CASE NOTE

R (PROJECT FOR THE REGISTRATION OF CHILDREN AS BRITISH CITIZENS & ORS) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2022] UKSC 3; [2022] 2 WLR 343

ERIC FRIPP* AND ARANIYA KOGULATHAS**

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I INTRODUCTION

The *British Nationality Act 1981* ('*BNA 1981*') provides a number of routes by which a minor who is not a British citizen may acquire British citizenship by registration. By *BNA 1981* s 1(3), a person born in the United Kingdom who is not otherwise a British citizen shall be entitled to be registered as a British citizen if, while he or she is a minor, his or her parent becomes such a citizen or 'settled' by maintaining ordinary residence in the United Kingdom and holding indefinite leave to remain. *BNA 1981* s 1(3A) makes an equivalent provision applicable when a parent has joined the British armed forces. By *BNA 1981* s 1(4), a person born in the United Kingdom who is not otherwise a British citizen shall be entitled to registration if he or she has reached the age of 10 without being absent for more than 90 days in any of those first 10 years of life. In the background is a broader provision, *BNA 1981* s 3(1), allowing discretionary grant of citizenship to a minor if the Secretary of State 'thinks fit' to do so and another provision giving rise to entitlement to registration where specified circumstances are met, at *BNA 1981* s 3(2).

Although there are multiple routes to registration as a British citizen for minors, all require the payment of a fee. That fee has been cumulatively increased over the years and presently stands at £1,012, of which £372 defrays the costs of processing the application, while the remainder cross subsidises other immigration and nationality-related activities of the Secretary of State for the Home Department ('SSHD').[1] The fee is high compared to its equivalent in many

* Eric Fripp is a barrister at 36 Public and Human Rights, London WC1R 5EF, and Senior Visiting Fellow in the Refugee Law Initiative, School of Advanced Study, University of London. He is General Editor of *The Law and Practice of Expulsion and Exclusion from the United Kingdom* (Hart 2014) and author of *Nationality and Statelessness in the International Law of Refugee Status* (Hart 2016).

** Araniya Kogulathas is a barrister at Goldsmith Chambers, London EC4Y 7BL, and former Legal Manager, Bail for Immigration Detainees, London, N4 2LA.

1 The equivalent fee for adults is higher, at £1,330.

countries.[2] Until recently, there was no provision for waiver or variation of the fee requirement.[3]

This requirement to pay a fee when a child wishes to seek registration as a British citizen, whatever the circumstances, has been the subject of a series of judicial decisions in recent years,[4] culminating in that of the United Kingdom Supreme Court examined herein.[5]

II LITIGATION PRIOR TO THE JUDGMENT OF THE SUPREME COURT

In *R (Williams) v SSHD* [2017] EWCA Civ 98 ('*R (Williams)*'), the Court of Appeal considered the appeal of a child who was, at the time of the application, destitute and supported by the local authority and had failed in seeking judicial review of a decision refusing his application for registration under *BNA 1981* s 1(4) on two grounds. First, that failure to pay the fee (then £672) rendered the application invalid and second, that there was no statutory discretion to waive or reduce the fee. The case failed, essentially for the following reasons:

(i) The statutory scheme clearly indicated that an application made without the fee would be invalid;[6]

(ii) The right to acquire citizenship by registration was not a fundamental or constitutional right above and beyond its creation by the legislature through statute. The requirement for payment of an application fee unaffordable to some potential applicants as a condition of validity was not ultra vires the enabling statute;[7]

(iii) The refusal to grant citizenship by registration, notwithstanding failure to pay the fee and so make a valid application, did not of itself breach art 8 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'). A child could be protected by the grant of leave to remain in relation to which fee waiver provisions existed. Moreover, there was no prospect of the child being removed from the UK

