INTERNATIONAL LAW OPINIONS

Selected and annotated by

LORD McNAIR

VOLUME TWO

PEACE

CAMBRIDGE UNIVERSITY PRESS

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INDIVIDUALS I

Individuals

It is perhaps not surprising, having regard to the severely practical object of the Law Officers' Reports, that they throw no light on the question whether individuals are capable of holding rights and being subject to duties on the plane of international law. It often happens that as a consequence of a treaty or other transaction between two States we find individuals enjoying rights against a foreign State; but it does not necessarily follow that these rights are on the plane of international law; it is necessary to consider in each case whether or not they are municipal rights which that State has agreed with the other State to confer upon the individuals against itself.[1] The fringe of this problem is just touched by a Report of 25 October 1875, on extradition.[2] The Geneva Convention relative to the treatment of prisoners of war, of 12 August 1949, is an interesting treaty from this point of view.[3]

1
Nationality

Nationality stands on the frontier which is common to international law and municipal law, and so far but little authority exists as to the extent to which international law can control, and in extreme cases refuse to recognize, municipal regulations on the matter.

It was described by Oppenheim[4] as 'the link between [the law of nations] and individuals'.

Nationality is a topic upon which the Law Officers are frequently consulted by the Foreign Office, the Home Office and other Departments; for instance, a very common subject of inquiry is whether a British passport can properly be granted to a certain person as a British national. No attempt is here made to present a fair sample of the many Reports available on nationality questions, partly because most of them are of municipal rather than international interest, and partly because, unlike

[1] See Permanent Court of International Justice, Ser. B, No. 15 (Jurisdiction of the Courts of Danzig).
[2] See below, p. 60, and see pp. 61–3.
[3] See, *inter alia*, Sections 6, 7, 118 and 119.
[4] 2nd ed., §291.

some of the other topics dealt with in these volumes, there exist printed and published materials from which the British law and conception of nationality can be ascertained.[1] Mervyn Jones's *British Nationality, Law and Practice*, 1947, is the standard work.[2] Clive Parry's *British Nationality*, 1951, is shorter and takes account of the British Nationality Act, 1948, which made important changes.[3]

The Reports are grouped under the following headings: (*a*) the connexion between international law and national laws of nationality; (*b*) acquisition of nationality, (i) by birth and by marriage, (ii) naturalization and double nationality; (*c*) collective naturalization or loss of nationality, (i) on cession, (ii) on annexation; (*d*) birth on territory under hostile occupation; (*e*) nationality in protected States and protectorates (see Vol. I, Section II); (*f*) miscellaneous.

Drastic changes were made in the law of British nationality by the British Nationality and Status of Aliens Acts, 1914 to 1943, and by the British Nationality Act, 1948, and the reader is warned that many of the Reports in this section possess only a historical interest.

(*a*) The Connexion between International Law and National Laws of Nationality

This heading can be regarded as little more than *pro forma*. Nearly all the Reports discuss the question whether in certain circumstances a certain person is a British national or not. Undoubtedly there are limits within which International Law can control the national regulation of nationality, its acquisition, loss, etc.,[4] but it is rare to find a Report in which the matter is discussed from this angle. As an illustration, on 1 February 1881, James, Herschell and Deane reported that 'the provision of the law in question, imposing the status of Hungarian subjects upon foreigners by reason of [apparently, five] years' consecutive residence, is not open to objection in an international point of view'.

(*b*) Acquisition of Nationality

(i) *By Birth and by Marriage*

¶ The British law of nationality rests partly on *jus soli* and partly on *jus sanguinis*. The commonest source of British nationality has for long been birth within the allegiance of the British Crown, whether of a British or a foreign father.

[1] There are in the Foreign Office Library two volumes of Reports by the Law Officers covering the periods 1831–60 and 1864–90 and relating to nationality and aliens.
[2] References are to the 1947 edition; there is a revised edition of 1956, largely re-written.
[3] See Mervyn Jones in *British Year Book*, XXV (1948), 158–79.
[4] See the *Nottebohm Case*, in I.C.J. Reports, 1955.

