⁹ Less briefly, the 1962 Act kept out “coloured immigrants” both from the independent Commonwealth countries such as India and Pakistan (as well as white ones from Australia and Canada) who would generally be Indian Citizens

This distinction was crystallised into the BC/BOTC/BOC structure, noted above in relation to the “imperial dimension”, by the *British Nationality Act 1981*.¹¹¹ Under that Act, BCs acquired the status by the modified *jus soli* in the UK;¹¹² BDTCs acquired the status by the modified *jus soli* in a colony;¹¹³ and BOCs did not acquire the status by *jus soli* at all, since it was designed to be acquired at commencement only. And the only right attaching to BC status is the “right of abode”:¹¹⁴ which was the purpose of the Act. This manipulation of statuses to limit the right of entry to the UK thus permitted preservation of the *jus soli* in heavily modified form.

Secondly, the changes to the status of BDTC and BOC: these were also noted above in relation to the “imperial dimension”, and they amount to a significant reversal of the policy of the 1962 and 1968 Acts. Since BOTCs (as they now are) will generally also be BCs from now on, and BCs may be able to become so, they will regain the right of entry to the UK.¹¹⁵ This is remarkable in itself, but of more immediate interest is that the modified *jus soli* undergoes a consequential further modification such that being “born in a qualifying territory” (that is, a British Overseas Territory¹¹⁶) is now as good as being “born in the United Kingdom” for the purpose of acquiring BC status at birth.¹¹⁷ So, while the parental requirement remains, the territorial extent of the *jus soli* returns to something like its 1948 dimensions.

But why the reversal of policy? The answer in relation to BOTCs (as they now are) is straightforward. The White Paper preceding the *British Overseas*

or Pakistani Citizens (etc), and not CUKCs; and from the colonies such as the still-colonial West Indies and Hong Kong (as well as the Falkland Islands and Gibraltar) who generally would be CUKCs. It did so by restricting the right of entry to the UK to CUKCs who were either born in the UK, or held a passport issued by the UK Government (as opposed to a colonial government, such as Antigua or Hong Kong). Thus the first two classes of CUKC. The 1968 Act followed upon the independence in the East African colonies. CUKCs there of African origin became citizens of Kenya, Malawi or Uganda, but many CUKCs of Indian Sub-continent origin were effectively denied such citizenship, so remained CUKCs. There were no longer colonial governments there to issue them with passports, so their passports became ones issued by the UK Government, and they thereby regained the right of entry (by transferring them from the second class to the first). When they tried to use that right, the 1968 Act was passed to exclude them by requiring “UK passport holders” to have an ancestral connection with the UK as well to retain the right of entry. So not only had they no right of entry to Kenya, Malawi or Uganda, they lost their right of entry to the UK too. Thus the third class of CUKC. For a fuller explanation, see *White (1996)*, at 35-38.

¹¹⁰ See *East African Asians v UK* (1973) ECHR 76.

¹¹¹ There was further manipulation by the *Immigration Act 1971* which created the additional concept of “patricity”, which was abolished by the 1981 Act, and is too complicated to discuss here, though it supports the argument on manipulation.

¹¹² *British Nationality Act 1981* s 1(1) (as originally enacted).

¹¹³ *Ibid* s 15(1).

¹¹⁴ *Immigration Act 1971* s 2(1)(a) (now as amended).

¹¹⁵ *Ibid*.

¹¹⁶ *British Nationality Act 1981* s 50 (1) (as amended by *British Overseas Territories Act 2002* s 5, Sch 1, para 5).

¹¹⁷ *Ibid* s 1(1) (as amended by *British Overseas Territories Act 2002* s 5, Sch 1, para 1(2); and see Sch 1 generally).

Territories Act 2002 referred to their “sense of grievance”, “an irritant affecting the ease with which they can travel” and simply that they “feel British”.¹¹⁸ But these complaints date from 1962 and if taken seriously then would have prevented introduction of the *Commonwealth Immigrants Act 1962*. So what has changed? The answer is that the vast majority of BDTs (more than 3,000,000 latterly)¹¹⁹ were always in Hong Kong. After the handover of Hong Kong to China, in 1997, the total population of all remaining dependencies was small (probably about 186,000).¹²⁰ So the ethnocultural threat is tiny and it is safe to give them back the right of entry to the UK. In relation to BOCs, the distinction is a little less straightforward, though essentially similar.¹²¹

acquisition at birth - conclusions

Thus the *jus soli* remained (albeit modified by the parental requirement), but at the price of manipulation of statuses for distinctly ethnoculturally exclusionary reasons, and the state did in fact “deny entry to its own citizens”. Indeed, this manipulation became a basis of the citizenship law, and the circumstances of the recent reversal of policy underline the point. Brubaker’s thesis is not simply vindicated.

Acquisition after birth

If state preceded nation, Brubaker’s thesis also requires that, irrespective of immigration experience (and the UK partook of “similar migration processes, comparable immigrant populations and converging immigration policies” to those of France and Germany), the UK naturalisation régime be relatively liberal; regarded as normal by natives; and widely used by immigrants. This is of immediate interest given impending changes in UK naturalisation, discussed below.

settlement - the pool of naturalisation applicants

The starting point is Brubaker’s insight on the “circular quality of social closure”, though it was suggested that he does not fully explicate the implication that “who we let in permanently” (that is, for “settlement”¹²²) influences “who we are” because it provides the pool of naturalisation applicants. The immigration policy described above can be summed up as “Less!”¹²³ but was never “None!”. The UK has never applied a *Gastarbeiter*

¹¹⁸ *Partnership for Progress and Prosperity: Britain and the Overseas Territories* Cm 4264 (1999), para 3.6.

¹¹⁹ See *Hong Kong: the nationality provisions of the Hong Kong Act 1985: a draft Order in Council* Cmnd 9637 (1986), para 10: and adjust for the lapse of a decade.

