Reasserting Rights to British Citizenship Through Registration: the section 3(1) discretion to register children

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At a glance

In previous articles for this journal,[1] we have reviewed the origins of British citizenship, explained the relevance of these origins to understanding rights to British citizenship and examined the consequences of this for law, policy and practice concerning these rights. In this article we explore a further advance in recognition and reassertion of rights to British citizenship through registration. This advance concerns the Home Secretary's discretion to register a child as a British citizen under s 3(1) of the British Nationality Act 1981. Over several years, the Project for the Registration of Children as British Citizens (PRCBC) assisted and represented children to be registered as British citizens under that provision. In many cases it proved necessary to litigate. That has been consistently successful as the litigation has been settled by the Home Secretary at various stages prior to a full hearing of each child's application for judicial review. Ultimately this has led to the Home Office revising its guidance to caseworkers on making decisions under s 3(1) of the 1981 Act. That revision, published in July 2022, fundamentally changes the attitude and understanding of the department in relation to the discretion to register a child as a British citizen. Here, we explain the importance of the revision to the guidance, the litigation by which it was secured and the wider implications of all this for an ambition to ultimately secure the rights to British citizenship of all British people connected to the UK by recognising and reasserting the rights of registration to that citizenship.

1. Introduction

In April 2021, the applications for judicial review of five children – each assisted or represented by the Project for the Registration of Children as British Citizens (PRCBC) – were settled by the Secretary of State for the Home Department.[2] In doing so, she agreed to exercise her

1 'Reasserting Rights to British Citizenship Through Registration' (2020) 34 JIANL 139 and 'Reasserting Rights to British Citizenship Through Registration: Judicial Review of the Registration Fee' (2022) 36 JIANL 285.

2 The lead case was that of *R (Ojeh) v Secretary of State for the Home Department*, CO/4869/2020.

discretion under s 3(1) of the British Nationality Act 1981 to register each child as a British citizen. She agreed to pay the legal costs of judicial review proceedings for each child. She also agreed to review her guidance to her caseworkers on making decisions upon applications for registration under her s 3(1) discretion.

Ultimately, the review of that guidance was delayed by the department's decision to await the conclusion of separate litigation concerning the lawfulness of the fee charged by the Secretary of State for children to make an application for their registration as British citizens. That litigation and its resolution by the Supreme Court in February 2022 is the subject of our second article for this journal.[3] Accordingly, the revised guidance was not published until 18 July 2022.[4]

Section 2 of this article tells the story of the litigation that has led to this revision. In doing so, it provides analysis of s 3(1) of the British Nationality Act 1981 – the discretion, its purpose and application. It also offers wider lessons concerning strategic legal practice, including litigation. Section 3 explains key revisions made to the guidance and their importance. These should assist many children – particularly children who have grown up in the UK having been brought here at a young age and children in local authority care – to exercise their rights to be registered as British citizens. For many children, their registration as a British citizen should no longer be encumbered by complex or challenging evidential demands. Legal practitioners and social workers should now, therefore, be able to ensure that many more children – whose connection, future and identity is to the UK – secure British citizenship. Section 4 provides a short conclusion, bringing the discussion back to the wider ambition of reasserting rights to British citizenship.

2. The s 3(1) discretion and its litigation

Section 3(1) of the British Nationality Act 1981 provides an unfettered discretion for the Secretary of State to register a child, on application, as a British citizen.[5] It states:

> If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.

PRCBC was founded in November 2012. From the start, a critical focus of its casework, litigation and wider work has been the application of this discretion. The first registration as a British citizen of a child assisted by PRCBC was achieved in March 2013. The first application for judicial review of the refusal to register as a British citizen a child assisted by PRCBC was issued in July 2013. In the years that have followed, registration under s 3(1) has been – if measured solely by the number of children assisted and the volume of litigation brought – by far the largest proportion of PRCBC's work. Moreover, every child assisted or represented by PRCBC in making an application for registration under s 3(1), whose application has been finally resolved, has been registered as a British citizen. Often, though not always, this has required pre-action litigation and, in many cases, the issue of an application for judicial review in the High Court. None of these cases has ever been heard substantively by the court, although a few have been settled by the Secretary of State only days or even hours prior to a hearing.

3 'Reasserting Rights to British Citizenship Through Registration: Judicial Review of the Registration Fee' (2022) (n 1).
4 *Registration as a British citizen: children*, version 9.0 (the current guidance is version 13.0).
5 *R (Ali) v Secretary of State for the Home Department* [2007] EWHC 1983 (Admin), para 6 (The Claimant instructed Solange Valdez-Symonds at the time of her employment at Hammersmith & Fulham Law Centre).

