Briefing on Fees for the Registration of Children as British Citizens

28 September 2016 (revised on 1 January and 8 April 2017)

This Briefing concerns the charging of fees for children to register as British citizens. It concerns cases of children:

- registering their entitlement to British citizenship under the British Nationality Act 1981; or
- seeking registration as British citizens by discretion of the Secretary of State under section 3(1) of that Act.

These matters were debated last year in the House of Lords at Committee and Report stages of the passage of the Immigration Act 2016.[1] The Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK supported the Lord Alton of Liverpool and the Baroness Lister of Burtersett in leading these debates. So far as PRCBC and Amnesty UK are aware, this constituted the first time parliament has given significant consideration to the fee applying to children's registration since the British Nationality Act 1981 came into effect on 1 January 1983,[2] at which time the fee was £35.[3] It is now £973.[4]

This Briefing closes with recommendations in respect of the charging of this fee. In short:

- the profit-making aspect of the fee should be removed;
- a power to waive the fee should be adopted; and
- no fee should be charged in the case of a child assisted by a local authority.

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[1] http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160203-0002.htm#16020378000169 and http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160321-0004.htm#16032216000138

[2] The matter was raised by Keir Starmer MP in the House of Commons in debate on the Immigration and Nationality (Fees) Order 2016 (*Hansard* HC, 2 Feb 2016 : Column 5), but the Minister's response referred neither to the specific fee nor to children. The debate is available at: http://hansard.parliament.uk/Commons/2016-02-02/debates/67ae94df-8d31-41cd-aa6d-0161d7a02b35/ImmigrationAndNationality(Fees)Order2016?highlight=immigration%20nationality%20fees%20order#contribution-16020337000005

[3] See scale of fees in Annex D to chapter 6 of the Nationality Instructions: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510655/nationality-applications-scale-of-fees-_chapter6__v1_0.pdf

[4] The fee for an adult to register their entitlement to citizenship is £1,163.

Introduction

An estimated 120,000 children are in the UK, many of whom were born here, with neither British citizenship nor immigration leave to enter or remain.[5] Many of these children are entitled to British citizenship, and others may apply to be registered as British by discretion. Some of these children may be stateless.[6] Several other children with immigration leave – including many granted periods of leave for 30 months at a time – are also entitled to British citizenship, or entitled to apply for registration by discretion.

These rights are of importance to children as British citizenship provides a certainty concerning their future that immigration leave, whether temporary or indefinite, cannot provide; including rights to a British passport, freedom from immigration control and intangible rights concerning identity and security.[7] This includes the provision of a status which – while it may be derived from that of a parent – is independent of the parent's status.[8] As the guide to completing application form MN1 (a form by which a child may seek to register) states:

> *British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up.*

However, particularly over recent years, the charging of fees has become one of the chief impediments preventing children exercising their entitlement. Research conducted by the PRCBC found such impediments to be systemic.[9] Three case studies are appended to this Briefing.

The application and escalation of the fees charged to children have proceeded without consideration of substantial distinctions, in particular those between:

- nationality and immigration law and policy;
- adults and children; and
- registration by entitlement and registration by discretion.

In failing to consider or apply these distinctions, the Secretary of State has essentially assumed the power and propriety of charging children fees that have become exorbitantly and prohibitively high. Currently, the registration charge for children is £973[10], of which £386 is said to constitute the cost of administration and £587 is profit to the Home Office.[11]

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[5] http://www.compas.ox.ac.uk/media/PR-2012-Undocumented_Migrant_Children.pdf

[6] Distinct provision for the registration of a stateless child as a British citizen is provided by section 36 and Schedule 2 of the British Nationality Act 1981 (though in individual cases it is important to recall that a stateless child may have an alternative entitlement to register under other provisions of the Act).

[7] See https://prcbc.wordpress.com/what-we-do/

[8] This may be a significant matter where a parent is subject to a deportation order as a consequence of which a non-British child may also be subject to deportation under section 3(5)(b) of the Immigration Act 1971.

[9] See PRCBC report, *Systemic obstacles to children's registration as British citizens, November 2014,* at https://prcbc.files.wordpress.com/2015/08/systemic-obstacles-on-the-registration-of-children-as-british-citizens.pdf

[10] The Immigration and Nationality (Fees) Regulations 2017, SI 2017/515

[11] See Impact Assessment for the Immigration and Nationality (Fees) Order 2016 at http://www.legislation.gov.uk/uksi/2016/177/impacts/2016/33

The escalation in the fee over the years has largely and inappropriately mirrored the escalation in fees for adult naturalisation and for settlement application.[12] Prior to 2007, fees were set by regulations specific to nationality applications – British Nationality (Fees) Regulations. From 2007, the regulations concerning charges for immigration and nationality applications were combined – Immigration and Nationality (Fees) Regulations.[13]

Such high fees are incompatible with parliament's intention in legislating to preserve both:

- the entitlement to British citizenship of certain groups of children born in the UK; and
- the means whereby other children whose future clearly lies in the UK may become British citizens even though not born here.