DOCTORS' COMMONS
December 31st, 1840[1]

My Lord,

I am honored with your Lordship's Commands signified in Mr Backhouse's letter of the 30th instant, stating that he was directed to transmit to me a Despatch from Her Majesty's Agent and Consul General at Algiers, requesting instructions upon certain points connected with the right of Individuals to claim his protection as British Subjects; and to request that I would take this subject into consideration and report to your Lordship my opinion thereupon.

In obedience to your Lordship's Commands I have taken the Despatch into consideration, and have the Honor to report that all Persons born within the Allegiance of the British Crown of this Kingdom, whether of British or Foreign Parents, are by the Common Law of this Country deemed British Born Subjects, and entitled to the protection of the Crown abroad as well as at Home until forfeited by their own misbehaviour.

2ndly. That Female British Subjects who intermarry with Foreigners assume the National Character of their Husbands, and cannot, as matter of strict right, claim for themselves or Their Children Born of such Marriage, the privilege of British Protection in a Foreign Land, upon becoming Widows, or being deserted by Their Husbands.[2]

3rdly. That Foreign Females by intermarrying with British Born Subjects are entitled to be considered as British Born Subjects, not only whilst their Husbands are living, but during their widowhood.[3]

Lastly. The Children of British Parents, though Born out of the Allegiance of the British Crown are by Statute, entitled to be considered as British Subjects.

I have the honour to be etc.

The Rt. Hon. the Viscount Palmerston, G.C.B. J. DODSON

¶ On a question affecting British subjects in Uruguay, there is a letter from the Foreign Office to Pro-consul Dale dated 10 December 1842, which contains the following passage:[4]

. . . by the Statute Law of this country, all children born out of the allegiance of the King, whose fathers or grandfathers by the father's side were natural-born subjects, are themselves deemed to be natural-born subjects, and are therefore entitled to enjoy British rights and privileges while they are within British territory; but the effect of British Statute law cannot extend so far as to take away from the Government of the country in which those persons may have been born, the right to claim them as natural-born subjects, at least so long as they remain in that country . . . , therefore . . . the children of British fathers born in the Republic of the Uruguay . . . cannot be protected by you against the operation of the Monte Videan laws affecting the subjects of the Uruguay, unless the laws of that country do not admit the child of a foreigner [*scilicet*, born there] to the rights of a subject.

[1] FO. 83. 2203: Algiers.
[2] *Quaere*: see Mervyn Jones, *op. cit.* 72.
[3] See n. 2 above. There is a Report dated 11 November 1862, in FO. 83. 2215 (U.S.A.), which gives some difficulty.
[4] Substantially repeated by the Earl of Aberdeen in a dispatch of 10 June 1843 to the British Minister at Lisbon (references mislaid).

¶ On 12 December 1844,[1] Dodson, Follett and Thesiger reported that a person 'born in England of foreign parents...is entitled to claim the full privileges of a British subject'.

¶ On 30 April 1849,[2] Dodson reported:

I am also of opinion that a child born abroad whose mother is a natural-born British subject but whose father is a foreigner, is not, whilst living in San Domingo or in any foreign territory, to be considered as a British subject, but as belonging to the country of his father, although by a late Statute[3] he would be entitled to inherit landed property in this country as if a British-born subject.

¶ In 1861 Harding reported[4] that the grandchildren of natural-born British subjects who and whose fathers were born *and domiciled* in a foreign country were British.

DOCTORS' COMMONS
December 11th, 1861

My Lord,

I am honoured with Your Lordship's commands signified in Mr Layard's letter of the 3rd December Instant, stating that with reference to Sir John Dodson's report of the 21st October 1841, therewith enclosed, and to the concluding portion of my Report of the 15th December 1859, he was directed to transmit to me a despatch from Sir Andrew Buchanan, and also three despatches from Her Majesty's present Minister at Madrid, respecting the cases of certain persons in Spain who have claimed exemption from Military Service in that Country on account of alleged British parentage; and to request that I would take these papers into consideration, and report to Your Lordship my Opinion as to the instructions which should be addressed to Sir John Crampton in this matter.

In obedience to Your Lordship's commands I have taken these papers into consideration and have the honour to *Report*

That Sir J. Crampton appears to me to have taken a correct view of this case in No. 148; and that I can see no sufficient grounds for instructing him to interfere in any of the cases herewith transmitted.