¹²⁰ See *Second Report from the Foreign Affairs Committee “Dependent Territories: Interim Report”* HC Paper (1997-98) No 347 para 16

¹²¹ After the *East Africans Case* (see n 110 above). BOCs were not mentioned in *Partnership for Progress*. . . (see n 118 above).

¹²² “Settlement” is a term of art for those with unrestricted rights to remain in the UK: see *Immigration Act 1971* s 3(1),(2A) and *Statement of Changes in Immigration Rules (“the Immigration Rules”)* HC Paper (1993-94) No 395 para 6: also paras 134, 255 (as substituted by CM 4851 (2000) para 23), and 288, and *Immigration (European Economic Area) Regulations 2000* (SI 2000/2326) reg 8.

¹²³ Or rather, “Fewer”.

policy. Once admitted, immigrants might always settle permanently (“primary immigration”), and indeed achieve family creation and reunification (“secondary immigration”) with or without naturalisation.

The pool of settled immigrants is therefore substantial. In the two decades before 1998, acceptances for settlement (that is, grants of leave to enter, or to remain, indefinitely) ran at some 50,000 to 70,000 per annum.¹²⁴ It is also clearly very preponderantly “secondary”. In 1998, almost 70,000 were accepted for settlement,¹²⁵ 75% (53,000) of whom were family members of people settled in the UK, whether BCs or not (including some 13,500 husbands, 22,000 wives, 12,300 children and 5,000 others).¹²⁶ Only 6% (4,200) were work permit holders or similar; 9% (6,500) were refugees; and 8% (5,500) others.¹²⁷

Further, it also largely reflects the primary immigration of half a century ago. The biggest single source of the 70,000 was the Indian Sub-Continent (excluding Sri Lanka) at 24% (16,500), the rest of Asia providing another 20% (13,500).¹²⁸ The next biggest was Africa with 23% (16,000); followed by 15% (11,000) from the Americas, including the West Indies; 11% (7,500) from Europe (despite free movement of workers, only 0.4% – just 270 – from the European Economic Area¹²⁹), and 5% (3,500) from Oceania.¹³⁰

the naturalisation regime

Turning to the naturalisation régime, five principal Acts have operated a modern naturalisation procedure, that is, the *Naturalisation Acts 1844* and *1870*, and the *British Nationality Acts 1914*, *1948*, and *1981*.¹³¹ (Procedure for married women has altered significantly but, as Brubaker does not consider that interesting topic, it is not pursued here). A sixth Act is about to be passed.¹³²

Brubaker’s criteria for restrictiveness of naturalisation were the number of years residence and the requirement (or otherwise) to renounce previous nationality. The 1844 Act imposed no specific length of residence at all. Only in 1870 did a specific requirement, of five years, appear, and this has

¹²⁴ Dudley & Harvey *Control of Immigration Statistics: UK, 2000* Home Office Statistical Bulletin 14/01 (hereafter “*HOSB 14/01*”: available at www.homeoffice.gov.uk/rds/hospubs1.html) Fig 1 and paras 16 & 21.

¹²⁵ *HOSB 14/01* Table 3.1. Since 1998, the number of acceptances has almost doubled “mainly due to a rise in asylum-related settlement” (*ibid* p 1 “main points” first unnumbered paragraph) so to avoid the complexities this factor introduces, the 1998 figures are chiefly considered here.

¹²⁶ *Ibid* (“husbands & wives” includes fiancé(e)s, accepted for settlement after marriage).

¹²⁷ *Ibid*.

¹²⁸ *Ibid* Table 3.2.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

¹³¹ See also the *British Nationality Act 1943* s 4. Before 1844, it was normally only by private Act of Parliament.

¹³² *I.e.*, the *Nationality, Immigration and Asylum Bill 2002* awaiting its Report and Third Reading stages in the House of Lords at the time of writing. It is not thought that there will be any relevant amendments at these stages.

applied ever since, with modifications,¹³³ with a continuing power to reduce this period in certain cases.¹³⁴ Renunciation has never been required, though the 1870 Act¹³⁵ divested a British Subject voluntarily naturalising elsewhere of British Subjecthood, a policy continued by the 1914 Act,¹³⁶ but repealed by the 1948 Act. The UK now expressly requires an applicant not be in breach of immigration laws and be settled¹³⁷. Probably this requirement was informally applied before through the Secretary of State's discretion. It emphasises that the pool of applicants is "who we let in permanently". So far, UK naturalisation seems as unrestrictive as the French.

There are complications. Until the 1914 Act, "local naturalisation" was allowed in colonies,¹³⁸ but universal "imperial naturalisation" required UK residence. From 1914 to 1948 Acts (although "local naturalisation" continued), "imperial naturalisation" required just one year's residence in the UK, and the rest might otherwise be anywhere in the Empire or Commonwealth. From the 1948 to 1981 Acts, reflecting the UK's reduced colonial responsibilities (expressed in the "gateway citizenships"), naturalisation as a CUKC required residence anywhere in the UK or colonies (but not in independent Commonwealth countries, who had their own gateway naturalisation). From the 1981 Act, reflecting the creation of the UK's three new "gateway citizenships", residence must be in the UK for BCs, or a colony for BDTCs¹³⁹ (and independent Commonwealth countries continue to follow their own policies). This still seems unrestrictive.

Brubaker mentions, later to ignore, the criteria of restrictiveness as discretion, appeals, procedure and fees. Until now, suffice it to say that the UK standard naturalisation has been discretionary,¹⁴⁰ unappealable,¹⁴¹ subject to no complicated procedure,¹⁴² but with significant fees.¹⁴³ Also, there are criteria not mentioned by Brubaker. A future residence requirement has

¹³³ 1870 Act s 7; 1914 Act s 2(1)(a),(2); 1948 Act s 10 Sch 2 para 1(a)(b); 1981 Act ss 6(1)(2) & 18, Sch 1 paras 1(2)(a)(b), 3(1)(a)(b) and 5(1)(a)(b).

