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CASENOTE

PRCBC & O v SSHD Supreme Court judgment

2 February 2022

***R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department; R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3**

1. Judgment was handed down by the Supreme Court, dismissing the appeals of O and PRCBC, on 2 February 2022 following a hearing on 23-24 June 2021.

2. The question before the Supreme Court was:

   Whether the regulation that set the fee of £1,012 for a child to be registered as a British citizen was ultra vires by having the practical effect of making it unaffordable for children to exercise their statutory rights to be registered as British citizens and so rendering those rights nugatory.

3. That formulation is taken from the Supreme Court's judgment in *R (UNISON) v Lord Chancellor (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869, paragraphs 103-104.

The facts:

4. As the judgment expressly records, there was no dispute that:

   a. Statutory rights to British citizenship by registration are important (paragraphs 5 & 26). The Supreme Court summarised this:

   "*There is no dispute as to the importance to an individual of the possession of British citizenship. It gives a right of abode in the UK which is not subject to the qualifications that apply to non-citizens, 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, and 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."

b. A large number of children cannot exercise their right to be registered as a British citizen because they cannot afford the current fee (paragraphs 5 & 20). The Supreme Court recited from the lead judgment in the Court of Appeal of David Richards LJ:

"*…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.*"

The decision:

5. On these facts, the Supreme Court summarised the issues before it as follows (paragraph 27):

"*The rights conferred by British citizenship are rights conferred by a process laid down by statute and subordinate legislation and not by the common law. The 1981 Act reformed the basis on which people acquire British citizenship. Entitlement to citizenship by registration arises under the 1981 Act as a result of a connection with the UK as laid down in that Act and compliance with the statutory procedures and conditions. The question raised in this appeal is one of statutory interpretation. The question in short is whether Parliament has authorised in primary legislation the imposition by subordinate legislation of the fees which the appellants challenge.*"

6. The Supreme Court summarised the principles concerning statutory interpretation before addressing two judgments on which the appellants particularly relied: *R (UNISON) v Lord Chancellor* and *R v Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275. The court rejected (paragraph 40) the analysis of Waite LJ in his short concurring judgment in the JCWI case where he had said:

"*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 statutory rights already enacted by other primary legislation.*"

7. On this, Lord Hodge giving the main judgment said (paragraph 40):

"*I have a difficulty with this formulation in so far as it extends the principle beyond the vires of the enabling statute. In my view it is to that extent incorrect. It is an incident of the sovereignty of the UK Parliament that Parliament can legislate either expressly or by necessary implication to amend or repeal a previously enacted statute. Where it is asserted that an earlier statute ("statute 1") has been amended by a later statute ("statute 2") or that statute 2 has empowered the executive branch of government to*

make subordinate legislation which impinges upon or even removes rights conferred by statute 1, the question for the court is one of interpreting statute 2. Where statute 2 authorises subordinate legislation, the interpretative task is to ascertain the scope of the enabling power contained in statute 2. In other words, it is a question of vires."

8. Having set itself this question, the Supreme Court reviewed the provisions of the Immigration Act 2014 concerning fees.

9. The Supreme Court summarised the position in the British Nationality Act 1981 as having (paragraph 47):

   "*…created statutory rights to British citizenship, which included a right to such citizenship under section 1(4) subject to the requirement that there be an application which had to be accompanied by a fee if the application were to be valid.*"

10. The court summarised the position in the Immigration Act 2014 as (paragraph 49):

    "*…authorising the Secretary of State to set the fees* [without imposing] *any criterion of affordability. On the contrary, it expressly empowered the Secretary of State to set the fees at levels which (i) took account of benefits likely to accrue from citizenship and (ii) could subsidise the cost of the exercise of other functions in connection with immigration or nationality, thereby moving part at least of the financial burden of such functions from the UK taxpayer to the applicants.*"

11. That was sufficient for the Supreme Court to decide to dismiss the appeals. In the court's view the question of whether it was 'appropriate' to impose such a fee on children applying to exercise their statutory entitlement to British citizenship (paragraph 51):

    "*…is a question of policy which is for political determination. 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.*"

12. The Court did not address a point that arose in argument as to the generality of the Immigration Act 2014 framework applying to a vast array of immigration and nationality applications that were in form and essence fundamentally different to the statutory rights of registration to which the specific fee it was considering related.

Best interests of children:

13. As the Supreme Court recorded, in December 2019, the High Court had declared that the Secretary of State had breached her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 in setting the fee for a child to be registered as a British citizen by her regulations of 2017 and 2018 made under the Immigration Act 2014 (paragraph 22).

That duty concerns the bests interests of children. The Court of Appeal had, in February 2021, dismissed the Secretary of State's appeal against that decision and no appeal was pursued by the Secretary of State against it (paragraph 24).

14. The Secretary of State remains to address the finding that she has set the fee unlawfully by failing to give consideration to the best interests of children. PRCBC is reviewing its position on this outstanding matter.

This casenote was written by Solange Valdez-Symonds (PRCBC, solicitor/CEO, consultant solicitor Cardinal Hume Centre), Steve Valdez-Symonds (PRCBC pro bono legal researcher)
We are grateful to Admas Habteslasie (junior counsel, Landmark Chambers) and Adrian Berry (Garden Court Chambers) for editing this note.

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