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Case Nos: CO/2663/2018; CO/4832/2018; CO/751/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2019

Before:

MR JUSTICE JAY

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Between:

R (oao (1) THE PROJECT FOR THE REGISTRATION OF CHILDREN AS BRITISH CITIZENS, (2) O, a child, by her litigation friend, AO, and (3) A, a child, by her litigation friend, NJM)	**Claimants**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Richard Drabble QC with (1) Miranda Butler, (2) Admas Habteslasie and (3) Jason Pobjoy and Isabel Buchanan (instructed by **Mishcon de Reya LPP**) for the **Claimants**
Sir James Eadie QC, William Hansen and Nicholas Chapman (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 26th and 27th November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. British citizenship is a status aspired to and cherished by many, conferring benefits on the holder which are both tangible and intangible. The present case is concerned with the rights and best interests of children, and the focus has been on the acquisition of British citizenship by registration. As is well known, those born here with a parent who is either a British citizen or with rights of settlement acquire this status automatically. For present purposes, and simplifying the matter somewhat, children's acquisition of citizenship by registration may be achieved by pursuing one of two avenues. The first requires the fulfilment of certain objective conditions, the completion of an application form and the payment of a fee; the second depends on the completion of an application form, paying the concomitant fee, and the favourable exercise of discretion of the Secretary of State. The British Nationality Act 1981 ("the BNA 1981") describes those seeking registration pursuant to this first avenue as exercising an "entitlement", but the exact meaning of that term has given rise to some debate.

2. The registration fee is mandatory and inflexible because the Secretary of State has decided not to allow exemptions, reductions or waivers to meet the merits of individual cases. These fees have risen substantially over the years as Government policy has moved towards a system of self-financing. The detail does not matter for present purposes. Currently, children who are entitled to be registered under the BNA 1981 must pay a fee of £1,012 (the prescribed amount is higher for adults: £1,206 together with £80 for the citizenship ceremony). The Secretary of State has said that only £372 of that fee is attributed to the administrative cost of processing the application; the remainder effectively cross-subsidises other functions in connection with immigration and nationality. Since 6th April 2007 subordinate legislation made under section 42 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 has set fees at a level which include what may be described as that additional element. The evidence before me is that for a substantial number of children a fee of £1,012 is simply unaffordable. The Claimants contend in various ways that the imposition of this additional element at a level which is unaffordable is unlawful. They challenge the secondary legislation which has set the fee.

3. The issue is undoubtedly important, but it is not novel. The gravamen of the complaint, but not in all its present iterations, was considered by the Court of Appeal in *R (Williams) v SSHD* [2017] 1 WLR 3283 affirming Hickinbottom J ([2015] EWHC 1268 (Admin)). The Claimants argue that *Williams* cannot be squared with subsequent Supreme Court authority; and, in any event, given that the scope of the challenge has broadened, *stare decisis* is not an insurmountable hurdle across the board.

4. There are six grounds of challenge as follows:

   (1) GROUND 1: the level of fee is incompatible with the statutory scheme under the BNA 1981 in that it renders nugatory entitlements to register (ss.1, 3(2) and para 3

of Schedule 2), and for that reason is not authorised by the *vires*-creating power conferred by s.68 of the Immigration Act 2014.

(2) GROUND 2: in setting the fee for registration of children as British citizens under the BNA 1981 at £1,012, the Secretary of State failed to discharge her duties under s.55 of the Borders, Citizenship and Immigration Act 2009 ("the section 55 duty").

(3) GROUND 3: this alleges a breach of the Secretary of State's public sector equality duty under s.149 of the Equality Act 2010 ("the PSED").

(4) GROUND 4: this alleges an equivalent breach of *Tameside* principles.

(5) GROUND 5: this alleges a breach of the rights of O and A under Article 8 of the Convention.

(6) GROUND 6: this alleges a breach of A's rights under Article 8 combined with Article 14 because the requirement imposed by s.50(9A) of the BNA 1981 is incompatible with those rights.