¹³⁴ *E.g.*, now 1981 Act ss 6(1)(2) & 18, Sch 1 paras 2(a)(b), 4(a)(b) and 6(a)(b).

¹³⁵ S 6 (implementing an agreement with the USA: see *Parry* p 183).

¹³⁶ S 13.

¹³⁷ 1981 Act s 6(1),(2) Sch 2 paras 1(2)(c)(d) and 5(1)(c)(d).

¹³⁸ This raises questions of terms of acquisition and territorial extent, too complicated to be pursued here: but see *Parry* pp 774-77 and each territory section.

¹³⁹ On earlier periods, see *Parry*, also 1870 Act s 7; 1914 Act s 2(1)(a),(2); 1948 Act s 10 Sch 2 para 1(a)(b); 1981 Act s 6(1),(2), Sch 1 paras 1(2)(a)(b) and 5(1)(a)(b).

¹⁴⁰ 1844 Act s 7; 1870 Act s 7; 1914 Act s 2(1); 1948 Act ss 10, 26; 1981 Act ss 6(1), 44: *Fransman* para 14.2 suggests, however, that there is little sign that, once the conditions are fulfilled, any further discretion is applied, and see *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763, [1997] 1 All ER 228. On 22 December 1997, the Home Secretary announced that he would in future give reasons for refusal

¹⁴¹ But see *ex parte Fayed* (previous note).

¹⁴² Currently, principally the *British Nationality (General) Regulations 1982* SI 1982/986: it is the law which is complicated, not the application procedure.

¹⁴³ Currently, £150 for straight naturalisation: *British Nationality (Fees) Regulations 1996* SI 1996/444.

always existed.¹⁴⁴ So probably has one of an oath of allegiance, formally required since 1844 (when it was over 170 words, required to be administered by an English or Irish, but not, curiously, a Scottish, judge, and included adherence to the Protestant succession).¹⁴⁵ Language and good character requirements have also no doubt always informally been applied through the Secretary of State's discretion, although neither was formally imposed until the 1914 Act, and the former is not exiguously applied and can be waived.¹⁴⁶ Crown service, now extended to service with international organisations or even UK companies, has been an alternative to past residence since 1914, and is now also an alternative to future residence.¹⁴⁷ If these factors are taken into account, naturalisation seems somewhat more restrictive.

It seems more so in the light of current changes, which are most interesting given Brubaker's analysis. These relate to appeals, procedure, and the allegiance and language requirements, and constitute a major policy shift.¹⁴⁸ No appeal as such is introduced, but the provisions exempting the Secretary of State from giving reasons for grant or refusal of naturalisation are repealed, making judicial review a real possibility.¹⁴⁹ Also, "nationality functions" are removed from the exemption to the application of race relations legislation,¹⁵⁰ which might be seen as an incidental distancing of naturalisation from ethnocultural exclusion.

These changes are less important, however, than changes in procedure, and the allegiance and language requirements, which must be taken together. Firstly, there is now to be a "citizenship ceremony".¹⁵¹ No form is laid down for such ceremony but the Secretary of State is empowered to make regulations for "the content and conduct of a citizenship ceremony" and related purposes.¹⁵² The significance of this is that (subject to a dispensing

¹⁴⁴ On pre-1844 private Acts, see *Parry*; 1844 Act s 6; 1870 Act s 7; 1914 Act s 2(1)(c); 1948 Act s 10, Sch 2 para 1(e)(i); 1981 Act ss 6 & 18, Sch 1 para 1(1)(d)(i).

¹⁴⁵ 1844 Act s 10; 1870 Act s 9; 1914 Act ss 2(4), 24, & Sch 2; 1948 Act ss 6, 10 & Sch 1; 1983 Act ss 6, 42(1) Sch 5.

¹⁴⁶ Since the 1981 Act, it may be taken in Scottish Gaelic (but not Irish – why?) or Welsh.

¹⁴⁷ 1914 Act s 2(1)(a); 1948 Act s 10 Sch 2 para 1(2)(a); 1983 Act s 6 & 18, Sch 1 para 1(3), 5(3).

¹⁴⁸ There are other amendments in the *Nationality, Immigration and Asylum Bill 2002* in relation to deprivation and resumption of citizenship, etc, which are not considered here.

¹⁴⁹ *Nationality, Immigration and Asylum Bill 2002* cl 7(1): at the time of writing, the Bill awaits its Report and third Reading stages in the House of Lords, and no amendments to this provision are anticipated.

¹⁵⁰ *Ibid* cl 6.

¹⁵¹ *Ibid* cl 3 & Sch 1 para 1 (substituting a new s 42 into the *British Nationality Act 1981*).

¹⁵² *British Nationality Act 1981* s 41(1)(db) (as substituted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1, para 4), and see s 41(1)(da),(dc) (as so substituted). S/he may also make regulations designating or authorising persons to exercise functions ("which may include a discretion"), and require local authorities to provide specified facilities, in connection with such ceremonies: *ibid* s 41(3A) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1, para 7, and see also Sch 1, para 9).

power in the Secretary of State) making the new oath and pledge (considered shortly) at such ceremony is to be a prerequisite of naturalisation.¹⁵³ Secondly, then, added to the oath of allegiance to the Sovereign (which remains unaltered) there is to be added a “pledge” expressing loyalty to the United Kingdom, its rights and freedoms, and its democratic values.¹⁵⁴ The significance of this is the clear change of focus of allegiance. Thirdly, the language requirement is to be tightened, by empowering the Secretary of State to make regulations “for determining whether a person has sufficient knowledge of a language for the purpose of an application for naturalisation” and related purposes.¹⁵⁵ The significance of this has to be looked at in connection with the next point. Fourthly, an entirely new formal requirement for naturalisation is created, that is “sufficient knowledge about life in the United Kingdom”.¹⁵⁶ These changes clearly make naturalisation more restrictive, but equally clearly indicate an increasingly clear political, rather than ethnocultural tradition. They are returned to in relation to the “natives’ attitude towards naturalisation” below.