The Grandchildren of Natural born British Subjects, when both they and their fathers have been born and domiciled in Spain, cannot, in my Opinion, rightfully claim to be exempted from Military Service, (as being themselves British Subjects) in Spain, merely by reason of their descent from British Grandfathers. British Law would certainly not admit this principle, nor extend any reciprocity to this class of cases.

[1] FO. 83. 2338: Saxony.
[2] FO. 83. 2262: Dominican Republic.
[3] Not specified, but doubtless the Aliens Act, 1844, s. 3.
[4] FO. 83. 2372: Spain. With reference to this Report and to the following Report which confirms it, I am unable to understand why the domicile of the grandson or his father in such a case should have been regarded as a factor *in determining whether or not the grandson possessed British nationality*. The location and other circumstances of a double national at the time at which he invokes British protection against his other State is a vital factor *in determining whether that protection will be granted*. As from 1 January 1915, the law as to grandchildren born in such circumstances was changed; it is now regulated by section 5 of the British Nationality Act, 1948: see Parry, *op. cit.* Rule 6.

The persons in question are (by Statute) British Subjects in the Queen's dominions; but this will not make them British Subjects in Spain; nor protect them, whilst in the Country of their birth, from being dealt with as its natural born Subjects.

This general principle has been frequently considered by the Law Officers (see, for instance, their Report of the 1st May 1856 on this same question; and their Report of the 26th February 1858, on a question submitted by the French Government with reference to Julian Walewski).

I do not understand upon what principle, after and notwithstanding the despatch of Earl Clarendon to Lord Howden of the 8th May 1856 (in accordance with the Law Officers' Report of May 1st 1856), Her Majesty's Consuls in Spain persisted in claiming for the persons in question (on the ground that they are British Subjects) the absolute right of exemption from Military Service, and also apparently have registered them and granted them Passports as being such. Sir J. Crampton offers no explanation of this practice, which should, in my Opinion, be discontinued.

I have the honour to be etc.

The Rt. Hon. Earl Russell J. D. HARDING

A year later the Law Officers approved this Report:

My Lord, July 7, 1862[1]

We are honoured with your Lordship's commands signified in Mr Layard's letter of the 20th June last, stating that with reference to the Queen's Advocate's Report of the 11th of December last, he was directed by your Lordship to transmit to us the inclosed despatch from Sir John Crampton (No. 197) respecting the rights of the sons of British subjects, born in Spain, to exemption from military service in that country, and to request that we take that despatch into our consideration, in connection with the papers . . . and report to your Lordship our opinion as to the instructions which should be addressed to Sir John Crampton regarding the cases of the persons alluded to in Inclosures Nos. 6 and 7 in his despatch No. 197.

In obedience to your Lordship's commands we have taken these papers into consideration, and have the honour to report—

That we agree with the views expressed in the Report of the Queen's Advocate, dated the 11th December, 1861, in accordance with which instructions have already (as we understand) been addressed to Her Majesty's Minister at Madrid; and upon the general question of the status of the children and grandchildren born in Spain of natural-born British subjects, we do not think it necessary to add anything to what is there stated.

The particular cases of Lieutenant Arguimban and his son Mr Joseph Arguimban, and any other cases which may fall under the same category, must (we conceive) be determined with reference to the domicil[2] of the parents at the time of the birth of the children within the territories of the Crown of Spain. If, at the time of the birth of Lieutenant Arguimban, his father was not only a natural-born British subject, but legally domiciled in the British dominions, we are of opinion that Lieutenant Arguimban himself, although

[1] FO. 83. 2372: Spain.

[2] See note on preceding Report.

born in Spain, was, at the time of his birth, a British subject, owing permanent allegiance to the British Crown and entitled to British protection. If, on the contrary, his father was then domiciled in the dominions of the Spanish Crown, he became, upon his birth, a Spanish subject, and he could not be entitled to claim British protection against any obligations resulting from his Spanish allegiance, although, by an English statute, he may have been also entitled to the privileges of a natural-born British subject in Great Britain. In like manner, the status of Mr Joseph Arguimban will be Spanish if, at the time of his birth, his father was a Spanish subject domiciled in Spain, or owing permanent allegiance to the Spanish Crown; but English if his father was then a British subject, with a British and not Spanish allegiance and domicil.