Nor are these fees compatible with the domestic and international duties by which the Secretary of State is bound to give primary consideration to children's best interests, and ensure their safety and promote their wellbeing.

The following sections address these various matters further under discrete subheadings:

- Fee charging powers
- Nationality law: distinct from immigration law and policy
- Children's entitlement to British citizenship
- Children's applications to be registered as British citizens at discretion
- Secretary of State's duties to children
- Conclusions
- Recommendations

Fee charging powers

Section 68 of the Immigration Act 2014 provides the power to charge a fee. The section sets out additional powers permitting fee waiver, exemption and reduction, and bases for charging above the cost of administration. On the face of the section, the various powers relate equally to immigration and nationality functions.

Nonetheless, section 68 does not require the Secretary of State to impose a fee, to set it at a particular level or to make no provision for a waiver or exemption. The distinctions highlighted in this Briefing still fall to be considered by the Secretary of State in exercising her fee making powers. There is nothing in the Immigration Act 2014 to indicate parliament intended or permitted the Secretary of State to disregard such matters – including distinctions in primary legislation (see below), and international and statutory duties to children – in setting fees. Indeed, section 71 of that Act expressly states that the statutory duty to safeguard and promote the welfare of children[14] is in no way limited by anything in

[12] *op cit*

[13] See Annex D to chapter 6 of the nationality instructions: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510655/nationality-applications-scale-of-fees-_chapter6__v1_0.pdf

[14] Section 71 reads: "*For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children).*"

the Act. The High Court has confirmed the need for the Secretary of State to consider her duties to children in registration cases.[15]

Section 68(10) empowers the Secretary of State to make provision for exemptions, waivers, reductions and refunds. In respect of children's registration cases, she has thus far exercised none of these powers.

Nationality law: distinct from immigration law and policy

A longstanding problem is the failure of the Secretary of State and others to properly distinguish between nationality and immigration law.

The British Nationality Act 1981 took effect on 1 January 1983. It sets out the various bases on which a person shall be or may become a British citizen. The essential role of the Secretary of State is not to devise the criteria or circumstances in which British citizenship is to be afforded to a person. The Act does this. The Secretary of State's role is to provide the administration to support the determination made by parliament of when such citizenship is to be recognised.

This differs fundamentally from the Immigration Act 1971, under which the Secretary of State is given power to both determine and apply the criteria and circumstances under which non-British citizens are to be permitted entry or stay in the UK.[16] This power is exercised primarily by the making of immigration rules.

Home Office statements in relation to these matters consistently reveal the department neither applies nor understands this distinction. For example, the November 2015 Impact Assessment for the Immigration and Nationality (Fees) Order 2016 stated (having referred to the costs of border and immigration operations):[17]

> *To ensure that the system is fair and sustainable, the government believes it is right that* ***those who use and benefit directly from the UK migration system*** *make an appropriate contribution to the meeting of its costs, thereby reducing the call on UK tax payers.* (emphasis in bold added)

The document continues in identifying the "groups affected":

> ***All migrants wishing to come to or remain in the UK****, for the purpose of visit, work, study, family, settlement, marriage or other reasons are required to pay the appropriate fee associated with their application…* (emphasis in bold added)

These extracts refer to immigration and nationality fees. There is generally no disaggregation or separate consideration of immigration and nationality in the document. Moreover, where nationality is expressly referred to, it is solely naturalisation that is being considered. This is made clear by the repeated assertion that applicants will "*necessarily already have indefinite leave to remain*", which accurately reflects the situation applying in

[15] *FI v Secretary of State for the Home Department* [2014] EWHC 2287 (Admin)
[16] Section 3(2) of the Immigration Act 1971
[17] http://www.legislation.gov.uk/uksi/2016/177/impacts/2016/33

naturalisation cases. Having indefinite leave to remain is a mandatory requirement for making a naturalisation application (an application that can only be made by an adult), but not for registration of children (or adults seeking to register an entitlement to British citizens).

