Reasserting Rights to British Citizenship Through Registration: Judicial Review of the Registration Fee

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At a glance

In our previous article for this journal, 'Reasserting Rights to British Citizenship Through Registration', we reviewed the origins of British citizenship and the parliamentary purpose of creating a citizenship of the UK that is founded upon a principle of 'connection to the UK'. In doing so, we explained how and why rights of registration as a British citizen under the British Nationality Act 1981 were as vital a part of this new determination of citizenship of the UK as the rights of automatic acquisition such as by birth or commencement of the Act. The decision of the High Court in *R (Project for the Registration of Children as British Citizens, O & A) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin) provided an opportunity to reassert these rights of registration in their proper place in the determination Parliament had made. There were, and remain, several barriers in law, policy and practice to that. Parliament's original intention in legislating for rights of registration under the 1981 Act has undoubtedly been significantly damaged over the years since the passing of that Act. These barriers include prohibitive fees set at above administrative costs for registration as a British citizen, which were the subject of the claims brought by the Project for the Registration of Children as British Citizens (PRCBC), O and A in the High Court.

The litigation of those claims is now concluded. As explained in this article, the courts have resolved two questions of law. One was resolved in favour of the claimants by the Court of Appeal in *R (Project for the Registration of Children as British Citizens & O) v Secretary of State of the Home Department* [2021] EWCA Civ 193 and, much more recently, has been acted upon by the Secretary of State. The other was resolved against the claimants by the Supreme Court in *R (O & Project for the Registration of Children as British Citizens) v Secretary of State of the Home Department* [2022] UKSC 3. In our previous article, we had argued for a reappraisal of the rights to citizenship by registration in the 1981 Act to, as we put it, reassert them. As explained in this article, the Supreme Court judgment constitutes a disappointing setback in that regard. However, changes to the fee in response to the Court of Appeal judgment, albeit implemented since the judgment of the Supreme Court, constitute a significant advance. This article seeks to explain this and its implications for where matters concerning rights of registration currently stand.

In December 2019, the High Court gave judgment in *R (Project for the Registration of Children as British Citizens, O & A) v Secretary of State for the Home Department*.[1] This provided significant impetus to calls for a reappraisal of the way in which successive Governments and Parliaments have in the years since the commencement of the British Nationality Act 1981 treated rights to be registered as a British citizen under that Act. The basis for such calls is more fully expanded upon in our previous article for this journal, *Reasserting Rights to British Citizenship Through Registration*.[2] In short, the Act made a new determination of the UK's citizenship and citizenry. It did so by establishing rights to citizenship based on connection to the UK and, in its various provisions for acquisition of citizenship by right, set out the connection that Parliament determined was sufficient to identify someone as British by connection to the UK. Those rights of acquisition importantly include rights of registration. The error of successive Governments and Parliaments has been to dissociate these rights of registration from the other rights of acquisition of citizenship. In doing so, increasingly prohibitive barriers – including fees – have been introduced that wrongly deprive people, many of whom are children, of their citizenship rights.

The ultimate purpose of the present article is to evaluate the current position regarding rights to British citizenship by registration in the light of judicial review of the fee for children to be registered as citizens. The litigation brought by the Project for the Registration of Children as British Citizens (PRCBC) and two children, O and A, is now resolved. That litigation comprises judgments of the High Court, Court of Appeal and Supreme Court. Ultimately, these courts have resolved two distinct questions of law – one in favour of the claimants and one in favour of the Secretary of State.

Section 1 of this article provides a short recap of the litigation and the decisions of the High Court and the Court of Appeal. It summarises the main issues before these courts, how they resolved them and which of these main issues progressed to the Supreme Court and which did not. Section 2 provides an analysis of the Supreme Court judgment. For reasons explained in that section, the Supreme Court's conclusion and reasoning constitutes a significant setback for the reappraisal of rights to British citizenship by registration for which we called in our previous article and, arguably, for citizenship rights more broadly. However, the claimants' success in the courts below was not disturbed by the Supreme Court. Section 3 evaluates how that success in the courts below has been addressed by the Secretary of State since the Supreme Court's judgment. In contrast to the Supreme Court judgment, the changes made to the fee for children to be registered as British citizens represents a significant advance for the reappraisal for which we have argued. Section 4 provides a short conclusion as to where this leaves matters.

1. The PRCBC fee litigation

It is important to briefly recall the judgments of the High Court and Court of Appeal that preceded the Supreme Court. These judgments include findings of law and fact that were not in issue before, and which have led to important developments since the judgment of, the Supreme Court.