“Registration” must be mentioned, a process which once made naturalisation less restrictive. The 1948 Act, as part of the common status/gateway citizenship compromise, allowed holders of another “gateway citizenship” to become CUKCs on the strength of twelve months ordinary residence, or Crown service, in the UK.¹⁵⁷ Thus it was an entitlement, and there was a single, unexiguous, condition of residence which was readily achievable through the right of entry to the UK until 1962. However, the *Commonwealth Immigrants Act 1962* not only removed the right of entry from BS/CCs, but also increased the residence requirement to five years.¹⁵⁸ Further, the use of registration was considerably altered by the 1981 Act and rendered enormously complex, in part by transitional provisions and

¹⁵³ *British Nationality Act 1981* s 42(2),(4),(6),(7) (as substituted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1). The words of the pledge are: “I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen [or BOTC, or BOC]”. There may be logical difficulties in simultaneously swearing loyalty to different entities in the oath and the pledge, as well as difficulties in pinning down precisely what the pledge means. Comparison may nevertheless be made with the requirements for naturalisation in Germany referred to in n38 above.

¹⁵⁴ *British Nationality Act 1981* Sch 5 (as substituted by *Nationality, Immigration and Asylum Bill 2002* Sch 1, para 2).

¹⁵⁵ *British Nationality Act 1981* s 41(1)(ba) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(2)). S/he may also make regulations concerning specified qualifications, courses, levels of achievement, etc: *ibid* s 41(1A) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(3)).

¹⁵⁶ *British Nationality Act 1981* Sch 1, para 1(1)(ca) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(1)). The Secretary of State is given powers in relation to such knowledge, parallel to those concerning language qualifications, courses etc: *ibid* s 41(1)(bb) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(2), (3)). It will be fascinating to discover what aspects of life will be covered, and how sufficient knowledge demonstrated. It would be a cheap shot to wonder if there might be a question on whether the national dish is chicken tikka.

¹⁵⁷ 1948 Act 6(1).

¹⁵⁸ 1962 Act s12(2).

abandonment of the simple *jus soli*. This cannot be examined here, but in brief, the “intra-gateway” registration was not continued (save for transitional cases),¹⁵⁹ though a parallel form was enacted for BDTCs and BOCs to register as BCs.¹⁶⁰ The recent changes in relation to naturalisation discussed above apply, *mutatis mutandis* to the remaining forms of registration.

On balance, then, naturalisation (including registration) has been as unrestrictive as the French, though the criteria unexamined by Brubaker and the 1962 and 1981 Acts, and the recent changes, cast doubt. Brubaker’s thesis is only equivocally supported.

natives’ attitudes towards naturalisation

Brubaker’s criterion of natives’ attitudes towards naturalisation can be inferred from anecdotes and Government thinking. As to anecdotes, Zola Budd may be recalled.¹⁶¹ She was a South African runner when, during the era of *apartheid*, South Africa was boycotted from the 1984 Olympic Games. The Home Office processed her application for citizenship in possibly unprecedented time, in order for her to compete for the UK. This was widely applauded. In a recent case with a different outcome, a 22-year-old Australian, settled in the UK with his family some nine years earlier, applied for naturalisation. He was a talented basketball player and under the relevant rules, could not play professionally in the UK unless a “UK citizen”. However, he had spent approaching four of the preceding five years, including the whole of the preceding year, in the USA on a sports scholarship, so failed to fulfil the residence requirement, and it appears the Secretary of State declined to waive it. His father was reported as regarding the decision as “nothing but red tape” and as being supported by his MP, and the British Basketball League was quoted as considering it “ludicrous”.¹⁶²

As to Government thinking, a recent example is the Hinduja “Passports-for-Favours” Affair. Two millionaire businessman brothers sought naturalisation. Initially refused on residence requirement grounds (though good character was in issue), they were finally granted citizenship in 1998. The matter came to public attention because of suggestions that a senior Minister tried to facilitate their naturalisation in return for funds for the Millennium Dome. An enquiry, while finding he behaved properly, at least temporarily ended his ministerial career.¹⁶³ It also produced evidence of

¹⁵⁹ 1981 Act s 7.

¹⁶⁰ 1981 Act s 4; there is no parallel provision for registration as a BDTC.

¹⁶¹ See *e.g.*, *Times* of various dates in 1984, including 3, 9, 27 March; 10, 11, 14, 24, 27, 28 April; 8, 16 May; 1 June; 28 July, 27 September; 1, 2, 3 November.

¹⁶² *Dundee Courier* 3/11/01: it may be significant that both cases involve sport, and that the applicant in the second had a very Scottish name. A straw poll of 30 Honours law students of nationality and immigration law in November 2001 produced a third who thought the operation of the law appropriate, a third who thought sport demanded special rules, and a third who could not see what the fuss was about.

