R (PRCBC & Ors) v Secretary of State for the Home Department
Strategic litigation seeking to challenge the fee for children's registration of British citizenship

This note is for all organisations engaged in this case, particularly their policy advisers and advocates, to ensure a correct understanding of children's registration in British nationality law.[1]

This is of especial importance:

- in securing children's access to their rights to British citizenship
- to the success of this litigation in challenging the Home Office fee; and
- in securing a judgment that will assist advocacy and litigation of other matters concerning citizenship rights.

What is the case about?

This case is about the lawfulness of the Home Office fee of £1,012 for a child to register as a British citizen. The case is due to be heard in the high court at a three day hearing on 26-28 November 2019.

Before the British Nationality Act 1981, anyone born in the UK was born British. The Act ended this. Since the Act, someone born in the UK is only a British citizen if one of their parents is a British citizen or one of their parents is settled in the UK. The main rights for children to register as British citizens under the Act are intended to mitigate the ending of automatic citizenship by birth so that all children born and growing up in the UK are equally recognised as British citizens.

The Home Office states that the fee of £1,012 is made of two parts: £372 is the administrative cost of processing registration; £640 is a profit element to finance the immigration system.[2] This case challenges the lawfulness of charging any fee where a child cannot afford it. It also challenges the lawfulness of the profit element in all cases.

There are currently three claimants. Two of the claimants are individual children challenging the fee that stands in the way of securing their British citizenship. Both claimants were born in the UK. The other claimant is PRCBC. PRCBC, by its work, experience and expertise, is able to represent the interests of children from a wider range of circumstances.[3] This includes children who have grown up in the UK but were not born here, including many children in care.

[1] A fuller understanding of the law and policy that lies at the heart of this case is available from the joint PRCBC and Amnesty International UK briefing here:
https://prcbc.files.wordpress.com/2019/03/fees_briefing_revised_march_2019.pdf
[2] The Home Office sets out what it says is the administrative cost of registration in the table here:
https://www.gov.uk/government/publications/visa-fees-transparency-data
[3] The British Nationality Act 1981 includes many provisions for registration of British citizenship. They are not all set out in this note. Any of these provisions could apply to a child. Some children may benefit from more than one. Some of them also apply to adults (but these must not be confused with the fundamentally different provision for naturalisation of adults).

The witness statement of PRCBC's director in support of this challenge is appended to this note. It provides further information about the rights at stake and the children affected.

Academic researchers have estimated there to be around 120,000 children in the UK without British citizenship, around 65,000 of whom were born in the UK.[4] In 2018, more than 40,000 children applied to be registered as British citizens.[5]

Distinction between nationality law and immigration law

Nationality law is not a part of immigration law and policy. The primary sources for these two areas of law are found in different Acts of Parliament. It is important not to treat these areas of law as the same or similar.

The British Nationality Act 1981 establishes who is and who is not a British citizen and who is entitled to citizenship.[6] The Act does not give to the Home Secretary the decision whether someone is entitled to citizenship.

This is completely different to how the Immigration Act 1971 works. That Act empowers the Home Secretary to set out rules by which he decides whether someone other than British citizens may enter or stay in the UK.

The above distinction is important to why the Home Secretary's power to set fees for registration of British citizenship cannot be treated in the same way as his power to set fees for immigration applications. The rights at stake are fundamentally different.

Distinction between registration of British citizenship and naturalisation

Registration is fundamentally different to naturalisation. All registration under the British Nationality Act 1981 (with one exception – see below) is by entitlement. A child[7] who satisfies the relevant criteria for registration is entitled to British citizenship. The role of the Home Secretary is simply to recognise the child's legal right and register the child's citizenship.

By contrast, an adult migrant to the UK may be naturalised as a British citizen only at the discretion of the Home Secretary. Unlike with registration rights, it is the role of the Home Secretary to decide whether an adult applying to naturalise should be made a British citizen. Only adults can be naturalised. In all cases, they must first have secured indefinite leave to remain.[8] Because naturalisation is the culmination of an adult migrant's journey through the immigration system, it is often described as the route, path or pathway to citizenship. However, naturalisation has nothing to do with registration.