5. An apparently formidable list of grounds dwindles substantially when the following matters are considered. Ground 1 directly confronts *Williams* and, subject to any other difficulties, requires an examination of the true *ratio* of that case and its compatibility with subsequent Supreme Court authority. Ground 2 is not covered by *Williams* and captures what I would characterise as the Claimant's overall merits case. Ground 3 adds very little, if anything, to the previous ground. Ground 4 is entirely parasitic on Ground 2. Ground 5 adds nothing, and Mr Richard Drabble QC for the Claimants rightly did not develop it. Ground 6 has now been conceded by the Secretary of State following the decision of this Court in *R (K) v SSHD* [2018] EWHC 1834 (Admin) which has not been taken on appeal, although the parties are not in agreement as to the form of any relief.

6. It is convenient to divide this judgment into the following chapters:

(1) The Claimants and their Individual Circumstances

(2) The Advantages of British Citizenship

(3) The Impact of the Fee

(4) The Defendant's Decision-Making

(5) A Synopsis of the Statutory Scheme

(6) The Decision of the Court of Appeal in *Williams*

(7) Ground 1

(8) Ground 2

(9) Ground 3

The Claimants and their Individual Circumstances

7. PRCBC is a charitable organisation focusing exclusively on the registration of children as British citizens. It works to assist children and young adults to ascertain and establish their British citizenship rights by way of legal advice and representation, and it has lobbied Parliament in connection with the scale of the registration fee. For present purposes it claims to represent the interests of all those adversely affected by the fee. The precise number is disputed and cannot be ascertained: a figure of 120,000 has been put forward for children in this country without citizenship or immigration leave, although those who would qualify for the former, who would not wish to be registered at all or could in fact pay the fee constitute an uncertain number.

8. O was born in the UK on 14th July 2007. She has never left the UK. O attends school and is not legally allowed to work. From 14th July 2017 O satisfied the requirements for registration under s.1(4) of the BNA 1981 having been born and resided here continuously for ten years. O's mother is a single parent and is in receipt of state benefits. O, her sibling and her mother have limited leave to remain. O's mother has been unable to pay the full fee but has been able to raise from third parties that part of it which represents the administrative element of processing an application. The Secretary of State has refused to determine O's application on the basis that the full amount must be paid.

9. It is clear from the available evidence that O and her mother cannot as a matter of practical reality pay the full fee. They could only do so by taking steps which to my mind would be wholly unreasonable. O's evidence is that she regards herself as British and wishes to be treated as such by her friends and by society. Her friends do not perceive her as "being British like them".

10. A was born in the UK on 13th June 2016. Her mother is Nigerian and at the time of A's birth she was married to a Lithuanian citizen. A's biological father is and has been at all material times a British citizen. A would be automatically entitled to British citizenship pursuant to s.1(1) of the BNA 1981 were it not for s.50(9A). Both A and her mother have limited leave to remain in the UK. The family is in receipt of state benefits and cannot afford the registration fee. An application was made on behalf of A for registration under s.3(1) of the BNA 1981 with the Secretary of State being invited to waive the fee. The latter has said that the full fee must be paid before the application may be considered.

The Advantages of British Citizenship

11. As Baroness Hale stated in *ZH (Tanzania) v SSHD* [2011] 2 AC 166 para 30, nationality is of particular importance in assessing the best interests of any child. The United Nations Convention on the Rights of Children ("UNCRC") recognises the right of any child to be registered and acquire a nationality; and to preserve his identity, including his nationality (Articles 7 and 8). In addition:

> "the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond." (see the publication referred to with approval by Baroness Hale, para 32)

> [T]here is much more to British citizenship than the status it gives to the children in immigration law … [i]t carries with it a host of other benefits and advantages … [which] ought never to be left out of account." (Lord Hope, para 41)"

12. Further, in *R (Johnson) v SSHD* [2017] AC 365, Baroness Hale DPSC stressed the link between citizenship and social identity (para 27).

13. The Secretary of State's own guidance documents reflect this – for example:

> "[b]ecoming a British citizen is a significant life event. Apart from allowing a child to apply for a British passport, British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up." (Guide MN1, July 2019)

14. British citizens have the right of abode: see s.1(1) of the Immigration Act 1971. In *R (Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453 para 151, Lord Mance characterised the right of abode as "fundamental and, in the informal sense in which that term is necessarily used in a United Kingdom context, constitutional". Here, he was describing the rights which inhere in the acquisition of citizenship, automatically or by registration, not the entitlement to apply by the latter route. In this same context Lord Hoffmann put the matter slightly differently, at para 45:

> "What these citations show is that the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131-132. But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers - a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it."