¹⁶³ *Review of the Circumstances Surrounding an Application for Naturalisation by Mr SP Hinduja in 1998* by Sir Anthony Hammond KCB, QC HC Paper (2000-2001) No 287 (also *Review of the Conclusions of the 2001 Review*. . . HC Paper (2001-2002) No 652)

lobbying for the naturalisation by public figures, and shed light on the application process and Secretary of State's discretion. Not only was the waivable residence requirement waived, but so was "the unwaivable requirement" of presence in the UK.¹⁶⁴ Also, possible good character difficulties were overlooked,¹⁶⁵ and the application was considerably prioritised.¹⁶⁶ It is difficult to resist the conclusion that all this was because it was thought some of the applicants' wealth would rub off on the UK.¹⁶⁷

Two Home Office reports published in December 2001 on racially-linked rioting in northern English towns¹⁶⁸ are further evidence. Their principal remedy, "social cohesion", relates to citizenship in a non-legal sense ("good citizenship"), but the argument is clearly part of the "politics of identity". Multiculturalism was seen as compatible with "nationhood" only so long as certain "inviolable rights and duties" were upheld.¹⁶⁹ What caught press attention¹⁷⁰ was the conclusion that there should be "a universal acceptance of the English language" and "a clearer statement of allegiance".¹⁷¹

This presaged the most important White Paper *Secure Borders, Safe Haven: integration with diversity in Modern Britain* (2002)¹⁷² which contained a chapter on "Citizenship and Nationality"¹⁷³ indicating the considerable changes in Government thinking which emerged in the recent legislative changes proposed on naturalisation. It opened by indicating that "those who settle here [should] gain a fuller appreciation of the civic and political dimensions of British citizenship and . . . understand the rights and responsibilities that come with [its] acquisition" and rehearses the theme of "welcom[ing] the richness of cultural diversity which immigrants have brought to the UK", while recognising that it "will sometimes be necessary to confront some cultural practices which conflict with [British Citizenships'] basic values".¹⁷⁴ The significance of naturalisation was to be enhanced in the three broad ways¹⁷⁵ which we have met when dealing with the proposed legislative changes, that is: citizenship ceremonies "celebrating

¹⁶⁴ *Ibid* paras 5.153-5.155, 5.178-5.187

¹⁶⁵ *Ibid* paras 5.156-5.162, 5.192-5.196

¹⁶⁶ *Ibid* paras 5.166-5.177 and Annex D (note Para 3(1)(a), (2)(j), (l) thereof, also 3(2)(g) in relation to Zola Budd).

¹⁶⁷ *Ibid passim*

¹⁶⁸ *Building Cohesive Communities: a Report of the Ministerial Group on Public Order and Community Cohesion* (hereafter "Ministerial Group") and *Community Cohesion: a Report of the Independent Review Team Chaired by Ted Cantle* (hereafter "Cantle").

¹⁶⁹ *Ministerial Group* para 3.12

¹⁷⁰ *E.g.*, *Scotsman* 12/12/01 p 8 "Oath stalls frank talk on racism in Britain"

¹⁷¹ *Cantle* paras 5.1.7 and 5.1.15

¹⁷² CM 5387 (hereafter "SBSH") which draws on and replaces *Fairer, Faster and Firmer: a modern approach to immigration and asylum* CM 4018 (1988), the first White Paper on the subject since 1964.

¹⁷³ *Ibid*: Annex A contains an interesting brief chart of naturalisation requirements in seven other states.

¹⁷⁴ *Ibid* paras 2.1, 2.2 and 2.3.

¹⁷⁵ The other legislative changes were also outlined: *ibid* paras 2.9-2.10, 2.24-2.25.

the acquisition of citizenship;¹⁷⁶ a reworded oath of allegiance referring to “citizenship obligations”;¹⁷⁷ and formal language and “citizenship” tests.

The significance of all this is that the natives seem to view citizenship in a rather instrumental way, but certainly as “a normal and desirable outcome of settlement”. Indeed, the proposed increased restrictiveness is specifically designed to enhance “an essentially political understanding” of citizenship “centrally expressed in the striving for cultural unity”, running contrary to Brubaker’s equation of political tradition with unrestrictiveness. His thesis is again only equivocally supported.

immigrants’ attitude towards naturalisation

Immigrants’ attitudes towards naturalisation are also difficult to gauge. Brubaker’s primary evidence is simply propensity to naturalise. Although direct comparison with his figures for France and Germany is not possible, it is clear that in the UK, among the pool of the “settled”, the propensity is high.

Some 82,000 people naturalised as British Citizens in 2000.¹⁷⁸ This was a considerable rise over the previous year, indeed over any year in the preceding decade, when the numbers fluctuated between about 40,000 and 60,000.¹⁷⁹ However, such fluctuations are in part an artefact of Home Office activity,¹⁸⁰ so the number of applications is a better index of demand. These show a steady rise from 1991 (less than 40,000) to 1998 (nearly 70,000) with a small drop thereafter (to about 65,000 in 2000).¹⁸¹ Since, as noted above, some 50,000 to 70,000 people were accepted for settlement each year over the same period,¹⁸² it is clear that the great majority of the pool of those settled seek, and achieve, naturalisation.¹⁸³

To emphasise the point, their geographical origins show remarkable similarity to those for settlement, also noted above.¹⁸⁴ In 2000, 27% (22,000) of those naturalised were from the Indian Sub-Continent (excluding Sri Lanka), with a similar proportion from Africa, and the rest of Asia and non-

¹⁷⁶ *Ibid* paras 2.19-2.20

¹⁷⁷ *Ibid* para 2.21 and Annex B “I [swear by Almighty God] [do solemnly and sincerely affirm] that, from this time forward, I will give my loyalty and allegiance to Her Majesty Queen Elizabeth the Second Her Heirs and Successors and to the United Kingdom. I will respect the rights and freedoms of the United Kingdom. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen”.

¹⁷⁸ Dudley & Harvey *Persons Granted Citizenship, 2000* Home Office Statistical Bulletin 9/01 (hereafter “*HOSB 9/01*”: available at www.homeoffice.gov.uk/rds/hospubs1.html): see also Fig 1 in *SBSH*.

¹⁷⁹ *HOSB* Fig 1 & para 2

¹⁸⁰ *Ibid* para 2

¹⁸¹ *Ibid* Fig 2 and para 1: see also Fig 1 in *SBSH*.

