



Project for the Registration of Children as British Citizens (PRCBC)
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WORKSHOP 3: British Citizenship by Discretion 17 October 2020, 2-4:30pm

Main legal sources when advising and representing on British citizenship matters

Legislation

British Nationality Act 1981

- i. Section 3(1) provides a discretion to register any child as a British citizen
- ii. Section 41 empowers the Secretary of State to make regulations as to how an application for registration is to be made. The relevant regulations are the British Nationality (General) Regulations 2006, SI 2006/548.
- iii. Section 41A imposes a good character requirement upon children aged 10 years or older.
- iv. Section 50(9A) defines 'father' for the purposes of the Act; and section 50(9B) empowers the Secretary of State to make regulations for the purposes of section 50(9A)(c). The relevant regulations are the British Nationality (Proof of Paternity) Regulations 2006, SI 2006/1496 (as amended).

Section 68, Immigration Act 2014 empowers the Secretary of State to set fees by order and regulations. The relevant secondary legislation is:

- i. The Immigration and Nationality (Fees) Order 2016, SI 2016/177 (as amended) sets the maximum that may be charged for registration at £1,500.
- ii. The Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 (as amended) set the fee for a child's registration at £1,012.¹

Relevant international law obligations:

The Secretary of State must have regard to the following matters:

- **The child's best interests:** section 55, Borders, Citizenship and Immigration Act 2009 gives effect to the 1989 UN Convention on the Rights of the Child.²³
- **The child's private life:** Article 8 (Human Rights Act 1998).

Caselaw

1. *Ali v SSHD* [2007] EWHC 1983 (Admin) (discretion and parent not settled)
2. *FI v SSHD* [2014] EWHC 2287 (Admin) (section 55 best interests)
3. *Williams v SSHD* [2015] EWHC 1268 (Admin); [2017] EWCA Civ 98 (Article 8 ECHR, citizenship fee)
4. *SA v SSHD* [2015] EWHC 1611 (Admin) (good character, children)
5. *Poloko Hiri v SSHD* [2014] EWHC 254 (Admin) (section 3(1) registration by discretion)
7. *MM v SSHD* [2015] EWHC 3513 (Admin) (children born in the UK and stateless)
8. *Genovese v Malta* (Application no. 53124/09) (Article 8 ECHR)
9. *Johnson v SSHD* [2016] UKSC 56 (discrimination, illegitimacy and good character)
10. *PRCBC, O & A v SSHD* [2019] EWHC 3536 (Admin) (citizenship fee)

Other relevant sources

¹ Schedule 8, Regulation 10, Fees Regulations 2018 as amended

² *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

Nationality Guidance: *Registration as a British citizen: children*, version 6.0, April 2020 (also worth looking at now archived Nationality Instructions Volumes 1 and 2⁴)

Introduction

The Project for the Registration of Children as British Citizens (PRCBC) has amassed several years' experience of successfully registering children as British citizens under section 3(1) of the British Nationality Act 1981. This session draws upon that experience of preparing registration applications and litigating in the High Court against refusals of these applications.

Before an application to register a child as a British citizen is considered, it is important to consider whether the child might already be a British citizen (e.g. by birth) or has a statutory entitlement to register as a British citizen under other provisions of the British Nationality Act 1981. See previous PRCBC notes of workshop 1- 2 and PRCBC leaflets.⁵

Importance of citizenship

The Special Immigration Appeals Commission ("SIAC") in *Al Jedda v SSHD* SC/66/2008 7 April 2009 at § 4 [in the context of deprivation]:

"Citizenship is the fundamental civic right. It is not necessary to go as far as Warren CJ in Trop v. Dulles 356 U.S. 86 in evaluating the importance of its loss as "the total destruction of the individual status in organised society"; but on any view, its loss, for the citizen, is a very serious detriment."

"Citizenship is a vested status, founded in the law of the United Kingdom. It differs from the right of an alien to enter or remain in the United Kingdom – a right which can only be granted by executive decision and can be taken away by it, subject to appeal to the

4 <https://webarchive.nationalarchives.gov.uk/20160811041412/https://www.gov.uk/topic/immigration-operational-guidance/nationality-instructions>

⁵ PRCBC information leaflets set out the main (not all) provisions under which a child may be a British citizen or have a right to register as a British citizen: <https://prcbc.org/information-leaflets/>

Immigration and Asylum Chamber of the First Tier Tribunal or SIAC as appropriate”.