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2 According to the European Network on Statelessness, the equivalent fee is nil in Norway, €55 in France and €255 in Germany, which is reducible to €51 on the ground of 'equity or public interest': 'UK Supreme Court Finds that Setting High Fees for Registration of Children as British Citizens is Not Unlawful', *European Network on Statelessness* (Blog Post, 3 February 2022) <https://www.statelessness.eu/updates/news/uk-supreme-court-finds-setting-high-fees-registration-children-british-citizens-not>, archived at <https://perma.cc/WNQ4-KSPU>. The fee for registration of a child as a British citizen is also much higher relative to the equivalent fee for adults than in some other countries. For instance, the equivalent fees for child and adult nationality applications in Canada are CAD100 and CAD630 respectively: 'Pay Your Application Fees Online', *Government of Canada* (Web Page, 2 August 2022) <https://eservices.cic.gc.ca/epay/order.do?category=1>, archived at , <https://perma.cc/GA8X-Q4G8>.

3 See *Immigration and Nationality (Fees) (Amendment) Regulation*s *2022* (UK) reg 2, brought into effect from 16 June 2022 by reg 1(2), amending the *Immigration (Fees) Regulations 2018* (UK). The effect of this is set out later in Part III of this case note.

4 The cases are *R (Williams) v SSHD* [2015] EWHC 1268 (Admin), on appeal *R (Williams) v SSHD* [2017] EWCA Civ 98; [2017] 1 WLR 3283 ('*Williams* CA'), and then successively *R (Project for the Registration of Children as British Citizens) v SSHD; O v SSHD* [2019] EWHC 3536 (Admin) ('*PRCBC* HC'); *R (Project for the Registration of Children as British Citizens) v SSHD; O v SSHD* [2021] EWCA Civ 193 ('*PRCBC* CA') and the decision that is the subject of this case note.

5 *R (Project for the Registration of Children as British Citizens & Ors) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343 ('*PRCBC* SC').

6 *Williams* CA (n 5) [37]–[41].

7 ibid [42]–[45].

> or separated from his or her parents. Further, he or she could apply for registration when money was available, destitution not being assumed to be a permanent state. As a result, there was either no interference with *ECHR* art 8 rights or any interference was marginal and clearly justified;[8]

(iv) Impecuniosity was not a prohibited ground of discrimination within the meaning of *ECHR* art 14, which bars discrimination on certain grounds in respect of *ECHR* rights. Consequently, there was no breach of the *ECHR* art 14 prohibition on unjustified discrimination in relation to *ECHR* art 8 rights.[9]

In subsequent cases a charitable organisation focusing on the registration of children as British citizens[10] and two children, who had sought to apply for registration under *BNA 1981* ss 1(4) and 3(2) respectively but could not pay the full fee (by this time the same as at present — £1,012), sought judicial review of decisions by the SSHD treating those applications as invalid by reason of failure to pay that fee. Evidence accepted by Jay J in the High Court demonstrated that (i) for a substantial number of children a fee of £1,012 'is simply unaffordable'[11] and (ii) children 'born in the UK and identifying as British' but unable to register because of the fee 'feel alienated, excluded, isolated, "second-best", insecure and not fully assimilated into the culture and social fabric of the UK'.[12] The Court found, though with evident hesitation, that it was bound by *R (Williams)* as regards the nature of the right to citizenship by registration. This was created by statute and not fundamental or constitutional; thus, the fee was not ultra vires the statutory scheme even though some potential applicants lacked the ability to pay it.[13]

However, the claimants also raised a point not canvassed in *R (Williams)* — namely, that the SSHD had failed, in devising and maintaining her fee policy, to satisfy the statutory duty imposed on her by the *Borders Citizenship and Immigration Act 2009* ('*BCIA 2009*') s 55. This duty provides that she must 'ensure' in performing 'any of her functions in relation to immigration, asylum, or nationality' that she has 'regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'; 'in all actions reflecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, the best interests of the child shall be a primary consideration'.[14] There was no evidence in the material advanced for the SSHD that she:

> has identified where the best interests of children seeking registration lie, has begun to characterise those interests properly, has identified that the level of fee creates practical difficulties for many (with some attempt being made to evaluate the numbers); and has then said that wider public interest considerations, including the

8 ibid [53]–[64].

