Workshop on Children's British Citizenship Rights for non-lawyers

(These notes are for the purpose of today's workshop only)

Solange Valdez-Symonds, Solicitor and CEO, 16 March 2022, 10-1pm

Introduction on British citizenship law

Distinction between nationality law and immigration law

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

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

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

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

Distinction between registration of British citizenship and naturalisation

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

By contrast, an adult migrant to the UK may be naturalised as a British citizen only at the discretion of the Home Secretary. Unlike with registration rights, it is the role of the Home Secretary to decide whether an adult applying to naturalise should be made a British citizen. Only adults can be naturalised. In all cases, they must first have secured

indefinite leave to remain. Because naturalisation is the culmination of an adult migrant's journey through the immigration system, it is often described as the route, path, or pathway to citizenship. However, naturalisation has nothing to do with registration.

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

Distinction between registration by entitlement and registration at discretion

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

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

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

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

Importance of citizenship

1. **Why is citizenship generally important?**

2. **Why is citizenship important to you?**

3. **Why is citizenship important to our young people?**

Holding British citizenship is fundamentally different to having Indefinite Leave to Remain (settled status) or any other immigration status. British citizens 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.

Citizenship is the fundamental civic right

"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..."

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…the right to vote and the right to stand in parliamentary elections".

The Home Office highlights the importance of British citizenship in, for example, its MN1 application registration guide, which 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."

Can I provide legal advice and services on British citizenship matters?

A person **must not give** immigration and nationality advice or services unless s/he is a **'qualified person'**.

Unless a person is a 'qualified person', **it is a criminal offence** to give advice on an immigration/asylum/nationality case.

However, the law does not prevent an unqualified person from signposting or referring a client who needs advice on immigration or nationality issues to a suitable qualified person.

Is there legal aid in citizenship applications?

Other than legal aid for separated children (i.e., children in care of the State) and exceptional case funding (ECF), legal advice in citizenship applications is not in scope of legal aid.

However, subject to merits and means, legal aid is available for judicial review claims.

Who is automatically a British citizen?

Before an application to register or naturalise a person as a British citizen is considered, it is important to establish whether the person might already be a British citizen (e.g., by birth). The following are examples of when a person is already a British citizen:

i) **A person born in the UK to a British or settled mother or father.**

** Definition of "father" if person born before 1/7/2006 out of wedlock**

** Definition of father if mother married to another man at the time of person's birth**

ii) **A person born in the UK on or after 13 January 2010 if at the time of the birth father or mother is a member of the armed forces.**

** Definition of armed forces **

** Definition of "father" if mother married to another man**

iii) **A new-born infant found abandoned in the UK is treated as born in the UK and born to a British parent unless it can be disproved.**

iv) **A child adopted by way of a UK court order or under a Convention adoption, and where one or both the adoptees are British citizens and both adoptees are habitually resident in the UK, will be a British citizen from the date of the adoption.**

v) **By descent**

A child born outside the UK is a British citizen if at the time of birth, the mother or father is a British citizen so long as that parent's British citizenship is otherwise than by descent.

** Definition of "father" before 1/7/2006

** Definition of "father" if child born before 1/7/2006 out of wedlock**

** Definition of by descent

Who is entitled to register as a British citizen?

Some persons have an **entitlement** to register as British citizens. This means that where a person meets certain criteria under the British Nationality Act 1981, on a valid application to register, other than where a person 10 or over does not meet the good character requirement, the person **must be** registered and there is normally **no discretion** for the Home Office to refuse registration.

The following are some of the ways that a person has an entitlement to register:

i) A child **born in the UK** whose father and/or mother is later **granted settled status or is naturalised/registered as a British citizen**;

ii) A person born in the UK who (a) is and has always been **stateless**; (b) has lived for 5 continuous years in the UK up to the point at which an application to register is made; and (c) is **under 22** years of age.

What does stateless mean? A person is considered stateless if s/he is "not considered as a national by any State under the operation of its law" (1954 Statelessness Convention). The ability to acquire a nationality is irrelevant for these purposes***

iii) A child (or adult) who was **born in the UK** and has remained here for his/her first **ten years** without **an absence** of more than 90 days in any one of those ten years is **entitled in his/her own right** to be registered as a British citizen.

iv) A child **born in the UK** on or after **13 January 2010** and one of his parents becomes a member of the **armed forces**.

v) A child **born outside the UK to a British citizen 'by descent'** can be registered on grounds of the British parent's residence in UK for three years or more prior to the child's birth or on grounds of the British parent and child's residence in UK for three years or more following the child's birth.

vi) **An illegitimate child/adult born before 1 July 2006** can register by entitlement if the person would have been a British citizen (or would be permitted to register by entitlement) if s/he or they had not been born out of wedlock**.** There is **no longer a good character** requirement for registration applications being made under these provisions.

Who may apply to register 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.*"

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

This discretion provision will more likely be relevant to the situation of children living in the UK who were not born here.

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. The following list describes children to whom this will usually apply.

- Children in care who are the subject of a full care order or whose circumstances are those stated below.

- Children with leave to remain whose parents have attained British citizenship, indefinite leave to remain or permanent residence.

- 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,* 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. 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.