The benefits of citizenship are substantial:

*“Besides the **intangible benefit** of being a citizen of a country which is their and their family’s home, there are the **tangible benefits** which include freedom from immigration control, citizenship of the European Union and the rights which accompany that citizenship—the right to vote and the right to stand in parliamentary elections”.* 6

The Secretary of State highlights the importance of British citizenship in her MN1 application registration guide, this states as follows:

“Becoming a British citizen is a significant life event. Apart from allowing a child to apply for a British citizen passport, British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up.” 7

Holding British citizenship is fundamentally different to having Indefinite Leave to Remain or any other immigration status. British citizens have the right of abode [Immigration Act 1971, section 2(1)(a)]; and are not subject to immigration control. They may live in, and come and go from, the UK as a matter of right whereas other persons may only do so with permission of the Secretary of State for the Home Department ([immigration Act 1971, section 1(1)].

Primary legislative provision of registration by discretion

Section 3(1), British Nationality Act 1981 gives the Secretary of State general discretion to register any child as a British citizen. 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.”

6 *Al Fayed v SSHD No 1* [1998] 1 W.L.R. 763 at 773, Lord Woolf concluded.

7 Page 5 of Home Office MN1 registration form:

<https://www.gov.uk/government/publications/form-mn1-guidance>

The purpose of the Act, in establishing British citizenship, was that this citizenship should be possessed by people with a close⁸ or real⁹ connection to the UK.

The Home Office discretion to register children under section 3(1) is broad and unfettered.¹⁰

Children to whom section 3(1) may apply

Generally speaking, section 3(1) will be relevant to the situation of children living in the UK who were not born here. However, there may be other children for whom section 3(1) will be relevant. For example:

- i. Children born in the UK who are unable to establish by evidence that they are British citizens by birth or that they are entitled to register as a British citizen.¹¹
- ii. Children born to a British citizen father after 1 July 2006¹² who is not the husband of the child's mother.^{13 14}

Where a child is growing up in the UK not having been born here, a key consideration is whether the child's future clearly lies in the UK.¹⁵ The following list describes children to whom this will usually apply.

- i. Children in care who are the subject of a full care order or whose circumstances are those stated below.
- ii. Children with leave to remain whose parents have attained British citizenship, indefinite leave to remain or permanent residence.

⁸ White Paper, *British Nationality Law: Outline of Proposed Legislation*, July 1980, Cmnd. 7987, paragraph 37

⁹ *Hansard* HC, 3 June 1981 : Cols 979-980 per Mr Timothy Raison, Minister of State, Home Office

¹⁰ R (on the application of Ali) v Secretary of State for the Home Department [2007] EWHC 1983 (Admin)

¹¹ For example, a child born in the UK may be unable to establish her, his or their entitlement to British citizenship under section 1(4), British Nationality Act 1981 because the child cannot establish continuous residence up to age 10.

¹² For those born before 1 July 2006, they can apply to register by entitlement for instance under s4G, there is no application fee for this registration except for ceremony fee if they are 18 at the time of decision to register them as British citizens

¹³ *K (A Child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin)

¹⁴ See UKVI guidance on this type of applications:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882537/guide_ukf_m.pdf

¹⁵ Home Office guidance also states that normally at least one parent is already a British citizen, or has applied and will be granted, and the other is settled in the UK or not removable in the short to medium term. This is not a legal requirement. It is important to focus on the child, the child's connections and future.

- iii. Children with leave to remain, where it can be argued they are not removable, who have grown up in the UK having been brought to the UK at a young age, e.g. older teenage children who have grown up in the UK.

Home Office guidance *Registration as British citizen: children*¹⁶ sets out various circumstances about when it is said it would be normal to register or refuse to register a child. If a child's circumstances match those in the guidance for registration, this should be relied upon in the application for registration. However, the guidance is not the law. It cannot fetter the broad discretion.¹⁷ The key is to show, by evidence, the strength of the child's connection to the UK and that his, her or their future lies here. That the Home Office accept the child is not removable (e.g. because they have granted the child leave to remain) may be a critical part of this.