¹⁸² *HOSB 14/01* Fig 1 and paragraphs 16 & 21.

¹⁸³ However, “there must be a large number of people who [are settled] who might be eligible for British Citizenship but who for one reason or another have not applied for it”: quoted in House of Lords *Fifth Report of the European Union Committee 2001-02* “The Legal Status of Long Term Resident Third Country Nationals” HL Paper (2001-02) No 33 (hereafter “*HL33*”) para 22.

¹⁸⁴ *HOSB 14/01* Table 3.2.

EEA Europe providing 11% (9,000) each, and the Americas and the Middle East, 8% (7,000) each (while the EEA produced the tiny proportion of 2% (1,700)).¹⁸⁵

Brubaker does suggest that the low German naturalisation rate flows in part from an immigrant desire not to lose original citizenship.¹⁸⁶ The UK does not require this, as noted, but the states of original citizenship may, so it is difficult to make general statements. He further suggests that the high French rate flows in part from “a more instrumental, ‘desacralized’ understanding of citizenship”.¹⁸⁷ The legal advantages in the UK are in general actually rather limited, going little beyond “a right to enter. . . the territory of a state. . . suffrage and military service”.¹⁸⁸ However, a reason for the planned changes in the naturalisation régime is the assertion that “many applicants do not appear to attach great importance to acquiring British citizenship, beyond the convenience of obtaining a passport”.¹⁸⁹ In any event, Brubaker’s thesis is here unequivocally supported.

acquisition after birth - conclusions

The characteristics which Brubaker’s thesis predicts are generally fulfilled, subject to certain factors. The suggestions must be rehearsed that it underplays the role of immigration policy in the “circular quality of social closure”, and the suggestion made that he too readily equates an unrestrictive naturalisation régime with a political tradition of nationhood. Within those, UK naturalisation policy seems political, not ethnocultural.

EU Citizens, Third Country Nationals and the European Union

It is interesting to apply Brubaker’s thesis to the EU, and in relation to naturalisation, his analysis is especially interesting.

Fairly clearly “Citizenship of the European Union” is an attempt to bind the inhabitants to the EU by social closure. The rights attaching are usually seen as inclusive but, as Brubaker argues, inclusion only makes sense if there is exclusion. Free movement is about external borders. As to whether “state” precedes “nation”, clearly the state-like structure of the EU precedes any nation of Europeans, and Citizenship of the EU is in a political rather than ethnocultural tradition. (Maastricht can be seen as a pivotal event).

Certainly, all Citizens of the EU now have a certain citizenship rights in every other Member State, including a certain “right to enter (and remain in) the territory of [the other Member States]” and certain “suffrage” there, if not “military service”.¹⁹⁰

¹⁸⁵ *Ibid*

¹⁸⁶ *Brubaker* p 78

¹⁸⁷ *Ibid*

¹⁸⁸ See eg *Bradley & Ewing* various pp under general rubric “ALIEN - disabilities and disqualifications”.

¹⁸⁹ *SBSH* para 2.12

¹⁹⁰ Arts 17-22 TEC (ex art 8-8e).

EU Citizenship, national citizenship and naturalisation

This attempt to bind the inhabitants to the EU is, however, equivocal. It is to “complement and not replace national citizenship”¹⁹¹ as a compromise wording to calm Danish fears of excessive EU power. “Non-replacement” is effected largely by the means of acquisition which, in an echo of the *British Nationality Acts 1948* and *1981*, is by gateway citizenships, one for each Member State. Thus questions of *jus soli* and *jus sanguinis* do not apply, and nor at first sight does naturalisation.

However, gateway citizenship acquisition indicates a fascinating conclusion. Citizenship of the EU is really mass reciprocal naturalisation without renunciation of previous citizenship or prior residence, let alone use of discretion, appeals, procedure or fees, or for that matter, oath of allegiance or ceremony. (In Brubaker’s terms the regime is appropriately unrestrictive, as in the political tradition, the natives’ attitude *ex hypothesi* somewhat equivocal, but the propensity to naturalise unavoidable).

“Third Country Nationals”, naturalisation, nationality and Title IV

Were this not enough, relevant debate also occurs in relation to “Third Country Nationals”, that is, those from non-Member States living and working within the EC or (briefly put), settled immigrants. This requires more extended discussion.

As is well-known (and Brubaker notes), the EC has relied heavily on external immigrant labour, but many such immigrants, while settled, have not been assimilated into the EC population. This is most obvious in Germany, where many Turks, Yugoslavs and others entered, but remained non-citizens because of the ethnocultural exclusionism of German naturalisation law,¹⁹² as did their children because of reliance on the *jus sanguinis* (as Brubaker also notes). Their numbers are considerable,¹⁹³ their status not ambiguous, but arguably anomalous.¹⁹⁴

A Community immigration policy is an inevitable consequence of an internal market in labour, and very obviously so post-Schengen.¹⁹⁵ Thus, Title IV,¹⁹⁶ establishing a Community competence on visas, asylum, immigration and other policies related to free movement of persons and to be implemented

¹⁹¹ See Denmark’s Declaration appended to the TEC.

¹⁹² Greek law may be even more exiguous, requiring 15 years residence: see House of Lords *Thirteenth Report of the European Union Committee 2000-2001* “A Community Immigration Policy” HL Paper 2000-01 No 64 (hereafter “*HL64*”) para 107. However, Grammatiki-Alexiou in *Nascimbene* p 395 shows Greek naturalisation as rather complicated and appearing to require ten years residence for those not “ethnic Greeks”, five for “ethnic Greeks”.

¹⁹³ Estimates vary from 10m to 30m, of whom perhaps half are long-term residents *HL33* paras 21, 48.

¹⁹⁴ See Groenendijk, Guild & Barzilay *The Legal Status of Third Country Nationals who are Long Term Residents in a Member State of the European Union* Centre for Migration Law, University of Nijmegen (2000).