1 [2019] EWHC 3536 (Admin).

2 Solange Valdez-Symonds and Steve Valdez-Symonds, 'Reasserting Rights to British Citizenship Through Registration' (2020) 34(2) JIANL 139.

In brief, there were two main grounds for the judicial review claim before the High Court in *R (Project for the Registration of Children as British Citizens, O & A) v Secretary of State for the Home Department*. By a judgment given in December 2019, the claimants succeeded on one of these grounds and were unsuccessful on the other. The ground on which the claimants succeeded was that the Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 were unlawful insofar as they set a fee of £1,012 for children to be registered as British citizens without having had regard to the best interests of children. This first ground is referred to in this article as 'the best interests ground'. The other ground, on which the claimants were unsuccessful, was that these regulations were unlawful for having set the fee at a level that rendered the statutory rights of children to be registered as British citizens nugatory and so were *ultra vires*. The general powers to set nationality and immigration fees contained in the Immigration Act 2014 did not, argued the claimants, empower the Secretary of State to render these specific nationality rights in the British Nationality Act 1981 nugatory. This second ground is referred to in this article as 'the *vires* ground'. On this ground, Jay J in the High Court had described the claimants' arguments as 'powerful and sustained'[3] but concluded that he was bound by an earlier decision of the Court of Appeal[4] to reject them.[5]

The claimants and the Secretary of State each appealed to the Court of Appeal against the High Court's decision on the ground on which they had lost. In February 2021, the Court of Appeal in *R (Project for the Registration of Children as British Citizens & O) v Secretary of State for the Home Department*[6] upheld the High Court on each ground. Accordingly, the claimants were again successful on the best interests ground and unsuccessful on the *vires* ground. However, on the *vires* ground, Singh LJ had expressly stated that he would see 'considerable force' in the claimants' arguments 'if the matter were free from authority',[7] and Nicola Davies LJ had stated her agreement with his judgment.

At this point only the claimants sought and were permitted to appeal. Accordingly, it was only the *vires* ground that came before the Supreme Court. The Secretary of State, however, did not immediately address the failure, which she now accepted, to have regard to the best interests of children. Instead, she decided to wait for the Supreme Court to decide the *vires* ground before considering the best interests of children and determining what should be done with the fee in the light of their best interests.

When the claimants' appeal came before the Supreme Court, therefore, both the matter of best interests and the matter of *vires* were outstanding – but in different senses. The first had been resolved in the litigation but was outstanding in the sense that it remained necessary for the Secretary of State to act on the findings of the courts. The second was still to be resolved in the litigation. Section 2 of this article addresses the Supreme Court judgment and the way in which that court resolved the *vires* ground. Section 3 addresses the steps taken by the Secretary of State, after the Supreme Court judgment, to act on the conclusive decision of the Court of Appeal that the fee had been unlawfully set for failure to have regard to the best interests of children.

3 [2019] EWHC 3536 (Admin), para 59.

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

5 Jay J had granted the claimants a leapfrog certificate to enable an appeal on the *vires* ground direct from his judgment to the Supreme Court. However, the Supreme Court declined permission to appeal to it direct from the High Court indicating that the Court of Appeal should have the opportunity to consider the *vires* ground.

6 [2021] EWCA Civ 193.

7 ibid, para 119.

2. The Supreme Court judgment

The Supreme Court gave judgment in *R (O & Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*[8] on 2 February 2022. The success of the claimants on the best interests ground no longer being in dispute, there was but one question before the Supreme Court:

> … whether subordinate legislation was *ultra vires* because it set the fee for the exercise by a child or young person of the right to be registered as a British citizen at a level which many young applicants have found to be unaffordable.[9]

On the question of whether the regulations setting the fee for a child to be registered as a British citizen were *ultra vires* there was but one judgment given by Lord Hodge, with which the four other justices agreed. Lady Arden gave a separate judgment solely upon the role of pre-legislative material in statutory interpretation. This article does not address the matter to which Lady Arden's judgment relates.

The question of the regulations' *vires* required the court to consider two Acts of Parliament – the British Nationality Act 1981 and the Immigration Act 2014. The former gives statutory rights to British citizenship. The latter provides the Secretary of State powers to set fees by secondary legislation that relate to her various nationality and immigration functions. In summary, the question before the court was whether the powers delegated to the Secretary of State by the 2014 Act to set fees could lawfully be exercised in a way that rendered nugatory the rights of children to British citizenship under the 1981 Act.