******After a number of High Court cases represented by PRCBC's solicitor, the Home Office have agreed to review her registration by discretion policy guidance.**

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

In most cases, neither the Act nor regulations require consent from the parent(s) or guardian, however, the SSHD expects 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 7 (page 38). 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.*"

Who may apply to naturalise as a British citizen?

Migrant adults (people 18 or over) who are not already British by acquisition at birth and who have no entitlement to register can apply to naturalise as British citizens by discretion. The general requirements are as follows:

The person must:

1) Be an adult (i.e., 18 or over)
2) Be of sound mind (have full capacity)
3) Have settled status (ILR) for the last 12 months
4) Not have been unlawfully in the UK in the last five years (in breach of the immigration laws)

5) Be of good character (see below)
6) Have sufficient knowledge of English or Welsh
7) Have sufficient knowledge of life in the UK (KOL)
8) Make the UK his/her main home
9) Have been in the UK for the last five years ending with the date of the application
10) Not have been absent for more than 450 days during this 5 year-period
11) Not have been absent for more than 90 days in the last 12 months

If the person is the spouse or civil partner of a British citizen, the above requirements are modified as follows:

1) will require settled status but no requirement of ILR for last 12 months

2) the 5 years minimum period is reduced to 3 years

3)) the 450 days during the 5 year-period is reduced to 270 days in the last 3 years

The 'good character' requirement

In all applications naturalisation and registration for a child who is aged ten or over, the Secretary of State must be satisfied that the child/adult is of 'good character'. This is a mandatory application requirement and not discretionary. There is no legal definition of 'good character' and therefore no statutory guidance on its interpretation and how it should be applied.

However, it is wholly unsatisfactory that the Secretary of State's good character guidance for adult's naturalisation applications is current being applied to children's registration applications and to adults applying to register by entitlement. There is, therefore, no distinction at all on the face of the present policy between the ways in which children's character is assessed and the facts that adults seeking to register their entitlement are being assessed in the same way as a migrant adult.

Home Office Application Form

Generally, there is no specified form in citizenship applications. However, it is advisable to submit a citizenship application by using Home Office suggested forms. This should ensure that all relevant information is provided. Similarly, online citizenship applications are not mandatory.

Application registration fee

The current prescribed application registration fee for a child is £1,012 and £1,206 (this includes £80 citizenship ceremony fee) for registration of adults. There is also an £80 citizenship ceremony fee for those children who have turned 18 when the decision is made**.** The Fee for naturalisation (i.e., migrant adults) is £1,330. This includes £80 ceremony fee.

Apart from certain specific applications of children, there is currently no fee waiver or reduction on a registration application fee for those children who cannot afford to pay this extremely high fee – not even for the many such children who have a right to register by entitlement. There is also no fee exemption for those children in care. 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 entitlement to register**.

In December 2019, the High Court found that the Secretary of State on the basis of **"a mass of evidence"** that a significant number of children growing up in low- and middle-income families cannot afford these fees unless their parents or carers make **"unreasonable sacrifices"**. It also found, on that same evidence, that by excluding children from their citizenship rights, the fee makes them **"feel alienated, excluded, isolated, 'second-best', insecure and not fully assimilated into the culture and social fabric of the UK."**

In February 2021, the Court of Appeal emphasised that for many children of single parents on state benefits, **"it is difficult to see how the fee could be afforded at all."** On this basis both courts declared that the Secretary of State has set the fee unlawfully by failing to consider the best interests of children. 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. She has recently confirmed to PRCBC and others that she will complete her review by 4 May 2022.

PRCBC also challenged whether the regulation that set the fee of £1,012 for a child to be registered as a British citizen is unlawful 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. This part of PRCBC's challenge was heard by the Supreme Court with judgment delivered on 2 February 2022. The Supreme Court acknowledged that a large number of children are being excluded from their British citizenship rights by the Home Office fees of £1,012. It is, however, lamentable that the Supreme Court felt compelled not to find it unlawful that rights to British citizenship of children provided under the British Nationality Act 1981 are made ineffective by profit making fees set under the Immigration Act 2014.

Biometrics

Biometrics is a requirement in registration and naturalisation applications. There is a fee of £19.20 for this process.

What if an application to register or naturalise is refused by the Home Office?

Internal review

Generally, the registration application fee is not reimbursed if the application fails or is refused.

It is possible to request a review of a decision to refuse to register or naturalise as British. The Home Office would normally expect that a review request is made by completing Form NR. There is a £372 fee for this review process. The £372 is refundable if the decision is reversed in the applicant's favour. There is no specified time by which to submit a request for a review. However, this should be done as soon as reasonably possible.

Other than the above-mentioned internal review, there is no right of appeal to the Tribunal. The only remedy left to challenge a refusal to register or naturalise is by issuing judicial review proceedings in the High Court, which must be done as soon as reasonably possible and certainly within three months of the date of the decision to refuse to review a decision to refuse.

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. This is done by way of a pre-action letter. The Home Office will normally reply within that period.

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.

Dual nationality when becoming a British citizen

A child does not need to give up his/her present citizenship or nationality to become a British citizen.

However, some countries do not allow their citizens to hold another nationality (dual nationality). If a child becomes a British citizen and s/he is a national of a country which does not allow dual nationality, the authorities of that country may either regard the child as having lost that nationality or may refuse to recognise the child's new nationality.