15. British citizens, but not those with indefinite leave to remain, are eligible to apply for British passport, access consular support overseas and (albeit not of course when still children) vote in a general election.

16. The advantages of British citizenship cannot be considered in abstract. The position of British citizens falls to be contrasted with those who have limited or indefinite leave to remain (there are also important practical differences between these species of leave), into which categories the majority but not all of the children entitled to be

registered will no doubt fall. A person with leave to remain as opposed to the right of abode cannot enter and/or remain in the UK without let or hindrance: by definition, she requires leave, and this permission may require examination by immigration officers at a port of entry or at Lunar House. The status may lapse; it may be cancelled; and individuals holding such leave are liable to be deported on conducive grounds under s.3(5)(a) of the Immigration Act 1971.

17. I have said that there are practical differences between limited and indefinite leave to remain. As matters stand, O has limited leave to remain; A does not. Although in due course they may well qualify for indefinite leave to remain, should they need it, I think that the position should be regarded as authoritatively set out by the Secretary of State's witness, Mr Richard Bartholomew, at para 19 of his witness statement (cf. para 98 of the Claimants' skeleton argument):

> "A child with valid leave to remain would be able to reside in the UK, alongside their family unit. They would have access to education, healthcare and be in a similar position to their British peers. A child with settled status [i.e. with indefinite leave] would also have the same access to higher education and funding as that of a British citizen."

18. There have been cases in this Court where children entitled to be registered under s.1 of the BNA 1981 do not have any leave to remain, limited or otherwise. They are in an obviously precarious position, and in addition to their risk of being removed or deported have limited or no access to the welfare state.

The Impact of the Fee

19. I consider that I may take this aspect of the case very shortly because the Secretary of State does not dispute it.

20. First, there is a mass of evidence supporting the proposition that a significant number of children, and no doubt the majority growing up in households on low or middle incomes, could only pay the fee by those acting on their behalf being required to make unreasonable sacrifices. In this sense (see *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409) the registration fee is unaffordable.

21. Secondly, there is an equivalent mass of evidence supporting the proposition that children born in the UK and identifying as British (A, it is true, does not yet fall into this category because she is too young, but countless others do) feel alienated, excluded, isolated, "second-best", insecure and not fully assimilated into the culture and social fabric of the UK.

22. Although I have reduced the Claimants' case on this important aspect into two short paragraphs, I can assure the parties that I have studied the supporting evidence respecting Mr Drabble's economical and efficient approach to it in oral argument.

The Defendant's Decision-Making

23. The Secretary of State's ability to levy a registration fee which exceeds the administrative cost of processing the particular application has been in place for over

twelve years, but the documentary trail goes back to November 2013 and not before. Sir James Eadie QC for the Secretary of State is entitled to submit that although the present judicial review challenge focuses on subordinate legislation made in 2018, the underlying policy is of some maturity and has not materially changed, and the Claimants have not sought (nor could they seek) to uncover too many stones. It follows that the Secretary of State's reasons for introducing this policy in 2007 or thereabouts can, at best, only be inferred.

24. In a Consultation Document entitled *Fees and Charging Immigration and Visas*, November 2013, the Secretary of State asked a number of questions directed to possible reform of the existing system. The following point was made:

> "We could simplify the fee structure, to make it easier for customers to understand what they are required to pay, but in order to generate the same amount of income this could mean that many people have to pay more, thereby cross-subsidising others that pay less."

The only question which even arguably bore on the issue of fees for registration of nationality was item 6 which asked whether "premium services should be packages together as a single product". I, however, would read the jargon "premium services" as being a reference to business visas and the like, and not to registration applications.

25. The response to this consultation process was published in January 2014. Unsurprisingly, the respondents did not address registration fees. The responses to question 16 – "do you think any proposals outlined above would have a disproportionate effect upon any particular group?" – were all addressed to fees for visa services.