In the court below, Singh LJ (with whom Nicola Davies LJ had expressly agreed) had summarised the relevant question of principle that arose:

> … What is crucial, as a matter of principle, in my view, is that there is a hierarchy of legislation: primary legislation is enacted by Parliament and is superior to secondary legislation, which is made by the executive pursuant to powers delegated to it by Parliament. If there is a conflict between primary legislation and secondary legislation, it is the latter which must give way.
>
> … the question is one of statutory interpretation: what is the will of Parliament in conferring the power to make secondary legislation on the executive? In answering that question, one has to read all the relevant legislation and consider whether it was the intention of Parliament that a statutory right which it itself has conferred on a person is capable of being rendered nugatory by secondary legislation made by the executive.[10]

Singh LJ drew upon the Court of Appeal judgment in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for Social Security*[11] (*ex parte JCWI*) and his own judgment in *R (Al-Enein) v*

8 [2022] UKSC 3.
9 ibid, para 1.
10 [2021] EWCA Civ 193, paras 121 and 122.
11 [1997] 1 WLR 275.

Secretary of State for the Home Department.[12] In so doing, he referred to what Waite LJ had said in his concurring judgment in *ex parte JCWI*:

> The principle is undisputed. Subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with the statutory rights already enacted by other primary legislation.[13]

However, the Supreme Court did not agree with this formulation. It emphasised that the sole question was, if it is asserted that subordinate (or secondary) legislation made under one Act impinged upon rights established by an earlier Act, whether the enabling power in the second of the two Acts permitted that,[14] whether expressly or by necessary implication.[15] This was, as Singh LJ had said, a matter of statutory interpretation. The relevant principles of such interpretation were reviewed by the Supreme Court. In short, the role of the court is to identify the meaning of the words that Parliament has used. Resort to ministerial statements in the debates of a Bill is permitted only where there is some ambiguity, obscurity or absurdity in the words that the court needs to resolve and only if these statements are themselves clear and unequivocal on the point of interpretation that is before the court. Where fundamental rights are at stake, following *R (Simms) v Secretary of State for the Home Department* (*ex parte Simms*),[16] however, the court will more rigorously scrutinise the statutory language to ensure Parliament has squarely confronted any constraint or interference with those rights. The Supreme Court cited from the judgment of Lord Hoffmann in *ex parte Simms*, including:

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[17]

The Supreme Court also cited from the judgment of Lord Reed in *AXA General Insurance Ltd v HM Advocate*:

> The principle of legality means not only that Parliament cannot override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.[18]

The Supreme Court emphasised that this more rigorous scrutiny only applied if 'the court is dealing with an interference by statute with a common law constitutional right or with a

12 [2019] EWCA Civ 2024.
13 [1997] 1 WLR 275, 293E.
14 [2022] UKSC 3, para 40.
15 ibid, para 42.
16 [2000] 2 AC 115.
17 ibid, 131.
18 [2011] UKSC 46, para 152.

statutory provision which declares such a fundamental or constitutional right'.[19] In relation to that, it held:

> In this appeal the court is not dealing with a vested right at common law or under statute but with a statutory procedure for registration by which a person can acquire British citizenship and the important rights which it confers by making an application which is subject to conditions specified by Parliament. In this context the rigorous rule of statutory construction of which Lord Hoffmann spoke in *Simms* and which Lord Reid described in *AXA* (para 33 above) is not in play.[20]

Having regard to all the foregoing, there were three considerations that arose on the appeal before the Supreme Court that might have led it to conclude that the 2014 Act had not empowered the Secretary of State to impose a fee that deprived a large number of children of the rights to British citizenship given to them by the 1981 Act.[21] These three considerations are discussed below under discrete subheadings.

2.1 The nature of rights to British citizenship

The first of these considerations was the nature of the rights at stake. The Supreme Court acknowledged that British citizenship and rights to it are important:

> It gives a right of abode in the UK which is not subject to the qualifications that apply to a non-citizen, including even someone who has indefinite leave to remain. It gives a right to acquire a British passport and thereby a right to come and go without let or hindrance. It can contribute to one's sense of identity and belonging, assisting people, not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large.[22]

As the Supreme Court observed, British citizenship and rights to it are creatures of statute – specifically the British Nationality Act 1981. The appellants before the court submitted that the Act 'was a constitutional settlement which conferred statutory entitlement to citizenship in section 1(4)'[23] and under several other sections of the Act providing rights to citizenship.[24] The rights to British citizenship conferred by the Act were of especial importance given their manifest connection to rights to live in and participate in the political life (not to mention the social, economic and cultural life) of the UK.[25] The Supreme Court, however, without