These extracts and other references – such as repeated references to "*working migrants*", "*migrant income*" and "*volume of migrants*" – in this impact assessment make transparent the Home Office treatment of the nationality applications to which the order applies as merely part of the immigration system. This is confirmed where the impact assessment deals with "*settlement and nationality – supply of labour*" by the assumptions made concerning residence, having indefinite leave to remain and earnings. This approach may have relevance to naturalisation by adults under section 6(1) of the British Nationality Act 1981, but it is of no relevance and pays no regard to the situation of children entitled to register as British citizens – especially those born in the UK (who are not migrants).

The impact assessment also refers to the "*benefit*" of a successful application as justification for a fee above the cost of administration. So did the Minister, the Lord Bates, when responding to debates during the passage of the Immigration Act 2016.[18] The explanatory memorandum[19] to the Immigration and Nationality (Fees) Order 2016 makes a similar reference, without adding to the detail in the impact assessment.

But the concept of *benefit* is equally of no relevance in the case of a child (or adult) entitled to citizenship. In the case of such a child, there is no discretion on the part of the Secretary of State to refuse an application because all she is being required to do is register the entitlement parliament has decreed the child to have. The child is not seeking any benefit from the Secretary of State, but rather recognition of the child's pre-existing right at the time of his or her registration application. Thus, it is inappropriate for the Secretary of State to be charging on the basis of providing a benefit to which the child is already entitled and the Secretary of State has no discretion to refuse.

This mischaracterisation of registration by entitlement as providing a benefit is expressly relied upon by the Secretary of State in seeking to justify why a fee waiver is not provided for a child being provided with local authority assistance if the child applies to register her or his right to British citizenship even though a fee waiver is provided for that child if applying for leave to remain.[20]

Children's entitlement to British citizenship

There are several provisions of the British Nationality Act 1981 under which a child is entitled to be registered as British[21], chief among which are:

[18] http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160321-0004.htm#16032216000129

[19] http://www.legislation.gov.uk/uksi/2016/226/pdfs/uksiem_20160226_en.pdf

[20] This explanation was given in October 2014 in response to an FOI request.

[21] Save for the cases of registration under provisions of the British Nationality Act 1981 relating to statelessness, there is a good character requirement for all those aged 10 or above (section 41A commenced on 13 January 2010).

- **Section 1(3):** applies to children born in the UK, who are entitled to be registered as British if during their childhood either parent becomes a British citizen or settled

- **Section 1(4):** applies to children born in the UK, who are entitled to be registered as British if they have spent the first ten years of their lives in the UK[22] (with absences of no greater than 90 days in any of those years unless there are special circumstances[23])

Prior to the commencement of the 1981 Act on 1 January 1983, any child born in the UK was British by birth.[24] The green and white papers, which preceded the Bill that became the 1981 Act, and Ministerial statements during its passage, make clear the intention that changes to this rule of *jus soli* were to ensure British citizenship was the right of those with sufficiently close personal connection to the UK.[25] In Standing Committee F, the Minister, Mr Timothy Raison MP, referred to the concerns regarding the previous position:

> *The Green Paper noted that the jus soli method conferred citizenship indiscriminately on all who happened to have been here, even if the mother was on route somewhere else. It also confers citizenship on children who, though born here, may be brought up and live their lives abroad. The Green Paper even took note of children whose parents, though entirely unconnected with the United Kingdom, have arranged for the child to be born here to acquire citizenship for its possible usefulness later.*

Sections 1(3) and 1(4) of the Act concern the circumstances in which those who prior to the Act would have been British at and by birth, shall have that entitlement preserved by the opportunity to register where it is subsequently demonstrated that *their* connection is to the UK (even though at the time of their birth in the UK this was not so or insufficiently clear because neither parent was British or settled).

A distinct group of children also entitled to register as British citizens are stateless children born in the UK, who are entitled to do so after any five years' period of continuous residence in the UK provided they seek to register before their twenty-second birthday and have remained stateless since birth.[26]

Children's applications to be registered as British citizens at discretion

The British Nationality Act 1981 includes provision whereby children not born in the UK may apply to be registered as British:

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[22] Unlike in the case under section 1(3), a child entitled to register as a British citizen under section 1(4) retains this entitlement into adulthood.

[23] See section 1(7) of the British Nationality Act 1981

[24] An exception to this related to children born to diplomats in the UK.

[25] Relevant statements from *Hansard* and the green and white papers are available in the PRCBC report, *Systemic obstacles to children's registration as British citizens* at https://prcbc.files.wordpress.com/2015/08/systemic-obstacles-on-the-registration-of-children-as-british-citizens.pdf

[26] Section 36 and Schedule 2 to the British Nationality Act 1981 include further provisions for the reduction of statelessness.