26. The available documentation includes three Policy Equality Statements ("PESs"). The focus has been on the PES addressing Immigration and Nationality Fees Policy for 2016-17 but there are few material differences between them. I think that the following passages are relevant:

> "Longer term … we aim to achieve self-funded status for the BIC system by 2019-20. This means that, alongside expenditure reductions, the contribution from users of the BIC system must increase [from 60%] over the next four years.
>
> Further, we have a duty under [section 55] to have regard to a child's best interests when developing fees policy. There are fee exemptions and waivers in place which apply to children being provided with assistance from a local authority and which ensure that fees are not a disproportionate barrier to any applicant exercising their Convention rights.
>
> [*à propos* the November 2013 Consultation] On the wider aspects of our fees policy, a key concern from respondents was around the disproportionate effect of fee increases on applicants with lower income. We maintain our view that fee levels are justified by the valuable benefits and entitlements of a

> successful application. We have continued to offer specific concessions for certain applicants where possible and appropriate.
>
> This 2016-17 PES focuses on fees for statutory migrant applications made using standard services, as the costs of these must be met if an individual is to come to or remain in the UK to work, study or visit. **Since individuals can choose whether or not to use the optional premium services that the Home Office provides, or to apply for citizenship or nationality, these non-mandatory services are not included within the PES**. (emphasis supplied)
>
> Settlement is a broad term which includes a number of application routes where a successful applicant can subsequently apply to stay indefinitely or apply for citizenship. Fees for these routes are typically higher than those for limited periods of leave because the benefits conferred to successful applicants are greater. For example a grant of indefinite leave to remain means that there is no requirement to leave the UK at any point in the future; it comes with unrestricted access to the labour market and public funds such as NHS treatment and welfare benefits.
>
> Conclusion
>
> The Home Office has given due regard to the [PSED]"

It is immediately apparent that the PES has not in fact assessed the impact of fees on nationality applications. This is borne out by the highlighted passage, and by the fact that there are no exemptions and waivers in place for other than applications for leave to enter and remain.

27. To the extent that Mr Bartholomew's witness statement adds to this picture, I draw attention to paras 18, 20 and 22(iii):

> "18. Having regard to the need to consider the best interests of a child as a primary consideration, the Home Office considers that requiring payment of a fee for child registration applications does not breach the s.55 duty or disproportionately interfere with an applicant's Convention rights. This is because the main question to be addressed is whether children as a whole, and then as individual applicants, will be adversely impacted by the policy in question. Many of the benefits of citizenship are realised in later life, such as the ability to vote, sponsor family members or take reserved employment.
>
> 20. As mentioned above, the Home Office considers that citizenship is not a necessary pre-requisite to enable anybody to reside in the UK and enjoy the benefits of such. It is open to those who have ties to the UK to make an application for leave

> to remain, and where applicable, without charge. Therefore, a grant of citizenship is not required to act in the best interests of a child.
>
> 22(iii). Any assessment of a child's best interests in this context is extremely sensitive to individual circumstances and it cannot be said as a generalisation that it is in a child's best interests to acquire British citizenship. For example, because it may be in a child's best interests to preserve links to another country."

I note that paragraph 52(d) of the Secretary of State's skeleton argument disagrees with para 22(iii) of Mr Bartholomew's witness statement.

28. Sir James relied heavily on the fact that Parliament has debated this very issue. In chronological order, he drew my attention to the following four debates:

(1) Amendment debate in the House of Lords, 21st March 2016.

(2) Debate in the House of Commons on the Draft Immigration Fees Order 2016 (under the affirmative resolution procedure).

(3) Debate in the House of Lords on the same draft Order.

(4) Motion of Regret in the House of Lords on the Fees Regulations 2018 (under the negative resolution procedure).

29. As for Item (1), Baroness Lister of Burtersett moved amendment 145A which was designed to amend s.68 of the Immigration Act 2014 in two respects: first, to limit the ability to levy fees to the cost of exercising the function; and, secondly, to enable the Secretary of State to waive the fees for children (and to require her to do so when the child applicant was being provided assistance by a local authority). Baroness Lister advanced a number of arguments, one of these being that the level of the fee was a considerable barrier to child applicants. The Minister of State (Lord Bates) replied to the proponents of the amendment with the following points: (1) the system needed to be self-funding; (2) the fees for children are already £300 lower than those for adults; (3) the cost and administrative burden of operating a system of waivers would be prohibitive; and (4) citizenship is not an absolute right, nor is it necessary in order for a person to reside in the UK and access public services.