9 ibid [71]–[76].

10 The Project for the Registration of Children as British Citizens ('PRCBC').

11 *PRCBC* HC (n 5) [2], [19]–[22].

12 ibid [21].

13 ibid [76]–[78].

14 *R (MM (Lebanon)) v SSHD* [2017] UKSC 10; [2017] 1 WLR 6000, per Baroness Hale at [45]–[46] quoting *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1). The decision in *R (MM (Lebanon))* had been handed down after the Court of Appeal had heard argument in *R (Williams)*, though six days before the Court of Appeal's decision was handed down.

> fact that the adverse impact is to some extent ameliorated by the grant of leave to remain, tilts the balance.[15]

Counsel for the SSHD invited the Court to consider that evidence of exchanges in Parliamentary debates relating to registration fees showed the procedural duty under *BCIA 2009* s 55 had been satisfied, notwithstanding the absence of other evidence of relevant consideration by the SSHD.[16] The Court, while accepting that the exchanges did 'add to the evidential picture',[17] did not accept that they changed the conclusion reached, which was that the SSHD had violated the *BCIA 2009* s 55 procedural duty by failing to give adequate consideration, in relation to registration of children as British citizens, to the best interests of affected children. The Regulations setting out the fee were therefore unlawful and the Court deemed it 'unnecessary to go further. Whether a [*BCIA 2009*] section 55 compliant decision-making process could properly alight on a fee of £1,012 is beyond the proper ambit of this judgment.'[18]

Eventually, the SSHD appealed to the Court of Appeal and the claimants cross-appealed. The SSHD's appeal focused on the High Court's treatment of the evidence before it as regards whether she had complied with the *BCIA 2009* s 55 duty. This was, however, rejected.

The claimants' cross-appeal was premised on the High Court's decision to reject their application concerning the construction of the statutory scheme. That appeal also failed, with the Court of Appeal holding that the decision below was correct on the basis that this ground was bound to fail in light of the earlier decision in *R (Williams)*. In its view, this was not displaced by subsequent decisions; in particular, *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2017] UKSC 51; [2020] AC 869.[19] Permission to appeal was, however, granted by the Supreme Court. The SSHD did not appeal.

III THE JUDGMENT OF THE SUPREME COURT

In the Supreme Court, the claimants' appeal focused inevitably upon challenge to the decision of the Court of Appeal in *R (Williams)* and the subsequent decision of the Court of Appeal applying *R (Williams)*. That appeal failed on the basis that Parliament had authorised, in primary legislation, the imposition of the relevant fee via subordinate legislation.[20] The question of the appropriateness of the fee was held to be a political matter.[21]

The Supreme Court held that, where it was claimed that a later statute empowered the Executive to make subordinate legislation impinging upon or removing rights conferred by an earlier statute — in this case, the right to apply for registration as a British citizen — the question for the reviewing court was to interpret the *later* statute to ascertain the scope of the enabling power. The *presumption* is, however, that the later statute did *not* empower the Executive to make subordinate legislation that had the effect of removing rights conferred by

15 *PRCBC* HC (n 5) [112].
16 ibid [113].
17 ibid [115].
18 ibid [116].
19 *PRCBC* CA (n 5) [34]–[67] per Richards LJ. The Court of Appeal is, in general, bound as a matter of precedent by its own decisions.
20 ibid [27].
21 ibid [53].

the earlier statute. As an assumption or presumption, this is not a strict rule of law which predetermines the vires of the later statute. If, however, the Court concluded that the later statute, expressly or by necessary implication, *had* empowered the Executive to make subordinate legislation that had the effect of removing rights conferred by the earlier statute, there was no rule of law precluding such an interpretation. It followed that, in the instant case, the task of the Court was to ascertain the scope of the enabling powers in accordance with the presumption that statute had not empowered the Executive to make subordinate legislation, which removed rights conferred by *BNA 1981*. However, the right to be registered as a British citizen under *BNA 1981* was a statutory right and Parliament, by empowering the SSHD through creation of the statutory power to provide for fees to be charged for applications to be registered as a British citizen, had authorised the fees charged to children alongside the absence of provision for waiver or reduction, so that relevant standards were not ultra vires the rulemaking power.