19 [2022] UKSC 3, para 43.
20 ibid, para 43.
21 As the Supreme Court stated: 'On this appeal it is not disputed that a large number of children and their families cannot afford the fee …': [2022] UKSC 3, para 20. Home Office estimates of the number of children affected is included in *Child Citizenship Affordability Fee Waiver Impact Assessment 2022*, HO0415, 16 May 2022.
22 [2022] UKSC 3, para 26.
23 ibid, para 21.
24 These include rights of acquisition that are automatic as, for example, under s 1(1) of the British Nationality Act 1981 and rights that are by registration as, for example, under s 1(4) of that Act.
25 [2022] UKSC 3, para 21.

dismissing – and indeed agreeing with – much of this, emphasised that the appeal did not raise any matter of:

> … interference by statute with a common law constitutional right or with a statutory provision which declares such a fundamental or constitutional right …[26]

It considered that this was sufficient for it to reject any argument that any more rigorous approach to statutory interpretation than normal was required. Indeed, the final paragraphs of the Supreme Court's judgment make clear that the significance of the rights to British citizenship that were at stake was of no consequence to the conclusion that the 2014 Act was sufficient to authorise the setting of the fee at £1,012.

This was notwithstanding the impact, as found by the courts below and no longer in dispute, that many children of low or middle income families were unable to exercise their right to be registered as British citizens.[27] The Supreme Court took note of the underlying parliamentary intention to establish British citizenship as the nationality of all persons connected to the UK. In doing so, it solely referred to rights to that citizenship by way of registration and was silent about the other such rights.[28] However, the principle of connection underpins all statutory rights of acquisition established by the 1981 Act – whether by birth, adoption, registration or commencement.[29] This was the new 'constitutional settlement' to which the appellants had referred. It was revealed in the pre-legislative material, such as the Green and White Papers that preceded the Bill and emphasised in the statutory language of 'entitlement' used in the 1981 Act. Perhaps most of all, it was revealed by the subject matter – the determination of who is to be recognised as a citizen of the UK.

Failing to make the link between the parliamentary purpose in creating British citizenship, the principle of 'connection' that underlies that purpose and its centrality to all rights of acquisition – both those requiring registration and those that are automatic – is to significantly understate the significance of rights of registration. It risks improperly paring off registration rights from their place at the heart of Parliament's determination of citizenship of the UK. It is not possible to determine from the judgment whether the Supreme Court intended that, but the result is potentially undermining of citizenship rights across the board. There is no obvious reason to expect that other rights of acquisition may be put at further risk by any future enactment of Parliament that may empower the Secretary of State to, in some way, impinge on or remove citizenship rights at birth or by adoption.[30] Nonetheless, the Supreme Court's judgment offers little if any support for the notion that the right to British citizenship is of any constitutional or fundamental importance.

As others have pointed out,[31] this is a disturbing conclusion. It appears to strike at the very heart of the legitimacy of parliamentary authority and the courts' respect for that – at least insofar as that legitimacy is founded upon any principle relating to the right of citizens to equal and democratic political participation. Excluding a person from her, his or their right to citizenship is to exclude them from that participation, or at the very least to significantly constrain it. Treating rights to citizenship, unlike the right to free speech and access to justice,

26 ibid, para 43.
27 ibid, para 20.
28 ibid, para 27.
29 As discussed in 'Reasserting Rights to British Citizenship Through Registration' (n 2) 139.
30 We make no comment here on powers to strip a person of their British citizenship.
31 Paolo Sandro, *A 'political' constitution, but for whom?*, UK Constitution Law Association, 23 February 2022.

as not fundamental rights in the sense identified by Lord Hoffmann in *ex parte Simms*, permits these rights to be cut down by language in primary or subordinate legislation that is made in general terms. That enables the exclusion of people from the political participation that is their right and upon which the legitimacy of the parliamentary authority, at least in significant part, depends. It is to take the risk, as expressed by Lord Hoffmann,[32] that the full implications of unqualified statutory language curtailing rights to citizenship may have passed unnoticed during the passage of the 2014 Act, or the subordinate legislation made under it. That is a profound constitutional matter.