Consent of parents/guardian for child to be registered as a British citizen

Neither the Act nor regulations¹⁸ require consent from the parent(s) or guardian, however, the SSHD appears to expect parents/guardian to consent to the registration of minors.

Consent may be waived by the Home Office in certain circumstances, e.g. in cases of no contact with parent(s) or the parent(s)' whereabouts are unknown or in case of risk to the child, such as domestic violence. The issue of consent may also depend on the child's age. General guidance can be found in the Home Office guidance *Registration as British citizen: children*, version 6 (page 38).¹⁹ This includes the following statement:

“While it is not a legal requirement for applications under section 3(1) of the British Nationality Act 1981, it is reasonable that the view of both parents should be considered, as it is consistent with the assumptions which now lie behind much of UK family law. Where there is a conflict between the parents, the courts will put the welfare of the child first. This may be relevant in cases where a parent objects to registration.”

¹⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879763/registration-as-a-british-citizen-children-v6.0ext.pdf

¹⁷ R (on the application of Ali) v Secretary of State for the Home Department [2007] EWHC 1983 (Admin)

¹⁸ See regulations 14, British Nationality (Regulations) 2003 (as amended)

¹⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755505/Registration-as-a-British-citizen-children-v4.0ext.pdf

Evidence

PRCBC's experience has been that the Home Office has registered our young clients at the initial application stage. However, our more recent experience has been that pre-action letters or the issue of judicial review claims are necessary for the Home Office to register our young clients; and we have very recently had experience of the Home Office refusing to register even after a claim for judicial review has been withdrawn by consent for the Home Office to reconsider its original decision. It is extremely important to submit well-prepared applications, which should include all evidence of the child's circumstances and all the legal arguments in support of the child's registration to be submitted with the initial application. It should be assumed and is certainly best practice to assume that a judicial review claim will be necessary when preparing an application under section 3(1).

Evidence to consider submitting where the child's circumstances do not fulfil the Home Office guidance *Registration as British citizen: children*, version 6 (e.g. where the child has limited leave to remain and in some specific cases no leave to remain in the UK) and/or the parents are neither British citizens nor settled:

- i. Detailed chronology from time of the child's entry to the UK, including dates of grant of leave and attendance at schools, dates of grant of status to parents including dates of any siblings' registration or birth as British citizens, any achievements etc.²⁰
- ii. Detailed statement from the child of his, her or their life in the UK, friends, first memories, attendance at schools, part-time or voluntary work etc ²¹
- iii. Detailed evidence of the child's presence in the UK²²
- iv. Letters of support from friends, tutors, social worker; any other support workers or professionals²³

Home Office Application Form

²⁰ See specimen of chronology appended

²¹ See specimen guidance on statement appended

²² See checklist appended

²³ See guidance appended

Generally, under paragraph 1 of Schedule 1 to the British Nationality (General) Regulations 2003, SI 2003/548, there is no specified form in citizenship applications. However, it is generally advisable to submit a discretion application by using the Home Office registration form MN1.²⁴ This should ensure that all relevant information is provided. Similarly, online citizenship applications are not mandatory.

Where an application is being made on the basis that the child, born after 30 June 2006, would have been born a British citizen but for the fact that the child's mother was married to a man other than the child's British or settled natural father, it is generally advisable to use Home Office registration form UKF(M). This should ensure the application is clearly understood as being made on this basis (as the form is provided specifically for such applications). This may be of especial importance in relation to the matter of fees (see below).

Other application and process requirements are found in the same regulations mentioned above, such as biometrics requirements,²⁵ requirements concerning citizenship oaths (including exemption)²⁶, cancellation and deprivation²⁷ etc.

The current prescribed registration application fee is £1,012 for each child²⁸. There is also an £80 citizenship ceremony fee for those children who have turned 18 when the decision is made.