30. As for item (2), a number of MPs made the argument that the level of fee was out of reach for many. The Immigration Minister responded by pointing out that the level of nationality and settlement fees reflected the considerable benefits and entitlements available to successful applicants. Further:

> "Clearly, there are costs to the immigration system in processing and assessing such claims and in the ability to assert rights, so it is right that we have a system that can recover those costs. I will reflect on what [MPs] have said … It is all about that relative balance."

31. As for item (3), Lord Rosser asked how the Defendant would meet its section 55 obligations in the context of immigration, asylum or nationality, and then posed a specific question about settlement. The Minister of State did not directly address the question about section 55 duties, stating that it was right that the system sought to cover the costs of processing and assessing claims, that the Defendant would never require a fee that was incompatible with the ECHR, and that there are many fee exemptions. The Government's motion was then agreed.

32. As for item (4), Baroness Lister proposed a Motion of Regret as regards a £39 increase in the registration fee for children to £1,012. She drew attention to the fact that "many" children born in the UK or having lived here for most of their lives have not exercised their right to register for British citizenship "because of the exorbitant fee levied". Baroness Lister then added this:

> "The Motion is very modest. … It calls for two things. First, it calls for a children's best interests impact assessment of the fee level. A freedom of information request has elicited that such an assessment has never been carried out, even though, since 2009, [section 55] requires the Home Office to ensure that the children's best interests are given primary consideration in all decisions that affect them. Secondly, it calls for an independent review of fees for registering children of British citizens."

33. After a number of speeches in their Lordships' House, Baroness Manzour concluded the debate on behalf of the Government. Insofar as is material for present purposes, she said the following:

> "Parliament has explicitly to give statutory effect to that requirement [sc. the need to safeguard and promote the welfare of children] through [section 55]. As the noble Baroness, Lady Massey, said, words in statute are not enough: it is actions that matter.
>
> …
>
> To reset fees for child registration so that they cover just the costs associated with processing an individual application … would reduce fees to below the level that they were in 2007 and reduce the amount of funding that the Home Office has available to fund the immigration system by about £25M to £30M per annum.
>
> …
>
> I turn to the issue of child registration fees. Let me be clear at the outset that, far from wanting children and young people who regard this country as their home to leave the Government strongly encourage them to make appropriate applications to make their stay here lawful. The most compelling reason for this is that these children are at risk …

> …
>
> The Home Office may grant leave to remain to a child who has lived in the UK continuously for seven years or to a young person who is over 18 but under 25 who has lived continuously in the UK for half of their life. Such leave gives the person concerned the right to live, study and work in the UK and the right, in appropriate circumstances, to receive benefits from public funds.
>
> …
>
> Of course, some migrants … may wish to become citizens, reflecting that they have spent most of their lives here and are committed to this country – I agree … that citizenship is important as a part of civil society. That is something that we should welcome. …
>
> However, a child will normally acquire citizenship at birth derived from his or her parents. Since 1983, it has not been automatic that a child born in the UK is British. This does not mean that we do not cater for children and their well-being. We care. Children born in the UK are indeed catered for in our immigration and nationality provisions, which are designed to take account of the fact that a child's strongest entitlement is to preserve links with his or her parents and, where they exist, with his or her country of origin.
>
> …[O]ne reason why the Government require formal applications to be made in a designated way is so that all the factors relevant to a child's life and future can be taken into account in an appropriate and considered way. We do not provide fee waivers for citizenship, which reflects the fact that, while citizenship provides extra benefits such as the right to vote in elections and the ability to receive consular assistance while abroad, becoming a citizen is not necessary to enable individuals to live, study and work in the UK, and to be eligible for benefit of services appropriate to being a child or a young adult. The decision to become a citizen is a personal choice, and it is right that those who make that decision should pay a fee."

34. The Motion to Regret was eventually "disagreed" by ten votes.

A Synopsis of the Statutory Scheme

35. The key features of the statutory scheme have been authoritatively examined by the Court of Appeal in *Williams*, and all that is necessary is the highlighting of a limited number of points.