It's very important for the client and carer to be made aware of this. The client and carer should check with the authorities of the country of which the child is a citizen before a child applies to register as a British citizen.

Reference material

Children and their rights to British citizenship leaflet:
https://prcbc.files.wordpress.com/2019/03/children-and-their-rights-to-british-citizenship-march-2019.pdf

EEA and Swiss Nationals Children and their rights to be British citizenship leaflet:
https://prcbc.files.wordpress.com/2019/04/leaflet-british-citizens-rights-of-children-born-to-eaaswiss-nationals-.pdf

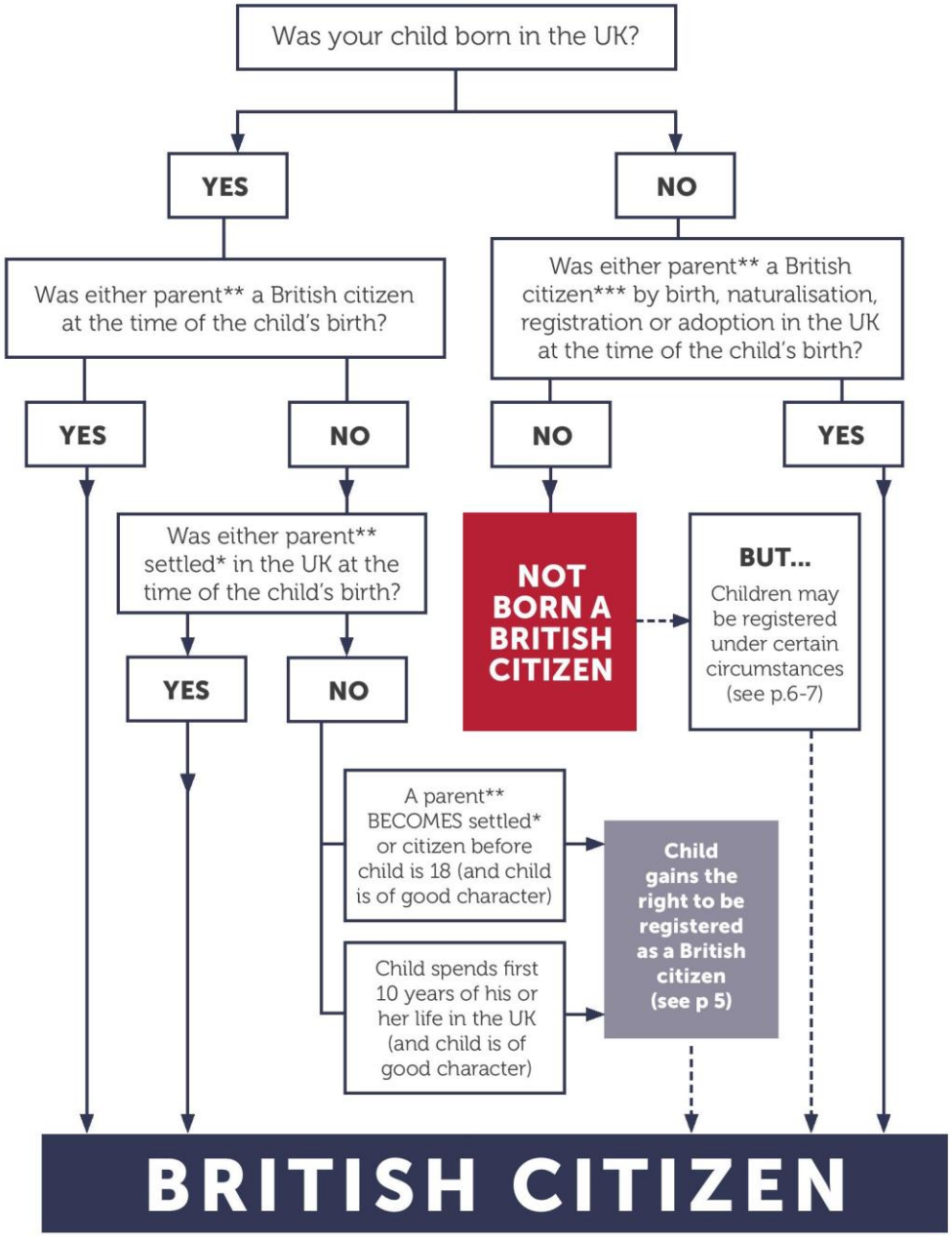
Comic: Belonging, British citizenship rights of children in the UK born to EEA and Swiss Nationals
https://prcbc.files.wordpress.com/2019/05/belonging-british-citizenship-rights-of-children-on-eaa-and-swiss-nationals.pdf

PRBC Casenote for policy workers and campaigners (this note is for organisations, particularly their policy advisers and advocates, to ensure a correct understanding of children's registration in British nationality law)

https://prcbc.files.wordpress.com/2021/02/note_fees_litigation_-feb_-2021-1.pdf

FAQ 7 on current Supreme court citizenship fee challenge:
https://prcbc.files.wordpress.com/2022/02/faqs7_feb_2022.docx

Is your child a British citizen?