2.2 The breadth of the enabling power relied upon

The second consideration that arose on the appeal before the Supreme Court was the exceptional breadth of the enabling provisions and the order and regulations made under them concerning fees. Section 68 of the 2014 Act empowers the Secretary of State to make orders and regulations in relation to fees concerning a very wide range of functions arising from her distinct nationality and immigration responsibilities. That Act, however, makes no express distinction between these various functions. Most significantly, it includes no express recognition that among the nationality functions to which it applies is the function of formally registering the right of a person entitled to British citizenship as such a citizen. That is a function that is manifestly of a different nature to the many other functions to which fees are applied.

The fees that are set relate to well in excess of 150 different functions. Nearly all of these relate to immigration functions including a host of different applications that may be made for a visa to come to the UK, a similarly large number of applications that may be made to permit someone to extend their stay in the country, applications that may be made to grant someone permission to stay permanently, applications by educational institutions and various businesses to be permitted to sponsor people to come to study or work respectively, and fees and rates relating to services in connection with processing or making some of these various applications. These various functions for which the 2014 Act also permits a fee to be made neither concern any statutory right nor concern any matter of British citizenship. They are not concerned with any constitutional settlement of membership of the UK's citizenry as of right.

The Supreme Court set out the relevant provisions of the 2014 Act,[33] and summarised their operative effect. However, although there was argument at the hearing of the appeal on the matter, at no point in its judgment is there consideration of the very wide range of fees to which these provisions apply and the fundamental difference between the overwhelming majority of the functions to which they relate and the statutory rights to citizenship to which the specific fee under consideration relates. Parliament did not on the face of the 2014 Act identify the fundamental distinction between the registration of British citizenship by statutory right and a wide range of immigration-related functions, none of which concern any statutory right still less a right to recognition as a citizen. It appears that the Supreme Court either failed to identify this distinction or considered it irrelevant.

This compounds the concern regarding the Supreme Court's treatment of the first consideration. Each of these considerations – the nature of rights to British citizenship and the breadth of the enabling power relied upon – is dealt with in a way that, on its face, fails to give

32 [2000] 2 AC 115, 131.
33 [2022] UKSC 3, paras 10–16.

appropriate respect to the rights in question. In practice, dozens and dozens of fees are now set by a process that sweeps up fees concerning rights to citizenship with a host of others with no express or obvious implied recognition within the enabling powers of the nature of the relevant fees and vital differences between them. Parliament cannot amend any of the fees orders or regulations presented to it by the Secretary of State and must either reject in total all of these and the fees to which they relate or allow them to pass.

This brings us back again to Lord Hoffmann in *ex parte Simms*. There is every reason to consider that statutory rights to British citizenship did pass unnoticed by Parliament in enacting the 2014 Act; and that the process for making the relevant subordinate legislation does not provide any real or effective opportunity for that to be corrected. The risk of this is passed over in the Supreme Court judgment, presumably because of its conclusions relating to the nature of those rights as discussed above.

2.3 Rendering the rights nugatory

The third consideration was the impact of the fee upon the rights in question. Given the Supreme Court's conclusions concerning the previous two considerations, it was perhaps inevitable that this consideration could be of no weight. However, the Supreme Court's summary of the appeal raises an additional concern:

> It is not disputed that the right to become a British citizen is an important right as citizenship, once obtained, confers significant rights. Nor is it disputed that for many young people and their families the current level of the fees is unaffordable. The difficulties which a young person may encounter from an inability to acquire British citizenship are revealed in the witness statements of teenage applicants which have been made available in these proceedings. It is also not in dispute that a young person's rights to apply to be registered as a British citizen under section 1(4) of the 1981 Act, once acquired, continues throughout that person's life. A person, who has gained an entitlement to apply, can therefore acquire British citizenship later once he or she has obtained the means to pay the current fee.[34]

The concern here relates to the final observation that once the right to citizenship is gained, it can be exercised at some later time.

The Supreme Court made no express ruling on the question. However, treating rights to citizenship as if not rendered nugatory but merely delayed would ignore that certain rights to citizenship by registration are age limited.[35] It would also constitute a grave and indefinite limitation upon the tangible and intangible rights and interests, to which the Supreme Court made brief reference, that are contingent on the acquisition of citizenship – including the sense of identity and belonging, and capacity for social, economic, cultural and political participation. More fundamentally, it would validate a notion that exclusion from full and equal membership of the UK's citizenry was made a minor matter merely by the prospect that an immediately existing right to such membership may be exercisable at some future time. Parliament's creation of rights to citizenship by registration provides no support for any such notion. Indeed, the

34 ibid, para 5.
35 For example, ss 1(3) and 3(1), (2) and (5) each provide for registration of children only.

notion is manifestly inconsistent with the parliamentary purpose and inherently antagonistic to the rights that are at stake.