[4] See https://www.compas.ox.ac.uk/project/undocumented-migrant-children-in-the-uk/
[5] FOI obtained by PRCBC (Nos. 53372 & 53656)
[6] The two PRCBC leaflets at the following link concisely explain the main relevant citizenship rights: https://prcbc.org/information-leaflets/
[7] The same applies to adults with registration rights under the Act.
[8] Indefinite leave to remain (or enter) is also referred to as being settled. It is often granted after a defined period of lawful residence in the UK. Permanent residence, in the case of people exercising EU Treaty rights is equivalent to indefinite leave.

The above distinction between registration and naturalisation was made explicit by Ministers during the passage of the British Nationality Act 1981.[9] The distinction is important to why the Home Secretary's power to set fees for registration of British citizenship cannot be treated in the same way as his power to set fees for naturalisation.

Distinction between registration by entitlement and registration at discretion

The British Nationality Act 1981 includes a general power for the Home Secretary to register any child as a British citizen. This is the only provision in the Act for registration at discretion (as opposed to by entitlement).

This discretionary power is important to children in a variety of situations. There are children brought to the UK at a young age and who grow up here. In most cases, these children do not have an entitlement to register as British citizens. There are also children who have an entitlement to register but cannot get the evidence to prove their entitlement. There are even children who are British citizens but cannot get the evidence to prove this.[10]

The distinction between registration by entitlement and at discretion is important. However, the Home Secretary's discretion to register a child should not be treated in the same way as his discretion to naturalise an adult migrant (see above). The discretion to register a child is not subject to any statutory criteria. An important reason for this is that the discretion is generally intended to ensure all children growing up in the UK whose connection and future is in this country should be British citizens.[11]

Parliament set out in the British Nationality Act 1981 the circumstances it considered sufficient to demonstrate a child's connection to the UK. Where these are met, the Act either recognises the child as a British citizen or ensures the child is legally entitled to British citizenship (by registration). However, Parliament recognised there would be various situations in which children also connected to the UK would either not satisfy the criteria in the Act or be unable to prove this. It, therefore, needed to maintain a general discretion to register to ensure these children also grew up as British citizens.

Home Office 'justifications' for the registration fee

The distinctions set out in this note are neglected by the Home Office. This can be seen by the way it seeks to justify the registration fee. This is an important matter at the heart of this case.

Home Office impact assessments on fees are economic assessments (not e.g. assessments of children's best interests).[12] They do not consider impact on children or their rights. They do not consider registration. The assessments (which underpin all nationality and immigration fees) simply ignore the distinctions set out in this note. The only consideration of nationality is of naturalisation. These economic assessments are founded on a 2012 Migration Advisory Committee (MAC) report.[13]

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[9] PRCBC's commentary on the parliamentary debates on the British Nationality Act 1981 highlights this: https://prcbc.files.wordpress.com/2018/11/commentary_-hansard-bna-1981-_registration_aug-2018.pdf

[10] This is discussed further in the LegalVoice article here: http://legalvoice.org.uk/british-born-children-entitled-citizenship-caught-evidence-trap/

[11] PRCBC's commentary on the parliamentary debates on the British Nationality Act 1981 highlights this: https://prcbc.files.wordpress.com/2018/11/commentary_-hansard-bna-1981-_registration_aug-2018.pdf

[12] The February 2018 impact assessment is here: https://www.legislation.gov.uk/ukia/2018/59/pdfs/ukia_20180059_en.pdf

[13] https://www.gov.uk/government/publications/analysis-of-the-impacts-of-migration

The Home Office seeks to justify fees on the basis, it says, that those who benefit from the immigration system should pay for that system.[14] Its ambition is to make the immigration system self-financing.[15] It also uses profit made on some applications (including registration applications) to subsidise certain immigration applications (e.g. the EEA settled status scheme and visitor visas).[16] These 'justifications' are exposed as false if it is understood that registration of British citizenship:

- is not an aspect of immigration law and policy;
- is not like naturalisation (which is related to immigration); and
- is not the giving of a benefit (citizenship) to the child but recognition of the right to citizenship already given by law.