* Indefinite leave or permanent residence

But if parents are not married, see **"Father" on page 9

***However, if the parent is a British citizen by descent, the child will not be born a British citizen.

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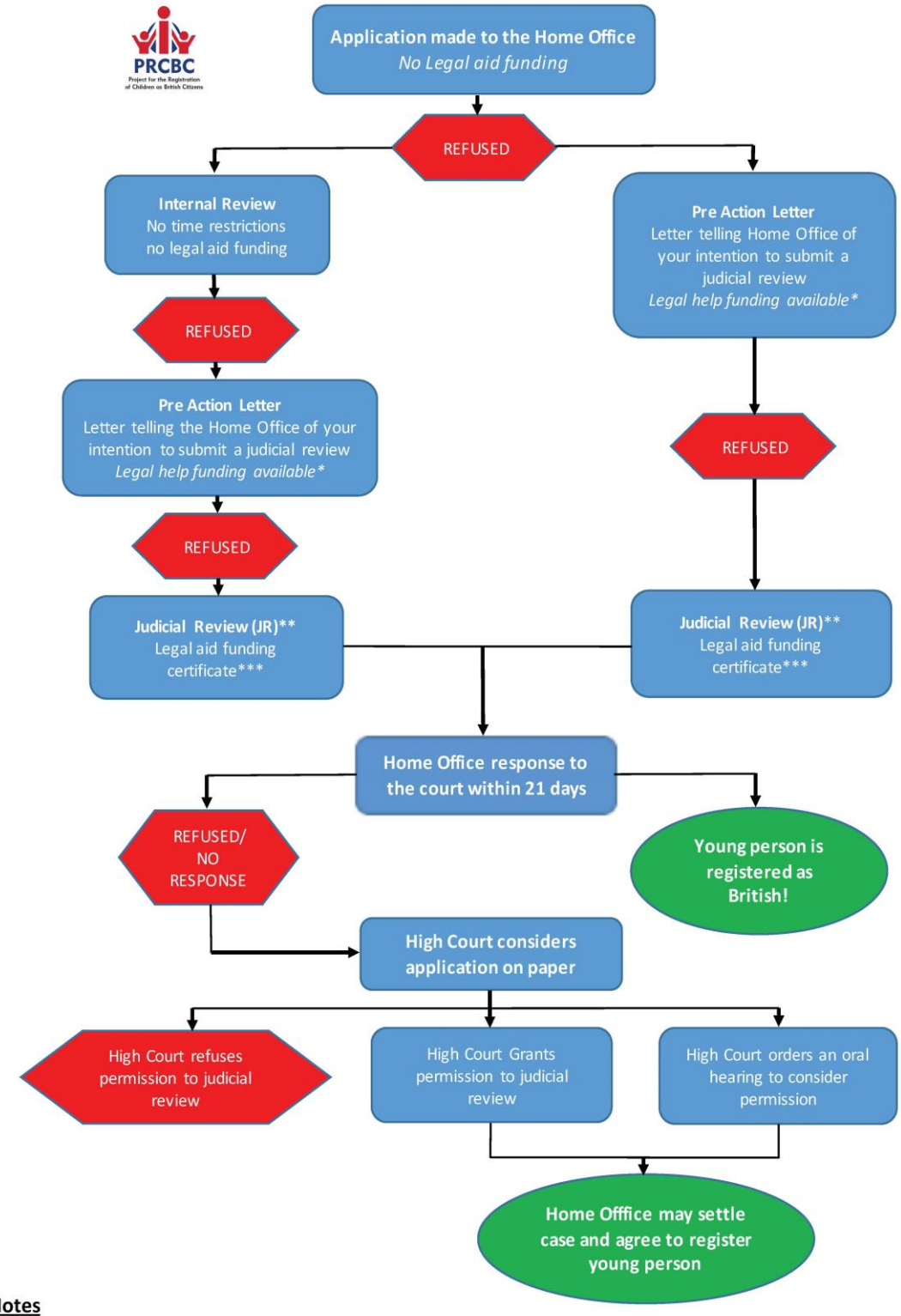

Notes

1. it is possible to secure exceptional case funding from the Legal Aid Agency:
https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding
*Legal help is subject to your financial means and the merits of your case.
**Judicial review must be issued as soon as reasonably possible and certainly within 3 months from date of refusal. Important to be aware that legal aid funding can take weeks to secure.
***Legal aid funding certificate is subject to your and to other people's financial means and the merits of your case

The following notes on the origins of British citizenship have been adapted from a commentary upon Parliament's intention in introducing registration provisions for children in the British Nationality Act 181 prepared for and from PRCBC research

End of *jus soli* (birth right citizenship):

1. The passing of the British Nationality Act 1981, which took effect on 1 January 1983, constitutes a seminal moment in British nationality law. Among its most important features is that it introduced British citizenship into that law. In doing so, it removed the principle of *jus soli* – the principle by which nationality is acquired by being born on the territory – from the operation of that nationality law. From that date, persons born in the UK acquired British citizenship, under section 1(1) of the Act, only if one of their parents was a British citizen or settled in the UK. This, together with other provisions in the Act by which British citizenship could be acquired, was intended to confer citizenship upon persons on the basis of their connection to the UK.

2. In making this change from *jus soli* to connection as the basis for citizenship, Parliament recognised the need to ensure British citizenship for many children growing up in the UK who would in future not be born British. It legislated for various entitlements to be available to these children. As this commentary examines, the statutory recognition of an entitlement is important and deliberate. It is intended to ensure that all children growing up in the UK, connected to this country, can and do acquire British citizenship independent of the status and circumstances of their parents.