In 1981, the responsible Minister laid stress upon what he described as 'the fundamental position' during the passage of the Bill that became the British Nationality Act 1981:

> We believe that it is extremely important that those who grow up in this country should have as strong a sense of security as possible.[36]

The High Court had found, on the strength of a 'mass of evidence', that the impact of the fee upon 'countless' children who could not afford it was to make them:

> … feel alienated, excluded, isolated, 'second-best', insecure and not fully assimilated into the culture and social fabric of the UK.[37]

That result is the very antithesis of the purpose clearly elaborated by the Minister concerning the specific rights under consideration in the appeal before the Supreme Court. Indefinite delay of the right to citizenship until such point a child may secure the means to pay the fee perpetuates a child's alienation and insecurity.

The significance of this is compounded in various circumstances. These include where the potentially exclusionary impact of the fee is passed from one generation to another because a child is born without British citizenship, and therefore faced with the future barrier of the fee to be registered as a British citizen, solely because the child's parent has remained unable to register her, his or their own right to British citizenship by reason of that fee. They also include where someone's adulthood is afflicted by the same or similar relative poverty that had affected their childhood, including where that condition persists due to a physical or mental disability preventing the person from earning or earning sufficient to meet the fee.

2.4 Summary

Each of the three considerations above relates to the importance of rights to citizenship by registration. Whether singly or together, they do not appear to receive adequate consideration by the Supreme Court.

In essence, the Supreme Court reached its conclusion in a very straightforward manner, which may be summarised as follows. Parliament had not expressly required the Secretary of State to consider the affordability of the fee when setting the level of it. It had expressly authorised fees to be set above administrative cost. In passing the Immigration Act 2014, Parliament had required the Secretary of State to set a maximum level for fees by order that is subject to the affirmative resolution procedure, and then to set fees by regulations that are subject to the negative resolution procedure. This having been done in relation to the particular fee in question, the impugned regulations were *intra vires*. As for whether £1,012 was a proper amount to charge for a child to exercise her, his or their right to British citizenship:

> The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination.

36 *Hansard* HC, Standing Committee F, 24 February 1981: Col 177.

37 *R (Project for the Registration of Children as British Citizens, A & O) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin), para 21.

> It is not a matter for judges for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level which it has been set.[38]

This is a very disappointing conclusion. That is only in part because it permitted the continued denial of British citizenship rights to a very large number of children. It is also because the conclusion is reached by reasoning that appears to pass over all too quickly the nature of rights to British citizenship. There is very little in the Supreme Court's judgment about the nature of the rights that were at stake, the nature of the fee-making powers affecting them or the impact upon them of those fee-making powers. Perhaps the most telling matter for the Supreme Court was that the 1981 Act had always required a fee for registration. However, as the Supreme Court acknowledged, until the passing of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and further statutory provisions in 2006 and 2007,[39] no provision was made for fees in excess of administrative costs.[40] The impact of the original provision in the 1981 Act for a fee[41] could not possibly be said to have been passed by Parliament without recognition of its potential impact on the registration rights to which it related. However, the impact of later provisions, ultimately in the 2014 Act, to permit nationality fees to be set at levels above the administrative cost of registration is surely a very different matter.

3. More recent developments

The disappointment of the Supreme Court judgment has, to a degree, been mitigated by the introduction of a fee exemption for looked after children and a discretion to waive the fee for a child where it is unaffordable. This is in direct response to the success of the claimants on the best interests ground in the High Court and Court of Appeal. Alongside these changes to the fee, there is also a change to the Secretary of State's recognition of the importance of British citizenship and rights to be registered as such a citizen.

In the courts below, O and the PRCBC had succeeded in showing the fee for a child to be registered as a British citizen had been set without having regard to the best interests of children. Accordingly, in that regard the regulations in setting that fee were unlawful.[42] The Court of Appeal reached this conclusion in February 2021 and the Secretary of State did not seek to appeal against it. However, the Secretary of State decided to wait for the Supreme Court to give judgment on whether the fee was *ultra vires* before addressing the failure, which she now accepted, to consider children's best interests. The Supreme Court gave its judgment on 2 February 2022. On 26 May 2022, the Secretary of State laid the Immigration and Nationality (Fees) (Amendment) Regulations 2022, SI 2022/581 before Parliament (the 2022 regulations).