¹⁹⁵ See *e.g.*, *HL64*

¹⁹⁶ Which does not bind the UK unless it opts in: see Protocol on the position of the United Kingdom and Ireland.

within five years, was inserted into the EC Treaty at Amsterdam. The issue was emphasised by the Tampere European Council.¹⁹⁷ “Fair Treatment of Third Country Nationals” was one of the four elements it specifically set out to achieve by, among other things, “an approximation of national legislations [*sic*] on the admission and residence of [TCNs]”.¹⁹⁸ This would create a common “pool” of “who we let in”.

the Draft Directive and a status for LTR-TCNs

Citizenship law “will remain the sole prerogative of Member States”¹⁹⁹ (Brubaker noting this “essential attribute of sovereignty”). Nevertheless, the Tampere Conclusions went on to declare that they sought “a uniform set of rights which are as near as possible to those enjoyed by EU citizens”, including “the opportunity to obtain the nationality of the Member State in which they are resident”.²⁰⁰ (Confusingly, no doubt because Tampere was concerned with the “Charter of Fundamental Freedoms of the European Union” as well as an “area of freedom, security and justice”, these are sometimes referred to as “core rights”).²⁰¹

In particular, as part of the crop of Tampere-generated legislation²⁰², there appeared a Draft Council Directive concerning the status of third-country nationals who are long-term residents²⁰³ (“LTR-TCNs”), to fulfil these aims.²⁰⁴ This has been discussed by the House of Commons European Scrutiny Select Committee which classified it as “legally and politically important”,²⁰⁵ and the House of Lords Select Committee on the European Union, which pointed out it goes some way beyond what Tampere Council decided.²⁰⁶

¹⁹⁷ Conclusions of the Presidency 15 & 16 October 1999 (Bull EU 10-1999 pp 7-14) (hereafter “*Tampere Presidency Conclusions*”) para 20 (See also Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy COM (2000) 757 final, also printed as Appendix 4 to *HL64*).

¹⁹⁸ *Ibid* para 20

¹⁹⁹ *HL64* para 104

²⁰⁰ *Tampere Presidency Conclusions* para 21 (inaccurately quoted in House of Commons *First Report of the European Scrutiny Committee 2001-2002* HC Paper (2001-2002) No 152-i (hereafter “*HC152*”) para 6.1 as “para 12”).

²⁰¹ This convenient phrase seems popular, possibly because it is not clear what it means. O’Leary *The Evolving Concept of Community Citizenship* Kluwer (1996) p 29 observes that in negotiations on union citizenship there were calls for “fundamental rights” to be attached to it. Such calls would seem perverse. If rights are fundamental, they should attach to everyone, not just citizens. “Human rights” and citizenship rights are not synonyms, but alternatives.

²⁰² For a recent list of such legislation, see *Communication of 23 May 2001*. . . COM (2001) 278 final, or *HL64* Appendix 4, Annex 2

²⁰³ *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents* COM (01) 127 final (23.3.2001) made under art 63(3), (4) in Title IV (hereafter “*COM (01) 127*”). The Explanatory Memorandum details the history of the Draft Directive.

²⁰⁴ Explanatory Memorandum paras 1.1, 1.2.

²⁰⁵ *HC152* para 6 (Para 26 also deals with a Draft Directive on mutual recognition of decisions on the expulsion of third country nationals).

²⁰⁶ *HL33* paras 3, 4. (It also refers to interlocking Draft Directives).

long-term resident third-country nationals: a right to quasi-naturalisation?

The Draft Directive requires “Member States [to] grant long-term resident status to third-country nationals who have resided legally and continuously for five years in the territory of the Member State concerned”.²⁰⁷ Detailed rules define what constitutes the five years (and boil down to ignoring interruptions of less than six months, and some others, and excluding “temporary protection”), but grounds for original admission are irrelevant, and indeed, those born in the country who have not acquired citizenship are included.²⁰⁸ The applicant must also have adequate “resources” (unless a refugee or born in the Member State).²⁰⁹

Numerous criticisms can be made of the drafting, and this Draft Directive does dovetail into others.²¹⁰ However, it clearly provides that an applicant fulfilling the requirements and giving the appropriate information,²¹¹ must be granted the status as of right, subject only to a limited possibility of refusal on narrow “public policy and public security” (though not “public health”) grounds.²¹² Any refusals must be reasoned, and there must be legal redress.²¹³

quasi-naturalisation: the consequential rights

The status has four important consequences.²¹⁴ Firstly, an LTR-TCN acquires a right to remain for life since s/he must be re-admitted even if the residence permit has expired,²¹⁵ and expulsion is only possible on narrow grounds of “public policy” or “domestic security” (and again, not “public health”); and with an appeal process and legal aid required and “emergency expulsions” prohibited.²¹⁶ (Withdrawal of the status is required, though only by a reasoned decision with legal redress²¹⁷, on grounds of two consecutive years absence, subject to limitations; fraud; acquisition of the status in another Member State; or expulsion.)²¹⁸

Secondly, an LTR-TCN is entitled to equal treatment with nationals in relation to most occupational, educational and social security

²⁰⁷ *COM (01) 127* art 5(1).

²⁰⁸ *Ibid* art 5.2-5-4, read with art 3 and relevant parts of “Article-by-Article Commentary”.

²⁰⁹ *Ibid* art 6: essentially, at least subsistence income and sickness insurance for all risks.

²¹⁰ See *HL33* paras 8-10 and *passim*.

²¹¹ *COM (01) 127* art 8.

²¹² *Ibid* art 7: The “Article-by-Article Commentary” says refusal is “subject to criteria similar [not identical?] to some of those in Directive 64/221/EEC”. Cf the provision in relation to expulsion.

²¹³ *Ibid* art 11.