There are no fee waivers or exceptions for children's registration.[17] The Home Office seeks to justify this on the basis that waivers and exceptions are available for some children to apply for leave to remain.[18] It also says that children can wait. This is another way the Home Office wrongly treats children's citizenship rights as either an immigration matter or equivalent to an immigration status.

Some further language considerations and other guidance

This case is about nationality (not immigration). It is largely about children born in the UK. They are not migrants. It is also about children brought to the UK at a young age whose connection is clearly to this country. They may not perceive of themselves as migrants; and their rights to British citizenship by reason of connection to the UK are intended to foster their British identity.

This case is about children (not parents). The rights at stake are the rights of children to registration. These rights are independent of the rights or status of a parent.[19] While a parent's future and status may be affected by registration of a child as British, it is unhelpful to suggest (or invite the thought) that the motivation or importance of registration is to secure a status for the parent.

This case is about rights to citizenship (not the 'benefit' of citizenship). Citizenship is of very great importance to children. Its importance is significantly a matter of identity, belonging and security (including being free from Home Office immigration powers and controls). However, it is unhelpful to speak of the 'benefit' as distinct from the 'importance' of citizenship because adopting the language of 'benefit' merely repeats how the Home Office wrongly seeks to justify the registration fee.

This case is about registration fees (not immigration or naturalisation fees). As highlighted in this note, the Home Office wrongly treats registration, naturalisation and immigration fees all the same. It offers the same explanation and justification for these fees. It is harmful to the claimants' challenge to adopt or appear to adopt the same approach.

It is unhelpful to emphasise alternative sources of finance for fees. The claimants seek to avoid any suggestion that there are viable options for children to raise the fee. Children should not have to raise funds to pay for their registration rights (particularly where these rights are by entitlement). It is also PRCBC's experience that there are no viable options for many children.

[14] This is confirmed in impact assessments.
[15] This is confirmed in impact assessments.
[16] *Hansard* HL, 23 October 2018 : Columns 764-765 *per* Baroness Manzoor, Minister of State
[17] The Home Secretary has introduced no fee waivers or exceptions for children's registration despite having power to do so by regulations which can be made very quickly.
[18] *Hansard* HL, 12 June 2018 : Columns 1674-1675 *per* Baroness Manzoor, Minister of State
[19] In some cases, the right to registration may derive from the immigration or citizenship status of a parent. In many cases, however, the parent's status is entirely irrelevant to a child's right to register as a British citizen.

Someone born in the UK who has never left is not unlawfully present. As a matter of law, someone born in the UK who remains in the country is not here unlawfully.

The harms done to children if they are unable to register as British citizens are just like the harms done to people of the Windrush generation. The harms include harm to children's identity, sense of belonging and security. The harms include more tangible things including the risk of being removed from the UK. PRCBC's experience is that the Home Office pursues removal against children it knows to have an entitlement to British citizenship. The harms can also cross generations. A child unable to register as a British citizen may later be the parent of a child who for that reason is not born British. More detail of the harms done to children is given in paragraph 18 of the appended witness statement.

Only some of the children this case concerns are stateless. None of the individual claimants are (or ever were) stateless. Most of the children this case concerns are not stateless because they have the nationality of one or other of their parents. This case is not, therefore, largely about statelessness. It is about recognition of the rights of children, born or otherwise connected to the UK, to its citizenship. However, some children are stateless and have an entitlement to register as a British citizen because they are stateless. The fee applies to them. One injustice of the fee, therefore, is that it is a potential barrier to meeting the UK's international law obligations to reduce statelessness; or that it is financial exploitation of rights based on these obligations.

What the claimants are seeking

Ultimately, the claimants wish to secure a change to the fee to ensure at a minimum:

- The profit element of the fee in children's registration cases should be removed altogether.
- There should be a waiver for children whose parents or carers are unable to afford the fee to register.
- 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 Claimants

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