Connection to the UK:

3. The Government introduced the British Nationality Bill following the publication of a White Paper, *British Nationality Law: Outline of Proposed Legislation*, July 1980, Cmnd. 7987. The White Paper set out the Government's intention that:

"*37. ...British Citizenship will be the status of people closely connected with the United Kingdom.*"

4. This intention was confirmed by Ministers during the passage of the Bill. Thus, at Report stage, Mr Timothy Raison, Minister of State, Home Office, said:

"*...as I think the House knows by now, what we are looking for in the creation of our new scheme of British citizenship is real connection. We are looking for citizens who have a real connection with the United Kingdom.*" (*Hansard* HC, 3 June 1981 : Cols 979-980)

5. The British Nationality Act 1981, therefore, removed *jus soli* from British nationality law. The reason for this was set out by the Minister:

"*The question must be faced as to what rational reason there is for the children of people who are here purely temporarily or, for that matter, illegally, expecting to have the right to acquire British citizenship. The more one thinks about that fundamental point... the more doubtful it becomes as to what is the rationale in terms of principle for saying that everybody born here should be a British citizen, even if the person is merely born here, goes away after a few*

weeks and spends the next years or decades of life in some remote part of the world." (*Hansard* HC, 3 June 1981: Col 980)

6. Just as it was decided that *jus soli* was not to be the foundational principle by which British citizenship was to be acquired, so *jus sanguinis* – the principle by which nationality is acquired by being born to a parent of that nationality – was rejected.

7. Merely stating a principle of connection does not, however, define its application or meaning. To understand and apply the principle, it is necessary to consider the British Nationality Act 1981. Doing so reveals the ways by which Parliament determined that connection to the UK was made out such that British citizenship should be and is the right of each person with that connection.

Rights of Acquisition:

8. The British Nationality Act 1981 establishes four distinct rights of acquisition:

i. Acquisition by birth: a person with this right automatically acquires British citizenship at their birth
ii. Acquisition by adoption: a person with this right automatically acquires British citizenship at their adoption
iii. Acquisition by commencement: a person with this right automatically acquired British citizenship at the commencement of the Act
iv. Acquisition by registration: a person with this right is to acquire British citizenship on their making of an application for their registration

9. Taken together, these rights fully describe the circumstances that establish a person's existing connection to the UK such that it is Parliament's intention, in passing the British Nationality Act 1981, that British citizenship should be possessed by that person.

10. Additionally, the Act retained the power of the Secretary of State to naturalise migrant adults – who are not British, have their connection elsewhere and have become settled in the UK. By this means (naturalisation), a person may seek to make their connection with the UK.

11. As is further elaborated in this note, the starting points by which it was determined which persons were to be made British citizens at the creation of that citizenship on 1 January 1983 (the date the Act was commenced), and by which it was determined which persons were from that date to be made British citizens at and by their birth, were insufficient to encompass all connected people. Many of the provisions of Part 1 of the British Nationality Act 1981 have particular relevance to children reflecting the especial importance of the place in and to which a child develops their identity and connection. Section 1(5) of the British Nationality Act 1981 is one such measure. It concerns children who are adopted by a British citizen parent. Several rights of acquisition by registration address various other circumstances that demonstrate a child's connection to the UK. Children were not, and are not, the only persons to whom rights of acquisition by registration were provided. Nonetheless, wherever a right to registration is to be found, this reflects Parliament's concern to make good the intention that British citizenship be possessed by everyone connected to the UK.

Children born in the UK:

12. As previously indicated, it was decided that merely being born in the UK was insufficient to establish connection to the UK. A particular concern was the prospect that persons born in the UK to parents not connected to the UK, who were resident here only shortly, should not later be able to pass on British citizenship to their children born in another country and with no connection here (*Hansard* HC, Standing Committee F, 12 February 1981: Col 41). The starting point in section 1(1)(a), therefore, is that British citizenship is acquired at birth in the UK to a British citizen parent. Section 1(1)(b) extends that acquisition at birth to persons born in the UK to a settled parent. As the Minister explained:

"*There are people who are clearly not birds of passage but are born here to those who are settled here, and who by definition live here. The term 'settled here' is about living in this country, and about having the intention of continuing to do so. It would be reasonable on both humane and common-sense grounds to pick up those children when they are born, rather than to wait...*" (*Hansard* HC, Standing Committee F, 24 February 1981 : Col 177)

13. As can immediately be seen, the focus here is on the child's future and their connection. It being sufficiently clear that the child's future is here, British citizenship is automatically acquired by the child at birth in the UK. Section 1(3) flows directly from this. A child born in the UK whose parent becomes settled in the UK is not in any materially different circumstances to the child whose parent was already settled at the child's birth – save for not having automatically acquired citizenship at birth. Section 1(3), therefore, provides a right by entitlement for the child to be registered as a British citizen. Again, it is not the status of the parent *per se*, which is the making of the child's connection. Rather, the parent's status of being settled is sufficient indication that the child's future is here, and therefore their connection is here, such that citizenship should be recognised immediately rather than, as the Minister put it, waiting.