²¹⁴ *Ibid* art 9.

²¹⁵ *Ibid* art 26.

²¹⁶ *Ibid* art 13: the “Article-by-Article Commentary” is much fuller than the parallel provision in relation to acquisition, declaring that Directive 64/221 defines the relevant terms, referring to the case law, to art 8 ECHR and to art 47 of the Charter of Fundamental Rights of the European Union.

²¹⁷ *Ibid* art 11.

²¹⁸ *Ibid* arts 10, 27(2).

opportunities.²¹⁹ These are widely drafted to include equality of working conditions generally and trade union membership; access to education and vocational training, “including study grants”; recognition of diplomas, etc; and “access to goods and services. . . including housing”. Equal treatment can be extended to other matters.²²⁰

Thirdly, the LTR-TCN has a right of residence in any other Member State,²²¹ at least provided s/he fulfils one of, effectively, two conditions²²² (and refusal must be reasoned and legal redress available).²²³ The first is employment (which includes periods of incapacity or unemployment, etc), the second, economic self-sufficiency (i.e., s/he both possesses “adequate resources to avoid becoming a burden on the Member State” and has “sickness insurance covering all risks in the second Member State”).²²⁴ Further, the status entitles to equality of treatment with nationals of this Member State, save for “social assistance and study grants” (provided the relevant residence permit is obtained).²²⁵ (Five years such residence entitles to LTR-TCN status in this Member State instead.)²²⁶

Fourthly, the status entitles the LTR-TCN to bring in members of any existing family²²⁷ (though a second Member State may require, *int al*, evidence of economic self-sufficiency)²²⁸ subject only to “public policy and domestic security” and (in this case) “public health” provisos.²²⁹

LTR-TCNs, quasi-naturalisation and the last bastion

The draft Directive thus grants LTR-TCNs free movement as of right. This has been described as “revolutionary” and “by far the most radical part of the proposal”²³⁰ (though it seems an inevitable outcome of Schengen).²³¹ The Explanatory Memorandum makes it plain that voting rights were excluded only because no legal basis could be found.²³² The status starts looking like “a right to enter (and remain in) the territory of a state [and] suffrage”, albeit without reference to military service.

²¹⁹ *Ibid* art 12(1).

²²⁰ *Ibid* art 12(2).

²²¹ *Ibid* art 15.

²²² *Ibid* art 17 (outlining the application process): see also art 21 and the transitional art 25.

²²³ *Ibid* art 22.

²²⁴ *Ibid* art 16: it is drafted as three conditions: employment; study; and economic self-sufficiency. However, students have to be economically self-sufficient.

²²⁵ *Ibid* art 24, read with art 21.

²²⁶ *Ibid* art 27.

²²⁷ *Ibid* art 18(1): see also art 23(3). “Family members” is widely defined in art 2(e).

²²⁸ *Ibid* art 18(2).

²²⁹ *Ibid* arts 19 & 20.

²³⁰ *HL33* paras 12 (Prof E Guild) and 26 (Committee) respectively.

²³¹ NB art 39 TEC (ex art 48) refers to free movement of “workers”, only Reg 1612/68 limiting it to nationals of Member States, an ambiguity repeated in art 61(a).

²³² Para 5.5.

Unsurprisingly, the UK has determined not to opt in to the Draft Directive.²³³ But more importantly, is the status a quasi-Citizenship of the EU, obtained by a form of simple registration without oath of allegiance, language requirement, or the like, and indeed, in a form of reverse subsidiarity, detached from that of any Member State, so by-passing their conditions, procedures and discretion? (In Brubaker's terms this would be appropriately unrestrictive, as in the political tradition, accepted as normal by the natives, and widely used. Certainly its aim is as assimilatory as Citizenship of the EU itself).

Also more importantly, is it a step beyond "who do we let in?" towards a purely EU test of "who we are"? Is the last bastion of sovereignty falling?

CONCLUSIONS

This article has sought to outline Brubaker's thesis on citizenship and nationhood; to test it against UK experience; and to consider current UK naturalisation and EU citizenship and "third country national" issues within Brubaker's framework.

It concludes that (although recent changes in German law throw some doubt upon its fundamentals) the UK experience fits Brubaker's general thesis to a considerable degree, but suggest problems for it. The continuity of the history of those nations now contained within the UK, and the asymmetry of their status, make it difficult to determine whether state preceded nation or *vice versa*. The imperial dimension of citizenship law is very important, but Brubaker largely ignores empire. Brubaker's lengthy but unexamined criteria of restrictiveness of naturalisation criteria make the UK seem relatively exclusionary, while the short but examined ones make it assimilatory. Most importantly, are two other criticisms. Firstly, preservation of the *jus soli*, principal evidence of an assimilatory tradition, can be shown to have been preserved by manipulation of citizenship categories which make its continued modified existence misleading. Secondly, concentration upon naturalisation criteria is also misleading as it ignores the significance of preceding immigration decisions.

The article also concludes that Brubaker's views on naturalisation provide a useful prism for illuminating current UK discussions, though again suggesting a problem, for the proposed increasing restrictiveness is justified in terms of increasing assimilation.

Finally, it concludes two things in relation to the EU. Firstly, Citizenship of the EU, illuminated by Brubaker's views, may usefully be seen as constituting mass reciprocal naturalisation on wholly unrestrictive terms with a view to assimilation. Secondly, the envisaged long-term resident third-country status constitutes an alternative form of quasi-naturalisation,

²³³ *HL33* para 30 and Appendix 4. It is understood that the Directive was discussed during Spring 2002 under the Spanish Council Presidency, agreement being sought on amended Articles 1-5: Immigration Law Practitioners' Association European Update June 2002, Legislative Update para 3.3 referring to Council doc. 7193/02.

whereby a form of EU citizenship may be created, wholly unmediated by Member States.