Among the matters addressed by the 2022 regulations is the fee for children to be registered as British citizens. The explanatory memorandum makes clear that this aspect of the

38 [2022] UKSC 3, para 51.
39 Sections 51 and 52 of the Immigration, Asylum and Nationality Act 2006; and s 20 of the UK Borders Act 2007.
40 Strictly speaking, the Supreme Court was incorrect to have stated, at para 44 of Lord Hodge's judgment, that the fees had been set 'so as to recover the full cost of the application process' throughout the period though it had been the intention from the passing of the 1981 Act to move towards that.
41 The original provisions were ss 41(2) and (3) and s 42(1) of the British Nationality Act 1981.
42 [2021] EWCA Civ 193, para 117; [2019] EWHC 3536 (Admin), para 116.

regulations is the Secretary of State's response to the dismissal of her appeal by the Court of Appeal:

> … The Court of Appeal in *R (Project for the Registration of Children as British Citizens and O) v. Secretary of State for the Home Department* [2021] EWCA Civ 193, found that the Secretary of State had breached the duty under section 55 of the BCIA 2009 in setting this fee in the Regulations 2018 (and in previous fees regulations in 2017). Furthermore, the department has become increasingly aware of concerns regarding the impact of this fee on some children's ability to register as a British Citizen and consequent impacts on their individual rights both in childhood and later adulthood, and on their wider wellbeing. Consequently, the Secretary of State has undertaken a review of this fee in line with her duties under section 55 of the BCIA 2009.[43]

Richards LJ had given the lead judgment in the Court of Appeal. He summarised the impact of the £1,012 fee as having a 'serious adverse impact on the ability of a significant number of children' to make the application necessary for their registration as British citizens and said:

> … This is not disputed by the Secretary of State. The judge noted at [20] that there was 'a mass of evidence supporting the proposition that a significant number of children, and no doubt the majority growing up on low or middle incomes, could only pay the fee by those acting on their behalf being required to make unreasonable sacrifices'. I would only add that in cases such as that of O, one of three children of a single parent on state benefits, it is difficult to see how the fee could be afforded at all.[44]

The 2022 regulations substitute a fee of £1,012 for the previous fee of £1,012.[45] This formality is intended to make clear that the fee has been reviewed and a conscious decision has been made to set a fee of £1,012 that, the Secretary of State now says, has been made having regard to children's best interests. However, the regulations do more than this. Firstly, the regulations exempt looked after children from the fee.[46] From their taking effect on 16 June 2022, the registration as a British citizen of a looked after child has been without any fee. Secondly, the regulations introduce a discretion for the Secretary of State to waive the fee for any child to be registered as a British citizen if the fee is 'not affordable'.[47] The waiver also became available from 16 June 2022. There are other provisions relating to the fee. Children who are outside the UK but in circumstances akin to being a looked after child in the UK are similarly made exempt from the registration fee.[48] Where a child is exempt from the fee or granted a waiver of it, there is also an exemption from the fee for a citizenship ceremony that is usually required if the decision to register a child applicant as a British citizen is made only after the child has turned 18.[49]

43 Explanatory Memorandum to the Immigration and Nationality (Fees) (Amendment) Regulations 2022, SI 2022/581, para 7.2.
44 [2021] EWCA Civ 193, para 31.
45 Immigration and Nationality (Fees) (Amendment) Regulations 2022, SI 2022/581, regulation 2(4)(b).
46 ibid, 2(4)(c).
47 ibid, 2(4)(d).
48 ibid, 2(4)(c).
49 ibid.

These are significant developments, which should enable many more children to exercise their rights to British citizenship by registration. Almost as significant is ministerial recognition of the need to ensure this is achieved and its importance to the children with these rights. In reply to a joint letter of the PRCBC and Amnesty International UK, the Minister wrote:

> … In taking steps to better facilitate access to citizenship for children through the introduction of the fee waiver and exception, the Secretary of State has recognised it is in children's best interests to apply for British citizenship where they are eligible and willing to do so, and for the fee not to represent a significant barrier to an application.
>
> Furthermore, as I outlined in my statement of 26 May, the department clearly acknowledges the particular value British citizenship can have for children who have been born here or spent a substantial part of their lives in the UK, particularly those intangible benefits in terms of the sense of identity and belonging which develop during an individual's formative years, along with the impact this can have on their wider wellbeing. There can therefore be no doubt regarding the Government's position on this matter.[50]

This positive statement of the Government's position is reflected in the projections set out in the Home Office Impact Assessment that accompanied the introduction of the fee exemption and waiver.[51] Thus far, however, it is not reflected in the online process and paper form that have been established by which children are to apply for a fee waiver. These are long, complex and unnecessarily burdensome. There are serious concerns that some children, for whom the waiver ought to be a means to overcome an unaffordable fee that blocks their registration as a British citizen, may be effectively prevented from accessing the waiver due to the complexity and intrusiveness of the process.