IV CONCLUSION

The overall result of the decision is that the SSHD's fees policy was adjudged unlawful but only on the *BCIA 2009* s 55 point, that the SSHD had failed to have regard to the best interests of children when setting the relevant fee.

Looking at the development of the litigation, including the *R (Williams)* and *R (Project for the Registration of Children as British Citizens & Ors) v Secretary of State for the Home Department* ('*R (PRCBC)*') cases as a whole, changes the impression of the overall litigation positively, as against what the Supreme Court decision might suggest when read in isolation.

First, looking at the litigation overall keeps in sight the fact that, in the High Court, the claimants in *R (PRCBC)* won the *BCIA 2009* s 55 point. That success was confirmed by the Court of Appeal when it rejected the appeal by SSHD. The ultimate effect of those two decisions as regards the fee provision has been significant. In light of those decisions, the SSHD reviewed fees chargeable for applications made by children seeking to register as British citizens. She introduced a discretionary affordability-based fee waiver as well as a fee exception for children who are looked after by a local authority. Moreover, she created a related exception from the fees payable for the arrangement of a citizenship ceremony or administration of a citizenship oath and pledge. These changes were reflected in new regulations with Explanatory Memorandum,[22] a ministerial statement,[23] an impact assessment[24] and published guidance for Home Office staff.[25] The published guidance stated that the need to safeguard and promote the

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22 See n 3.

23 Kevin Foster, 'Changes in Respect of Child Citizenship Registration Fees' (Written Statement No UIN HCWS65, UK House of Commons, 26 May 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-05-26/hcws65>, archived at <https://perma.cc/6LAF-NCBM>; Baroness Williams of Trafford, 'Changes in Respect of Child Citizenship Registration Fees' (Written Statement No UIN HLWS61, UK House of Lords, 26 May 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-05-26/hlws61>, archived at <https://perma.cc/7N54-28GB>.

24 'Child Citizenship Affordability Fee Waiver Impact Assessment 2022' (Impact Assessment No HO415, UK Home Office, 2022).

25 UK Home Office, *Affordability Fee Waiver: Citizenship Registration for Individuals under the Age of 18 (Version 1.0)* (Guidance for Home Office Staff, 26 May 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078033/Affordability_fee_waiver_Citizenship_registration_for_individuals_under_the_age_of_18.pdf>, archived at <https://perma.cc/X9ZT-32CZ> ('Home Office Guidance').

welfare of a relevant child should be a primary consideration in deciding any fee waiver application; if applicants and parents can '*credibly*' show that they could not afford the fee or that being made to pay the fee would prevent a child's needs from being met, a fee waiver must be granted.[26] However, as highlighted by the charity Project for the Registration of Children as British Citizens, '*expenditure may not fit what the [SSHD] regards as essential living needs*.'[27] For example, extracurricular activities that benefit a child's wellbeing and development could be considered non-essential in the absence of evidence that being prevented from attending them would '*cause particular harm to the wellbeing of the child*.'[28] However, it is unclear what would constitute '*harm*' and how that might be evidenced. Thus, although the changes from the High Court decision are welcome, qualifying for a fee waiver will not necessarily be without difficulty for children from low and modest income families.