14. The Minister's reference to waiting begs a question: waiting for what? Completing the passage citied about provides the answer:

"*There are people who are clearly not birds of passage but are born here to those who are settled here, and who by definition live here. The term 'settled here' is about living in this country, and about having the intention of continuing to do so. It would be reasonable on both humane and common-sense grounds to pick up those children when they are born, rather than to wait for the 10-year provision…*" (*Hansard* HC, Standing Committee F, 24 February 1981 : Col 177)

15. That is a reference to section 1(4). The section provides a right by entitlement for a person to be registered as a British citizen having lived in the UK up to the age of 10 years after having been born here. As explained by the noble Lord, Lord Belstead, referring to what became section 1(3) and (4):

"*The Government accept that a child born here to a parent who has no connections with this country should be able to secure citizenship if real links with this country can be said to develop. We have, therefore, provided in Clause 1(3) that such a child will, while a minor, be entitled to British citizenship if either the mother or the father becomes a British citizen or becomes settled here. We have also provided in the subsection… for the 10-year period.*" (*Hansard* HL, 7 July 1981: Col 662)

Integration and race relations (and relevance to Windrush Scandal):

16. The intention to ensure British citizenship reflected connection to the UK was supplemented by further policy aims of promoting integration and securing good race relations. As Mr Raison explained at Committee:

"*It is the Government's view that it is in the interests of good race relations in this country that children born here to settled parents should be British citizens. We said this in paragraph 42 of the White Paper, which stated:*
'The Government considers that a move to the complete adoption of ius sanguinis would have a serious effect on racial harmony. It would mean that children born in this country to parents who had settled here would not have our citizenship, and this could hinder their integration into the community.'
That was the Government's formal position in the White Paper on this matter. It was fundamental to our position that the decision that the children of those who are lawfully settled here should be entitled to citizenship has to do with good community relations in this country." (*Hansard* HC, Standing Committee F, 24 February 1981: Col 177)

17. There is no basis for distinguishing this latter position in respect of children born in the UK to settled parents and the entitlement to register given under section 1(3) to those children whose parents settle during their childhood. Moreover, the Minister's further elucidation emphasises the importance of integration and security for all children with entitlements to register:

"*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)

"*We have to say that we are now living in a country where there are all sorts of different colours, ethnic backgrounds and minority communities. I believe profoundly that that is a fact of our society and we have got to make it work. We shall make it work by encouraging people to feel secure in this country rather than by encouraging their apprehensions. That is fundamental to our position.*" (*Hansard* HC, Standing Committee F, 24 February 1981: Col 179)

18. It clearly was not Parliament's intention that anyone, least of all children, entitled to British citizenship should be content with either limited or indefinite leave to remain as a substitute, which would leave them potentially liable to immigration control and powers to which it was intended they should be free. That would not fulfil the clear intention that they register as British citizens.

19. These concerns are no less relevant today. The Government's decision to offer citizenship by naturalisation for free to members of the Windrush Generation[1] recognises not only a strong moral obligation to facilitate the acquisition of British citizenship of people subjected to appalling mistreatment by the Home Office failure and refusal to recognise their settled status in the UK. It also recognises the depth of their connection to the UK, and the need to fulfil a duty arising from the failure of previous Governments to secure the intention of Parliament when passing the British Nationality Act 1981. It had then been intended that the Commonwealth citizens who had settled in the UK in the post-War period should be strongly

encouraged to register their entitlement to British citizenship given by what became section 7 of that Act. That entitlement, however, was restricted to registration within five years of the Act's commencement.[2]

People born and lived in the UK to age 10 (**Section 1(4) and entitlement):**

20. Section 1(4) was introduced during Commons' Committee stage. It was much discussed in both Houses, and the debates emphasise the importance of ensuring British citizenship for children growing up in the UK where the child's connection was established, whatever the status of her, his or their parents. At Report, Mr Raison recalled the amendment to the Bill at Committee stage:

"*We have also moved the important amendment to clause 1 that was accepted by the Standing Committee and is now incorporated as subsection (4). It provides that a child born here who does not become a British citizen through his parents' British citizenship or settled status shall have an entitlement to registration 10 years later if he has resided here continuously since birth.*" (*Hansard* HC, 3 June 1981: Col 984)

21. The purpose behind what is section 1(4) of the Act was explained by the Minister during the Standing Committee F debates as acknowledging the strength of connection with the UK that such a child will have, recognising 'connection' to be the underlying intention in replacing *jus soli*. The Minister there explained when speaking to Amendment No. 115, by which subsection (4) was introduced:

"*We feel that, after the passage of time, those children will be so deeply rooted in this country that it would be harsh to deprive them of citizenship for all time.*" (*Hansard* HC, Standing Committee F, 24 February 1981: Col 183)

22. As the Minister made express, this provision was to secure the British citizenship of children "*whose parents are not lawfully settled in this country*" (*Hansard* HC, Standing Committee F, 24 February 1981: Col 183). The children to be protected included children of parents who were illegal entrants, including those who had wrongly secured leave by deception and were later stripped of that leave (*Hansard* HC, Standing Committee F, 24 February 1981: Col 184). As the Minister later emphasised:

"*The essence of the matter is that if a child has been here for 10 years, we believe that it is reasonable, even though his parents may be illegals or overstayers, that he be granted citizenship because his roots will have gone deep.*" (*Hansard* HC, Standing Committee F, 26 February 1981: Col 230)