Underpinning this casework and litigation concerning s 3(1) has been an understanding that the unfettered discretion provided to the Secretary of State by that section remains a matter of law, not of mere policy. The applications for registration and the litigation of refusals have never been simply a matter of requiring the Secretary of State to apply her policy as set out in guidance to her caseworkers. Those applications and that litigation have rather concentrated on requiring the Secretary of State to put into practice, by the exercise of her discretion under s 3(1), the underlying principle of the rights to British citizenship that are to be found in the 1981 Act.

We explored this underlying principle, and its connection to s 3(1), in our first article for this journal.[6] We then argued that in considering this section:

> … it is necessary to recall the underlying intention of Part 1 of the Act. That intention is to recognise British citizenship on the basis of connection to the UK. As discussed above, what is meant by connection is revealed by considering the rights to British citizenship holistically. The connection that is relevant is that of the particular person. In the case of s 3(1), which only applies to children, that means the particular child whose right to British citizenship is in question. The Ministerial assurances and explanations on which Parliament acted in legislating for various entitlements to British citizenship for children born in the UK included express concern that all children growing up in this country be recognised as its citizens and so share the same sense of belonging and security as their peers. The requisite connection was said to be reasonably anticipated when the child's parent was a British citizen or settled or to have been conclusively demonstrated, whatever the status of the child's parents, where the child had spent the first 10 years of her, his or their life in the UK.[7]

The critical point is that registration of British citizenship forms part of the overall structure of the 1981 Act in providing rights that are intended to secure that citizenship as *the* citizenship of all British people connected to the UK. As regards who are the British people by virtue of this connection, this is determined by the Act in providing rights of acquisition some of which are automatic and others of which require an application for the purpose of the registration of citizenship. The totality of these rights of acquisition amounts to the determination made by Parliament in 1981 of the body of people so connected to the UK that their shared identity and bond should be formally recognised by citizenship. As regards what degree of connection is required, this is identified by the Act through the various rights of acquisition it establishes, which importantly include rights of registration. Section 3(1) is importantly unfettered.[8] Nonetheless, in applying her unfettered discretion under that section, it is necessary for the Secretary of State to respect the underlying purpose of Parliament in creating British citizenship. Additionally, when considering the circumstances of children, it is necessary to have regard to Parliament's concern to ensure the sense of belonging and security of children whose future clearly lies here.[9] Accordingly, it is appropriate to recognise children's connection as early as

6 'Reasserting Rights to British Citizenship Through Registration' (2020) (n 1).
7 'Reasserting Rights to British Citizenship Through Registration' (2020) (n 1), 147–148.
8 *R (Ali) v Secretary of State for the Home Department* (n 5).
9 As stated by the Minister during Committee: 'This is the fundamental position that we have adopted. 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.' Hansard HC, Standing Committee F, 24 February 1981: Col 177.

possible, either when the child has made their connection to the UK or when it is reasonably foreseeable that the child's future clearly lies here.[10]

For almost a decade, therefore, PRCBC has been assisting children with applications to be registered as British citizens under s 3(1) by amassing evidence of the strength of each child's connection to the UK. This usually required hours of work on each child's case to gather and present that evidence, including letters of support from friends, schools and social workers, documentary evidence of the child's social activity and experience and a statement, where appropriate, from each child and/or their carer explaining their sense of connection to the country and/or their local community. This evidence was necessary to clearly establish the connection of each child to the UK. The evidence spoke to the past and the future, detailing the life of the child in the UK as a demonstration of how the child's connection had been created and explaining how the child's future clearly lay in the UK.

In essence, what PRCBC established for each child was the reality of Parliament's original estimation of connection as revealed by the various statutory rights to registration as a British citizen. Applications for registration, therefore, established by evidence that each child did in fact have the connection to the UK, which the 1981 Act had established as the principled basis for acquisition of citizenship by right, whether at birth, adoption, commencement or by registration. Parliament had, for example, already determined, in the case of a child born in the UK, that when the child's future could reasonably clearly be anticipated to lie in the UK, it was right and in the interests of the principle underpinning the new citizenship of the UK that the child should be registered as a British citizen.[11] Similarly, for the child born in the UK, Parliament had determined that after 10 years living here, the child's connections would be sufficiently established that citizenship ought to be recognised.[12] These provide examples of what is meant by connection, but do not limit how that principle is to be applied.

No doubt, it was the weight of the evidence supporting the child's connection that was most critical to the Secretary of State concluding that any particular child should be registered as a British citizen – whether in response to an application, a request for review of a refusal, a pre-action letter or a claim issued in the High Court. The weight of the evidence was no doubt equally critical to securing the many High Court orders that were made over the years granting permission to apply for judicial review. Over the years, PRCBC was able to rely upon the many permission and consent orders it had amassed from these successive judicial review proceedings. These permission orders drew attention to the paucity of refusal decisions; and the many consent orders confirmed the repeated and consistent settlement of litigation by the Secretary of State, often agreeing to pay costs and to reconsider her refusal. Taking all this together, PRCBC built up its own evidence base of how the relevant connection of the child was properly to be applied in exercise of the s 3(1) discretion as revealed by the applications and evidence presented by each child, the final decision to register them as a British citizen and the permission orders and consent orders made on the way to securing their registration.