Second, the decisions in the *R (Williams)* and *R (PRCBC)* cases do identify some restraints on fee levels. In *R (Williams)* in the Court of Appeal, Counsel for the SSHD accepted 'that the [SSHD] could not simply stipulate an application fee of, say, £1 million.'[29] The Court, per Davis LJ, noted that it might provide scope for an extreme fee level, straying beyond the vires of the enabling statute.[30] Davis LJ observed, 'I do see the point here'. He stated that the concession would not gain traction in that context given that it was 'to be taken as a given that the Secretary of State's powers are to be exercised in good faith and not arbitrarily'. *Asylum and Immigration (Treatment of Claimants etc) Act 2004* s 42(1) allowed the amount of fees to exceed the administrative costs, subject to a requirement to 'reflect the benefits to the individual estimated as likely to accrue' and that 'the amount of fees required can only be exacted after prior scrutiny of both Houses of Parliament',[31] in addition to which an individual could register later when means permitted having had leave to remain in the meantime.[32] In the Supreme Court, Lord Hodge drew attention to *Immigration Act 2014* s 68(5) by which 'where a fees order provides for a fee (or part of a fee) to be a fixed amount, it — (a) must specify a maximum amount for the fee (or part), and (b) may specify a minimum amount.'[33] Section 68(9) of the same Act stipulates that in setting the fee amount, the SSHD may have regard only to certain permitted matters: (a) the cost of exercising the function, (b) the benefits that she thinks are likely to accrue to any person in connection with the exercise of that function, (c) the costs of exercising any other function in connection with immigration or nationality, (d) the promotion of economic growth, (e) the fees charged by governments of other countries in respect of comparable functions and (f) any international agreement.

More broadly, the decision provides a focus on the degree to which, in a common law system without an entrenched constitutional protection, the rubric by which citizenship is obtained (or retained) remains dependent on ordinary statute.

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26 ibid 6 (emphasis added).

27 Project for the Registration of Children as British Citizens: *Practitioners' Note on Changes to Fee Regulations on Registration of Children as British Citizens (Exemptions and Waivers)* (Practice Note, 30 May 2022) 4 [18] (emphasis added).

28 Home Office Guidance (n 25) 14 (emphasis added).

29 *Williams* CA (n 5) [49].

30 ibid.

31 ibid [50].

32 ibid [51].

33 *PRCBC* SC (n 5) [12]–[18]. The maximum amount specified as regards registration of a child as a British citizen is £1,500: *Immigration and Nationality (Fees) Order 2016* (UK) art 10.

The Supreme Court regarded the fee for children who apply for British citizenship as both unaffordable for many young people or their families[34] and not touching any fundamental or constitutional right. Rather, it was 'a question of policy which is for political determination' and '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'.[35] The *ECHR* art 8 right — incorporated into domestic law by the *Human Rights Act 1998* — is shown to have significant weaknesses when stretched to address the essentially public questions of the conditions for the obtaining (or loss) of citizenship and/or the civil rights and entitlements attached to it, weaknesses that tend to highlight the absence of other, more specific protection for nationality rights in *ECHR*.[36] These features of the instant decision arguably highlight both the desirability of further discussion regarding heightened protection of such conditions as a constitutional right and also the substantial obstacles to implementing greater safeguards for the acquisition of nationality in a common law system.

34 *PRCBC* SC (n 5) [5].

35 ibid [33], [51].

36 Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, ('*ECHR*') has been the preferred route of the European Court of Human Rights for a gradual development of principles relating to citizenship in the absence of more specific *ECHR* protection: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No.005 (entered into force 3 September 1953). See, eg, *Usmanov v Russia* (European Court of Human Rights, Application No 43936/18, 22 March 2021). The potential application of the *ECHR* art 3 prohibition of degrading treatment, for instance, has long been ignored by the Court, despite at least some precedent for application (in the context of citizenship and/or immigration laws undermined by race discrimination) in the decision of the then European Commission of Human Rights in *East African Asians v United Kingdom* [1973] 3 EHRR 67.