With one exception, there is no fee waiver or reduction on a registration application fee for those children who cannot afford to pay this very high fee, including children being looked after by a local authority. According to the Home Office transparency data, it costs **£372** to process a child's registration application. This means the Home Office makes **a profit of £640 on a child's registration application.**

The fee as it applies to children has been considered by the High Court in *PRCBC & Ors* [2019] EWCA Civ 3536 (Admin). For an update on this litigation

²⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/794875/form-mn1-04-19.pdf

²⁵ Part IIA, British Nationality Act (General) Regulations 2003 (as amended); section 41A(bza), British Nationality Act 1981

²⁶ *Ibid*, regulation 6-6A

²⁷ *Ibid* regulation 8-12

²⁸ Schedule 8, Regulation 10 of The Immigration and Nationality (Fees) Regulations 2018 (as amended in 2019)

(currently pending judgment by the Court of Appeal after hearing on 6-7 October 2020), see our FAQ4 at this link or visit our website:

https://prcbc.files.wordpress.com/2020/08/faq4_prcbc_aug2020docx-2.pdf

Following the decision in the High Court, the Home Office has introduced a fee waiver that applies only to children, born after 30 June 2006, applying to register under section 3(1) on the basis that they would have been born a British citizen had their mother not been married to someone other than their British or settled natural father (see reference to Form UKF (M) above). That waiver is established by paragraph 6 of Schedule 8 of the Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 [as amended by the Immigration and Nationality (Fees) (Amendment) (No. 2) Regulations 2020, SI 2020/294, regulation 9(4)].

The British Nationality (General) Regulations 2003 as amended at various times)²⁹

It cannot be emphasised enough that practitioners need to be conversant with these regulations as they prescribe the application requirements in nationality applications, such as:

1. Manner of application for registration and naturalisation applications
2. Biometric requirement and procedure; and consequences of not submitting to biometrics
3. Citizenship oath and ceremony arrangements, conduct including exemption
4. Notice of deprivation of citizenship
5. Cancellation of citizenship etc.

Biometrics

Section 41(1)(bza) of the BNA 1981 was introduced by section 10 of the Immigration Act 2014 to make biometrics a requirement in registration applications³⁰. This requirement came into force on 28 July 2014. The relevant registration forms have been amended to include the relevant required biometrics information. There is a Post Office fee of £19.20 for the process.

²⁹ SI/2003/548. These statutory provisions are made under s41 (1) and (3) of BNA 1981
³⁰ See Part IIA of the British Nationality Regulations 2003 as amended by SI/2015/7388

This fee is established under paragraph 2 of Schedule 8 to the Immigration and Nationality (Fees) Regulations 2018/330.

The British Nationality Act (General) Regulations 2003, SI 2003/548 (as amended) set out requirements in connection with biometrics at regulations 7A to 7I.

Remedy for refusal

There are two possible ways to seek a remedy for an unlawful or incorrect refusal. The Home Office operates an internal review process. The other is by way of a claim for judicial review. There may be very clear circumstances, in which it is appropriate to initiate judicial review proceedings without having sought an internal review. This may be the case because, for example, the reasoning given is so poor that it is impossible to know how the decision-maker reached the decision to refuse and, therefore, on what basis the decision-maker can reasonably be invited to reconsider. However, the court generally requires parties to exhaust all alternative remedies before bringing judicial review proceedings and there may, therefore, be costs implications of not pursuing an internal review.

Internal review

Inviting the Home Office to review its decision will require a Home Office fee of £372. The review process is not prescribed for by the British Nationality Act 1981; and there is no deadline by which a request for review must be submitted. Any such request should be submitted with Home Office NR form and representations as to why the Home Office should review its decision not to register the minor. If a review is successful, the Home Office review fee will be reimbursed.

Judicial review

If after a negative decision of an initial decision or after a review, the Home Office maintains its decision to refuse, the only remedy left is an application for judicial review to the High Court. This must be issued as soon as reasonably possible and certainly within three months from the date of the decision.

Before a judicial review application is issued, the Home Office must be put on notice of the applicant's intention to issue proceedings and must be given reasonable time by which to consider this.³¹ This is done by way of a pre-action letter.³² The Home Office will normally reply within that period of time.

If the Home Office don't reply or if they were to maintain the decision, a judicial review application may be issued thereafter and within the three-month deadline from date of refusal.

Legal aid

Other than exceptional case funding, advice and assistance in registration applications is not in scope of legal aid. However, legal aid is available for pre-action work under controlled work and judicial review applications under licensed work.³³

Appendices:

- 1) s3(1) checklist general
- 2) s3(1) checklist for looked after children
- 3) Guidance on witness statement
- 4) Guidance on content of letters of support
- 5) specimen of suggested chronology

³¹ https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

³² 14 days is normally a reasonable period of time for this type of applications

³³ Paragraph 19, schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012