From time to time, the prospect that the Secretary of State might put this all to the test of a hearing before a High Court judge loomed large. In April 2021, it once again seemed that the Secretary of State might do so. Ultimately, she did not. Although it is not possible to know

10 This is further discussed in our first article for this journal, 'Reasserting Rights to British Citizenship Through Registration' (2020) (n 1), 143–145 ('Future generations born in the UK').

11 Such as where the parent, of the child born and growing up in the UK without British citizenship, became settled or a British citizen thus giving rise to the expectation that the child's future lay here: British Nationality Act 1981, s 1(3).

12 British Nationality Act, s 1(4).

what may have deterred the Secretary of State from doing so, there are at least four factors that are likely to have carried significant weight. First, PRCBC had consistently invested significant time and energy (as generally had each child and their carers) in securing the evidence – including the child's own personal chronology and statement – to demonstrate the strength of their connection. Second, the longer PRCBC had pursued these applications, the greater the number and weight of the court orders, consent orders and consistency of final decisions to register each child. Third, as had been separately established by the litigation PRCBC, and children it assisted or represented, had brought against the fee, the alienating impact of growing up in the UK without British citizenship was both serious and powerfully connected to any proper consideration of the best interests of children. Finally, there was the clear relation of the applications made under s 3(1) to the broader determination by the 1981 Act of what constituted connection and the importance of recognising that connection by citizenship.

Although the following do not encompass the entirety of s 3(1) applications brought with PRCBC assistance, it is possible to identify two broad circumstances that applied to most of those applications.

The larger group of applications related to children brought to the UK at a young age, who had grown up in the UK. The children within this group were all in their teenage years. Many had experienced all or most of their schooling and childhoods in the UK. Their length of childhood residence in the UK generally ranged from seven years to longer. With the exception of not having been born here and, in some cases having some but little memory of the country from which they had been brought, these children were in essentially the same position as the child born in the UK, who had long residence here.[13] This length of residence during childhood could be expected to have established their connection to the UK.

The smaller group of applications related to children who may have lived in the UK for shorter time but whose future clearly lay here, such as children in the care of a local authority under a full care order. The ages of these children – both at the time of their being brought to the UK and the time of their application – varied more widely than the first group. The critical factor for the children in this second group was, for instance, the implication of the full care order in identifying that their future lay in the UK. The full care order and the implications of it showed that the child could be expected to be continuing their life here and, therefore, the propriety of recognising the child as a citizen.[14]

This brings us to the revisions made in July 2022 to the Secretary of State's guidance – revisions that were made in fulfilment of the terms on which the Secretary of State settled claims before the High Court in April 2021.[15]

3. Key revision of the guidance on s 3(1) decision-making

The Secretary of State's updated guidance now, critically, recognises the particular strength of applications for registration as a British citizen under s 3(1) made by the two groups of children, who had been at the core of so much of PRCBC's work over nearly a decade.

13 This compares to the statutory entitlement provided by s 1(4) of the British Nationality Act 1981.

14 The importance of recognising a child as a citizen as soon as it is reasonably clear that their future lies in the UK had been, for example, the foundation for Parliament's decision that citizenship should be acquired automatically where s 1(1)(b) of the British Nationality Act 1981 applies and should be a child's entitlement where s 1(3) of that Act applies.

15 Further information on these claims is available from PRCBC's *Case Note on Ojeh v SSHD, CO/4869/2020*, 27 April 2021; and PRCBC's *Practitioner's note on new Home Office policy guidance on Registration as a British citizen: children, version 9.0 – particularly as this relates to section 3(1) of the British Nationality Act 1981*, revised 29 August 2022 (each of which available on PRCBC's website).