23. It was generally assumed, as Ministers confirmed, that in most cases any questions concerning the status of the child's parents would have been resolved within ten years. At Committee, the noble Lord, Lord Belstead said:

"*If the child's parents were here subject to conditions of stay or in breach of immigration control, those problems would normally have been resolved one way or another during the 10-year period.*" (*Hansard* HL, 7 July 1981: Col 666)

24. However, many children, whom Parliament had then anticipated would be born British, are not now born British. This is because the child's parents are not settled at the time of her, his or their birth, despite having lived in the UK for long periods that Parliament had expected would lead to their being settled. This includes parents who previously would have become settled during their own childhoods in the UK. Parliament's expectation in 1981 has been radically affected by relatively recent changes to immigration rules and policy, which have greatly extended the period before someone with lengthy residence in the UK can apply for settlement. In making those changes, no regard was had to Parliament's expectation and intention in passing the 1981 Act. The effect of this is dramatic and harmful for it is to alienate many children born and connected to the UK in circumstances where it was clearly anticipated they would simply be born British citizens. One impact of this is to emphasise the importance of section 1(4) and the right it provides to registration as a British citizen.[3]

25. In any event, it was emphasised in 1981 that children growing up in the UK should be recognised as British. Mr Raison confirmed:

"*...as the Committee well knows by now, we have recognised that there has been concern about one particular aspect of our proposal. This concern was expressed on Second Reading and it has been expressed by people outside the House. The concern is about the problem of children who might grow up here knowing no other country and unaware that they have no right to citizenship because of their parents' status...*
"*We have chosen the tenth birthday as the cut-off point because we would not wish to insist on the deportation*[4] *of a child born here who had lived here for 10 years. If his parents were here subject to conditions of stay or in breach of the immigration control at the time of the birth, 10 years seems to the Government to be a long enough period in which to expect these problems to have been resolved.*
"*Furthermore, the first 10 years of a child's life clearly are the formative years. By the age of 10, we believe, the child's roots could be regarded as being firmly set in this country.*" (*Hansard* HC, Standing Committee F, 26 February 1981: Col 221)

26. Elsewhere the Minister confirmed that after ten years a child would have such "*substantial ties to this country*" that "*irrespective of his situation under immigration control... it would be wrong to create a position whereby the child might be removed.*" (*Hansard* HC, Standing Committee F, 26 February 1981: Col 223).[5]

The importance of entitlement:

27. The importance of having an "*entitlement*" was emphasised in the debates in several ways. Mr William Whitelaw, Secretary of State for the Home Department, did so in making clear at Report stage the difference between registration and naturalisation:

"*I say 'naturalisation' because the case is different with provisions in our legislation which provide for registration as an entitlement – the decisions taken by the Secretary of State on such applications are not discretionary. If satisfied that the entitlement exists, the Secretary of State must grant the application.*" (*Hansard* HC, 2 June 1981: Col 855)

28. It was emphasised by the Minister of State in rejecting a proposal for a quota system for section 1(4) put forward in Committee. A quota would fundamentally undermine the entitlement and, therefore, fail to satisfy the clear intention behind section 1(4) in providing "*justice*" for the children concerned:

"*I do not believe that I could accept that suggestion because ultimately, we are talking about a matter of some sort of justice for the children concerned. To have a quota, as it were, for justice of that sort would not be acceptable.*" (*Hansard* HC, Standing Committee F, 3 March 1981: Col 353)

29. Ultimately it was emphasised by the Government's decision to bring forward an amendment at Lords' Report to remove the need to satisfy the Secretary of State of an entitlement. The noble Lord, Lord Mackay of Clashfern, Lord Advocate explained:

"*This is the first of a series of amendments that we have brought forward which remove the references in the Bill which stipulate that applicant for citizenship as an entitlement must satisfy the Secretary of State that they have met various requirements… If the criteria are met, then the Government agree that the entitlement should obtain and that it should not be expressed as depending on the satisfaction of the Secretary of State.*" (*Hansard* HL, 6 October 1981: Col 36)

30. When the Bill returned to the Commons, Mr Raison invited acceptance of that Lords' amendment to "*...remove the stipulation in the Bill that applicants for citizenship as an entitlement must satisfy the Secretary of State that they have met the various requirements...*":

"*...If the criteria are met, the entitlement should obtain even if the Secretary of State is not satisfied.*" (*Hansard* HC, 27 October 1981: Col 728)

Statelessness and entitlement:

31. There is particular significance to be derived from the clear intention that the Act would comply with the 1961 Convention on the reduction of Statelessness. The removal of *jus soli* from British nationality law meant that Article 1(1)(a) of the Convention would no longer be met and hence Article 1(1)(b) would have to be satisfied (*Hansard* HC, 6 May 1981: Col 1730). That provision is mandatory as is emphasised by repetition of the word "*shall*" and the stipulation:

"*Subject to the provision of paragraph 2 of this Article, no such application may be rejected.*"

32. Ministers repeatedly emphasised full compliance with the Convention (e.g., *Hansard* HC, Standing Committee F, 6 May 1981: Col 1726 & 1735; 3 June 1981: Col 986). The Minister of State said:

"*Our approach reflects our need and our desire to continue to comply with our international obligations under the United Nations convention on the Reduction of Statelessness.*" (*Hansard* HC, Standing Committee F, 6 May 1981: Col 1730)

33. Paragraph 3 of Schedule 2 to the Act provides for registration by entitlement of any person born stateless in the UK at any time before she or he turns 22, if at the time of registration, she or he has lived in the UK continuously for the previous five years and has never ceased to be stateless. These requirements are taken from those exclusively permitted by Article 2 of the Convention.