- **Section 3(1):** applies to any child, who may be registered at the discretion of the Secretary of State

This preserved the discretion under section 7(2) of the British Nationality Act 1948 permitting the Secretary of State to register a child as British.

Secretary of State's duties to children

In November 2008, the Secretary of State withdrew the UK's reservation to the 1989 UN Convention on the Rights of the Child concerning immigration and citizenship. At least from that time, the Secretary of State has been bound under Article 3 to ensure primary consideration is given to the best interests of the child in exercising her nationality functions. (Articles 7 and 8 of the Convention expressly require States Parties to ensure and respect children's nationality rights.)

In November 2009, the Secretary of State became subject to the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children in the UK.[27]

The Secretary of State must also ensure that in exercising her nationality functions she does not disproportionately interfere with the right to respect for the private and family life of a child under Article 8 of the 1950 European Convention on Human Rights.[28]

The impact assessment (*op cit*) makes no reference to children's registration cases, indicating that no regard was had to any of these duties when it was done. Whereas this impact assessment was a business and economic assessment, it remains the only impact assessment done on the 2016 fees. It did promise a policy equality statement would be produced.[29] In October 2016, PRCBC requested and received disclosure of an October 2016 revised copy of this statement. The initial and revised statements appear not to be in the public domain. The revised policy equality statement makes no mention of children seeking to register their entitlement to British citizenship.[30] In a further Freedom of Information request, confirmation was received that there has been no Impact Assessment carried out on the fee charge scheme in relation to children's registration as British citizens.[31]

***R (Williams) v Secretary of State for the Home Department* [2017[EWCA Civ 98**

In *R (Williams)*, the Court of Appeal dismissed the appellant's submissions that the failure to provide for a fee waiver where a child was unable to afford the registration fee was

[27] This duty is supported by statutory guidance: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf

[28] See *Genovese v Malta* [2012] 1 F.L.R. 10, ECtHR; *Williams v SSHD* [2015] EWHC 1268 (Admin); *SA v SSHD* [2015] EWHC 1611 (Admin); and Johnson v SSHD [2016] UKSC 56
Paragraph 6 of The Explanatory Memorandum to the Immigration and Nationality (Fees) (Amendment) Order 2017 contains a statement that the provisions in the Fees Order 2017 is compatible with the Convention rights http://www.legislation.gov.uk/ukdsi/2017/9780111153017/pdfs/ukdsiem_9780111153017_en.pdf

[29] Section L, page 17

[30] FOI 41226, 4 October 2016

[31] FOI 41228, 31 October 2016

unlawful. The judgment makes only brief reference to the 1989 UN Convention on the Rights of the Child. No consideration is given to the Secretary of State's statutory duty under section 55 of the 2009 Act, nor the express priority given to that duty in section 71 of the Immigration Act 2014 over the other, including fee, provisions in the 2014 Act. This latter is unsurprising since the court was there considering fee provisions that are now superseded by section 68 of the 2014 Act.

Nonetheless, it was expressly conceded in argument that no fee should be charged if to do so would result in a breach of a child's Article 8 right to private and family life. This concession was made in the course of argument by the Secretary of State that fee exemptions "*generally only exist to ensure compliance with international obligations*". However, as highlighted by the absence of any impact assessment specific to children of the registration fee, let alone regarding children's best interests and welfare, it is clear that the Secretary of State has simply not considered her international (nor domestic) duties to children.

The judgment in *R (Williams)* also reflects the continued failure to appropriately distinguish immigration and nationality law, including in the assumption of the court (also made below by the High Court) that children wishing to exercise their entitlement to register would first have become entitled to leave to remain under the immigration rules. Citizenship is not merely an alternative means by which a child may lawfully stay in the UK; and, as PRCBC's experience confirms, by law and in practice, delay in registration of a child's citizenship may result in the loss of her or his entitlement.

Conclusions

Taken together, these various distinctions and duties require specific consideration in the treatment of applications made by children for registration as British citizens. Yet, no such consideration has been given in respect of the fee for registration. The failure here is multifaceted.

- The Secretary of State has not considered the distinction between nationality law and immigration law and policy as this affects children. She has specifically not considered the distinction between the entitlement to citizenship conferred by parliament upon children under section 1(3) and (4) of the British Nationality Act 1981, as distinct from the conferment of power upon her to determine the criteria and circumstances in which a person (including a child) may be granted entry or stay in the UK.