Firstly, as regards children in local authority care, the guidance provides an indication of positive intent. This appears to match the intent behind the fee exemption that has been introduced for looked after children[16] but will have wider application. The guidance indicates that a specific team has been established with a particular focus on assisting and encouraging local authorities to secure the British citizenship of children in their care. This is not about imposing British citizenship upon every child in the care system but does indicate an intent to ensure that children in care, whose connection is to the UK, should have their citizenship confirmed or registered as appropriate. The guidance states:

> Sensitive cases concerning children under Local Authority care, must be referred to the Citizenship Vulnerable Persons Team (CVPT). The CVPT has been established particularly to ensure that children in care, and those responsible for their care, do not overlook opportunities for British citizenship.[17]

Secondly, as regards children brought to the UK at a young age, the guidance now includes a specific category in which caseworkers are directed that children 'must normally' be registered. This category concerns children who have lived in the UK for 10 years. The relevant section of the guidance is entitled 'Children who have lived in the UK for more than 10 years' and it includes the following statement:

> 10 years is the length of time required for a child born here to have lived in the UK to have an entitlement to register under section 1(4) of the British Nationality Act 1981. As such, 10 years constitutes a significant period of residence for a child to demonstrate a strong connection with the UK.[18]

The circumstances in which it is stated registration must normally follow is subject to considerations of the child and parents now being in the UK lawfully and there being parental consent. However, the guidance should still assist children where either of these requirements is not met, particularly where there is additional evidence of the child's connection here. The guidance goes on to recognise other considerations. Immigration status is not generally a child's responsibility. The older a child is and the longer their life here, the greater their connection is likely to be and the stronger their best interests in being registered as British citizens. There may be strong reasons to ensure the strength of connection of older teenagers is recognised whatever the status of their parents.

The inclusion of this category of children who have lived in the UK for more than 10 years in the guidance to caseworkers is express recognition of the significance of connection and holistic consideration of Part 1 of the 1981 Act to the application of the discretion under s 3(1). That recognition is made more emphatic in the updated guidance in the section on 'Section 55 and Article 8 considerations' where it is now stated:

> All decisions must demonstrate that children's best interests have been considered as a primary, but not necessarily the only consideration. Whilst in the majority of cases it might be argued that it is in an individual child's best interests to become a British

16 Immigration and Nationality (Fees) (Amendment) Regulations 2022, SI 2022/581, regulation 2(4)(c).
17 *Registration as a British citizen: children*, version 13.0, p 42.
18 ibid, p 29.

> citizen, British nationality law is based on the acquisition of citizenship through a close connection with the UK, including residence, lawful presence and family ties. It is therefore consistent that we adopt similar expectations in applying the Home Secretary's discretion to register a child.[19]

This guidance now provides explicit recognition by the executive of the place of registration rights at the heart of the new constitutional order established by Parliament in creating British citizenship under the British Nationality Act 1981. The conclusion – 'it is therefore consistent that we adopt similar expectations' – confirms that this recognition of registration rights extends to the discretionary provision for registration under s 3(1) of that Act. As discussed above, this confirms connection to the UK as the key principle to be applied.

4. Conclusion

Section 3(1) of the British Nationality Act 1981 is not simply the delegation of authority to the Secretary of State to make any child who applies a British citizen. The discretion is unfettered but it must still be exercised according to law and legal principle. The relevant principle is to be derived from the Act in which the discretion sits; and the application of the discretion is to be undertaken in keeping with the purpose of that legislation in ensuring that all people connected to the UK should be recognised as British citizens.

In this way, the discretion is not an arbitrary delegation of power. This has implications for both the Secretary of State and for any child who may apply for registration under s 3(1) – and therefore for legal practitioners, social workers and others who may be representing, advising, assisting or working with children. Registration applications and decisions ought, therefore, to focus upon and reflect the significance of connection. With the revisions to the Secretary of State's guidance to caseworkers, this should prove to be far less demanding in many individual cases. The broad recognition of the significance of 10 years residence during childhood should mean that many children – children whose identity and connection to the UK has been established by their experience of growing up in the UK – are enabled to secure their British citizenship merely by demonstrating the fact of their long residence.

There will still be circumstances in which complex and detailed evidence may be required to establish a child is connected to the UK. Nonetheless, legal practitioners may more confidently start with the categorised circumstances set out in the Secretary of State's guidance as the basis for many applications; and, where that guidance indicates criteria that will normally be sufficient for registration of a child, prepare applications accordingly. If none of the categorised circumstances apply, it will be necessary to reflect further on whether the available evidence is sufficient to establish the child's connection or indeed whether the appropriate advice is that making an application for registration is, at the present time, premature or likely to be refused.

However, notwithstanding the much-improved guidance now available, it is vital to recall that the guidance is not law; and the underlying legal principle that falls to be applied is to be derived from the Act. What the revision to the guidance speaks to is greater recognition at the Home Office of that underlying principle – connection to the UK as revealed by holistic consideration of the Act, specifically as it relates to British citizenship – and its proper

19 ibid, p 35.

application. More generally, what nearly a decade of casework and litigation on s 3(1) speaks to is the importance of painstaking legal analysis of law and its origins; diligent evidence-gathering and presentation in support of casework and litigation; and the need to be ready to pursue litigation, with consistency, over an extended period of time to achieve a clearly identified and legally grounded goal.

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