Registration of children by discretion:

34. Registration under section 3(1) of the British Nationality Act 1981 is in form distinct for being by discretion. The retention of this discretion by the Act was, in part, to deal with "*hard*", "*obscure*" or "*compassionate*" cases where a child was not recognised as British either by acquisition at birth or registration by entitlement (*Hansard* HC, Standing Committee F, 24 February 1981: Col 186).

35. As more fully described below, discretion in relation to registration is not confined by statutory conditions for its exercise. This is consistent with the wider statutory purpose that British citizenship should recognise and reflect the shared connection of all persons connected to the UK. The discretion given to the Secretary of State to register a person as a British citizen ought, therefore, to be exercised where this is necessary to fulfil that purpose. This is relevant not merely to the exercise of discretion under section 3(1) but also, for example, to that under section 1(7) which allows the Secretary of State to waive a period of absence that would otherwise bar a person from the entitlement to be registered under section 1(4).

36. Section 3(1), however, provides a wide discretion under which the Secretary of State may register any child as a British citizen. Importantly, this provides the means for children to be registered as British citizens in recognition of their connection to the UK by growing up here, even though born elsewhere. It may also be relied upon where a child faces an evidential barrier to proving the citizenship or entitlement which she or he has under the Act.

37. Another important distinction concerning section 3(1) is that, unlike the discretion concerning adult naturalisation, there is no statutory requirement of indefinite leave to remain or link to the immigration system as is to be found for naturalisation in the requirements stipulated by section 6 and Schedule 1. Section 3(1) includes no requirement for the child to have any leave to remain.

38. All the objectives concerning integration, security, and justice for the child, emphasised in relation to registration by entitlement, apply in relation to section 3(1) discretion if and where the child has arrived in the UK at a young age and is long resident here including the concern, raised in relation to section 1(4):

"*The concern is about the problem of children who might grow up here knowing no other country and unaware that they have no right to citizenship because of their parents' status...*" (*Hansard* HC, Standing Committee F, 26 February 1981: Col 221)

39. A further important distinction is that section 3(1) solely concerns children whereas naturalisation solely concerns adults. The significance of this increased after the 1981 Act following the UK's ratification of the 1989 UN Convention on the Rights of the Child, its withdrawal of its reservation concerning nationality and immigration and its adoption in domestic law of section 55 of the Borders, Citizenship, and Immigration Act 2009 (also section 71 of the Immigration Act 2014).

Children born outside the UK with entitlement to register:

40. Section 2 of the British Nationality Act 1981 addresses circumstances in which a person born outside the UK is to automatically acquire British citizenship at birth. The focus is on birth to a British citizen parent, who is not a British citizen 'by descent' (see section 14). The underlying purpose is to prevent British citizenship being passed from generation to generation each born outside the UK. This, it was decided, would undermine the principle of connection to the UK that Parliament intended to be at the heart of British citizenship.

41. Section 3 of the British Nationality Act 1981 provides for several rights to registration by entitlement of children born outside the UK, who despite being born to British citizen parents do not automatically acquire British citizenship at birth by virtue of section 2. As with other registration provisions, section 3(2) and (5) reflect Parliament's determination that the connection of the child to the UK is demonstrated by fulfilment of the requirements for the entitlement to be registered as a British citizen that is provided by those provisions.

Children in local authority care:

42. The responsibility of local authorities to ensure the citizenship rights of children in their care was recognised while the Act was being passed. The Minster of State, acknowledged this responsibility, in response to a Written Question:

"*Normally a local authority responsible for the child's care should have the details necessary to establish citizenship but where it does not application may be made for the registration of the child under the Secretary of State's discretionary power to register any minor. Each case would be judged on its merits but obviously a major aspect would be whether the child's future lay in the United Kingdom.*" (*Hansard* HC, 6 July 1981 : Col 12WA)

Conclusion:

45. When passing the British Nationality Act 1981, Parliament recognised it was making a significant change by introducing British citizenship and abandoning *jus soli*. It intended to ensure that children born and growing up in the UK, who would be connected to the UK just as those children born British citizens by virtue of section 1(1), should also be recognised as British citizens. This was for the benefit of the children and wider community, and in furtherance of the general aim, or underlying statutory purpose, that connection to the UK be recognised by citizenship.

46. To achieve the result, Parliament legislated to create entitlements to British citizenship by registration, which are not subject to the Secretary of State's discretion. That Parliament was creating rights to citizenship was emphasised in the debates and by the statutory language adopted. Even where – such as in section 3(1) – there is discretion granted to the Secretary of State, it remains important to understand the underlying statutory purpose which must guide the Secretary of State in the exercise of that discretion.

PRCBC, March 2022

Act of Parliament
(British Nationality Act 1981)

Statutory Instruments (Regulations and Orders)
(British Nationality General Regulations 2003)

Caselaw
(PRCBC & O v SSHD etc)

Home Office Policy Guidance
(Nationality Guidance)