- The Secretary of State has not considered the distinction within nationality law between entitlement and discretion – as, for example, between a child's entitlement to citizenship and her power to naturalise an adult under section 6(1) of the British Nationality Act 1981.

- The Secretary of State has not considered the distinction within nationality law as regards the exercise of discretion in relation to section 3(1) of the British Nationality Act 1981 (concerning children) and her power to naturalise an adult under section 6(1), including the specific duties she owes to children in this regard.

- In failing to consider or apply these distinctions, the Secretary of State has generally failed to consider the impact on children and their best interests.

Recommendations

A charge of £973 for a child to register as British is exorbitant and prohibitive. Even assuming the Home Office assessment of £386 is a reasonable assessment of the cost of administering such an application, the following should be done:

The profit element of the fee in children's registration cases should be removed altogether:

- In the case of registration by entitlement – e.g. under section 1(3) and (4) – the child is entitled to British citizenship, the Secretary of State has no discretion about registering that entitlement and is not being asked to bestow any benefit on the child other than recognition of the right bestowed on the child by parliament.
- In the case of all registration cases by children – including by discretion under section 3(1) – ensuring primary consideration to the child's best interests is not compatible with the Secretary of State demanding a profit to register the child's citizenship.

There should be a waiver for children whose carers are unable to afford the fee to register:

- A child should not be excluded from his or her entitlement to British citizenship on the basis of impecuniousness of a parent or other carer.
- In the case of all registration cases by children – including by discretion under section 3(1) – ensuring primary consideration to the child's best interests is not compatible with the Secretary of State demanding a fee to register the child's citizenship in circumstances where that fee is unaffordable.

There should be no fee charged for a child for whom a local authority is exercising responsibilities under the Children Act 1989 to register:

- The application of a fee in the case of a child for whom a local authority is exercising responsibilities under the Children Act 1989 constitutes in effect a mere transfer of public funds from local to central government; in respect of a matter the cost of which central government controls. It is of no benefit to the public and serves no purpose other than to deter a local authority from pursuing a registration application for a child.
- In the case of all registration cases by children – including by discretion under section 3(1) – ensuring primary consideration to the child's best interests is not compatible with the Secretary of State requiring a fee that would fall upon a local authority in circumstances where this may deter that authority from acting to secure the child's citizenship.

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[32] The authors have been published on various matters concerning children's registration, including that of the fee, in *LegalVoice*; see http://www.legalvoice.org.uk/author/solange-valdez-and-steve-symonds/

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Case examples:

J was born in the UK. His mother referred him to PRCBC when he was six years old. By that time, his parents had separated due to the father's domestic violence. His mother was

aware the father had recently been granted indefinite leave to remain in the UK. Her church contributed a small donation towards the fee for her son to be registered. Over a period of nine months, she would lodge small sums of money with PRCBC until there was enough to pay the fee. This – along with the challenges of securing evidence of the father's status and violence – made J's a complicated case, which PRCBC dealt with exceptionally by keeping his file open requiring it to be periodically reviewed and supporting statements updated over an indefinite and extended period. (There is no legal aid for these cases; and PRCBC is not able to keep files open waiting to see whether sufficient funds will be available to pay a fee.) *The delays in this case were discouraging to J's mother, and in other cases delays including those caused by the need to raise funds to pay the fee have ultimately led to a parent not pursuing a child's registration.*

D, who was three years old when he was brought to the UK, was in receipt of assistance from social services. He had been offered a place at drama school. He had no leave to remain. He was referred to PRCBC as he was approaching his eighteenth birthday. They were able to assist him to apply to register as a British citizen. However, he could not afford the fee and the local authority refused to pay it. Had someone not donated to cover the fee, D would have lost his opportunity to be registered on turning 18.

E was born in the UK. She was taken into care aged five, at which time she was wrongly assumed to be British. She was a young adult when referred to PRCBC because her status had then been called into question by the Department of Work and Pensions. Social services, from whom she continues to receive assistance, initially offered to pay the fee for her to register as a British citizen, but while her application was being prepared decided not to do that. E has still not been registered. In addition to the fee, she faces other hurdles to securing the citizenship to which she is entitled – particularly in securing evidence to show she was resident in the UK for the first ten years of her life. Seeking to piece together the evidence is made more difficult by personal complications, some of which have led to her being sectioned on several occasions during her childhood. E's will to address these other hurdles is undermined by the fact that she still does not have the necessary fee to register her British citizenship – now £1,163 because she has turned 18.