These practical issues will have to be considered against the purpose of the waiver, by reference to the findings of the High Court and Court of Appeal, and the test established by the 2022 regulations for its application. The relevant provision now states:

> The Secretary of State may waive the fee [for a child to be registered as a British citizen] in a case where the Secretary of State considers that the fee is not affordable, taking into account the financial circumstances of the child in respect of whom the application is being made and of any other person who (in the Secretary of State's opinion) might otherwise reasonably be expected to bear the cost of paying all or part of the fee.[52]

It is the child's circumstances that are the focus here. Whether it is reasonable to expect a parent, carer or indeed other adult to pay or contribute towards paying the fee, if they can do so, will depend on the particular circumstances of each child. However, it is the best interests of the child that must be a primary consideration and careful regard must be had to ministerial,

50 Letter of Kevin Foster MP, Minister for Safe and Legal Migration, to the Project for the Registration of Children as British Citizens and Amnesty International UK, 25 July 2022.

51 Home Office Impact Assessment, *Child Citizenship Affordability Fee Waiver Impact Assessment 2022*, HO0415, 16 May 2022.

52 Paragraph 8 of Schedule 8 to the Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 (as amended by SI 2022/581).

judicial and wider recognition of the importance to children of being registered as British citizens. Notwithstanding the reasoning of the Supreme Court in its consideration of statutory interpretation, it is strongly arguable that access to the fee waiver cannot properly or lawfully be obstructed by a mere fishing expedition in search of some possible, but not obviously likely, source that can reasonably be expected to pay the fee.

In conclusion on these matters, the exemption of looked after children from the fee and the introduction of a discretion to waive the fee for other children who cannot afford it is clearly a welcome step forward. It is accompanied by greater recognition of the need to ensure children can exercise their rights to be registered as British citizens. That recognition should assist in securing a fee waiver. More fundamentally, it is also in keeping with the original parliamentary intention that all persons connected to the UK should share in its citizenship. We say no more on these matters here.

4. Conclusion

In the conclusion of our previous article, we wrote:

> In December 2019, the High Court gave judgment in PRCBC, O & A … The judgment constitutes an important step towards reassertion of the original parliamentary intention. It is founded upon a recognition both of the importance of British citizenship to those entitled to it and of the distinction between nationality law and the very different statuses that may be granted to a person by the Secretary of State under powers given to her under the Immigration Act 1971 … The claimant's appeal to the Court of Appeal on the ground that 'the level of the fee is incompatible with the statutory scheme under the BNA 1981 in that it renders nugatory entitlements to register and for that reason is not authorised by the vires-creating power conferred by s.68 of the Immigration Act 2014' provides an opportunity for an authoritative ruling on registration rights and the statutory purpose underpinning them. That would not merely be advantageous for addressing the particular barrier to rights of registration constituted by the fee. It has potential for preparing the ground for further legal and other challenges to many other barriers to those rights …[53]

The Supreme Court's judgment is undoubtedly a setback to that conclusion. The judgment has not provided the authoritative ruling on registration rights and the statutory purpose underpinning them that we had called for. As discussed in this article, there are reasons to question whether the significance of rights to British citizenship by registration was fully recognised by the Supreme Court. Whereas its judgment upon the registration fee appears to pare off registration rights from their place at the heart of the constitutional order to which the appellants drew attention, ministers have since moved in the opposite direction. They have done so in making changes to the fee for children to be registered as British citizens, which are made to address the judgments of the High Court and Court of Appeal on the best interests ground, which was not appealed to the Supreme Court. At least at this moment, there appears

53 Valdez-Symonds and Valdez-Symonds, 'Reasserting Rights to British Citizenship Through Registration' (n 2), 156.

to be greater political than judicial recognition of the fundamental nature of British citizenship and rights to it.[54] It must be hoped that the latter will not long lag behind the former on such a vital constitutional matter as who is to be recognised by right to be a full and equal member of the UK's citizenry.

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54 This is also attested by changes to the Secretary of State's policy guidance to her decision-makers in connection with applications for registration as a British citizen made under s 3(1) of the British Nationality Act 1981. These changes are not discussed here but will be the subject of a future article.