The circumstance of Lieutenant Arguimban and one of his sons being officers in the Royal Navy tends, *prima facie*, to show that the domicil of Lieutenant Arguimban, if originally English, did not afterwards cease to be so; but, even on this point, it would not be conclusive if the residence of that gentleman has been, during a long period of time, in the dominions of the Crown of Spain. And we do not think that any length of service in the army or navy of Great Britain would be material for the purpose of the present question, if the allegiance and domicil of the person engaged in such service were originally Spanish.

We think it proper to add, that even in the case of persons owing permanent allegiance to the British Crown, who may be domiciled and resident in Spain, the claim to exemption from the military service of Spain cannot justly be extended to any services required for the legitimate purposes of internal defence only, and which do not involve any acts at variance with the duties of British allegiance.

We should recommend that instructions in the sense of these remarks be addressed to Sir J. Crampton.

We have the honour to be etc.

WM. ATHERTON
ROUNDELL PALMER

The Rt. Hon. the Earl Russell

¶ In 1865 Phillimore reported that birth of foreign parents on board a British warship, wherever the warship might be, or on board a British merchant ship on the high seas, conferred British nationality.

DOCTORS' COMMONS
20th April, 1865[1]

My Lord,

I am honoured with Your Lordship's Commands, signified in Mr Murray's letter of the 13th Instant stating that he was directed by Your Lordship to transmit to me a Despatch from Her Majesty's Minister at Dresden requesting to be informed as to the nationality of a child of foreign parents born on board a British Vessel, and of a child born without the British Dominions, of foreigners naturalized as British Subjects, and Mr Murray was pleased to request that I would furnish Your Lordship with my Opinion upon the two points raised.

[1] FO. 83. 2338: Saxony.

In obedience to Your Lordship's Commands, I have taken this case into consideration, and have the honour to *Report*

(1) *That* I am of opinion that a child of foreign parents born on board one of Her Majesty's Ships of War, would be a British Subject wherever the ship might be; and that a child born on board a British Merchant or private unprivileged Vessel on the high seas, would also be entitled to be considered a British Subject. I think it is more doubtful whether such a child born on board such a Vessel in the Port or Waters of a Foreign State would be entitled to be considered as a British Subject.

(2) I am of opinion that a child born without the British Dominions of foreign parents, naturalized as British Subjects, would be entitled to be considered as a British Subject with reference to all other States but that to which his parents owed an original allegiance, unless indeed that State has by its own law allowed its subject to divest himself of his allegiance.

I have the honour to be etc.

The Rt. Hon. the Earl Russell ROBERT PHILLIMORE

¶ *Illegitimate children.* On 3 February 1852,[1] Dodson, Cockburn and Wood reported:

Illegitimate children born abroad of English parents are not British subjects; and, therefore, not entitled to British protection. By the common law, children born abroad of English parents were not, except in certain special cases, English subjects. Acts of Parliament have been passed to remedy this inconvenience, but we are of opinion that these Acts, from their particular purpose and wording, can only be held to apply to legitimate children.

On 9 June 1885,[2] James and Herschell reported that 'the illegitimate son (born out of Her Majesty's dominions) of a British Subject is not a British subject, and cannot acquire British nationality either by the subsequent marriage of his parents or by being formally recognized or adopted by his father'.

On the effect of legitimation on nationality, see Reports of 8 February and 1 September 1893 (General), and memorandum by W. E. Davidson appended thereto.

¶ *Birth on British merchant ships.* On 10 November 1897,[3] the Law Officers advised upon a claim for British nationality advanced by one Casquilho, a Portuguese subject, on behalf of his son who was born on the high seas on a British merchant ship in the course of a voyage from Brazil to Southampton. Reference was made to certain statements made in *Regina* v. *Anderson*[4] and also to a case reported upon by the Law Officers on 25 August 1894 (Germany).

[1] Reference not available.

[2] In connexion with an inquiry coming from Italy; see now Parry, *op. cit.* Rule 17, and the British Nationality Act, 1948, s. 23.

[3] Portugal.

[4] (1868), 1 C.C.C.R. 161.