36. Section 1(3) of the BNA 1981 provides that a person "born in the United Kingdom [who does not qualify automatically under sub-s.(1)] shall be entitled to be registered as a British citizen" if, whilst a child, (1) the person's mother or father becomes a British citizen or becomes settled, and (2) an application is made for the person's registration as a British citizen. Thus, citizenship by registration does not flow automatically; it requires an act of volition by the qualifying individual, the completion of the requisite application, and (by virtue of s.42A(1)), payment of the prescribed fee ("a person shall not be registered [under any provision of the BNA 1981] unless any fee payable by virtue of this Act in connection with registration has been paid"). Subject to these matters, the entitlement to be registered is expressed in Hohfeldian terms in the language of "right" (see, for example, *Akinyemi v SSHD* [2017] 1 WLR 3118 at paras 19 and 22, although I am not sure that the epithet "absolute" adds anything).

37. Section 1(4) provides that a "person born in the United Kingdom [who does not qualify automatically under sub-s. (1)] shall be entitled on an application for his registration as a British citizen made at any time after he has attained the age of 10 years" to be registered as such as long as the person was not absent from the country for more than ninety days in each of the first ten years of life. The Secretary of State has discretion to allow applications in the case of absences for longer periods. It may be seen that this provision is not limited to child applicants.

38. S.3(1) provides that "[i]f 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 a British citizen". I interpret this as conferring a general discretion on the Secretary of State to register children as British citizens. In contrast with other provisions, s.3(1) is not cast in the language of entitlement.

39. S.3(2) provides that a person born outside the United Kingdom "shall be entitled" to be registered as such in the event that the requirements set out in sub-s.(3) are fulfilled: these vary, dependent on whether the person was born stateless, and the detail matters not.

40. It may be seen that the rights conferred under ss. 1(3) and 3(2) may only be exercised whilst the individual who meets the qualifying conditions is a child, and that the discretionary provision in s.3(1) is also so limited. The breadth of s.1(4) to some extent compensates for this, although an indeterminate number of individuals cannot fulfil its terms, and Baroness Lister has stated in her evidence that many individuals may face difficulties in proving the statutory conditions as they grow older and available documentation disappears. As a matter of impression, I would accept her overall sentiment, but the extent of these difficulties cannot be quantified.

41. As the Claimants point out, the statutory formula of "shall be entitled" features elsewhere in the BNA 1981: see ss.1(3A) and 4F, and para 3 of Schedule 2.

42. Mr Drabble placed particular emphasis on the last of these provisions:

> "(1) A person born in the United Kingdom or a British overseas territory after commencement shall be entitled, on an application for his registration under this paragraph, to be so

> registered if the following requirements are satisfied in his case, namely—
>
> (a) that he is and always has been stateless; and
>
> (b) that on the date of the application he was under the age of twenty-two; and
>
> (c) that he was in the United Kingdom or a British overseas territory (no matter which) at the beginning of the period of five years ending with that date and that (subject to paragraph 6) the number of days on which he was absent from both the United Kingdom and the British overseas territories in that period does not exceed 450.
>
> (2) A person entitled to registration under this paragraph—
>
> (a) shall be registered under it as a British citizen if, in the period of five years mentioned in sub-paragraph (1), the number of days wholly or partly spent by him in the United Kingdom exceeds the number of days wholly or partly spent by him in the British overseas territories;
>
> (b) in any other case, shall be registered under it as a British overseas territories citizen."

43. As the Home Office paper dated 26th September 2017 makes clear, para 3 of Schedule 2 was enacted "to meet our obligations under the United Nations Convention on the Reduction of Statelessness" which was adopted in 1961. Article 1 provides:

> "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
>
> (a) at birth, by operation of law, or
>
> (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected.
>
> A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law."

44. At the time *Williams* was before Hickinbottom J, the Secretary of State's ability to set fees which exceeded the administrative cost attributable to the particular application was governed by s.42 of the 2004 Act. At that stage, account could be taken of the likely benefits flowing from a successful application. The Court of Appeal was aware that s.42 had been superseded by s.68 of the Immigration Act 2004, but said at para

26 that this provision did not require consideration. In my view, there is no material difference for present purposes between the old s.42(1) and the new s.68(9) which provides:

> "(9) In setting the amount of any fee, or rate or other factor, in fees regulations, the Secretary of State may have regard only to—
>
> (a) the costs of exercising the function;
>
> (b) benefits that the Secretary of State thinks are likely to accrue to any person in connection with the exercise of the function;
>
> (c) the costs of exercising any other function in connection with immigration or nationality;
>
> (d) the promotion of economic growth;
>
> (e) fees charged by or on behalf of governments of other countries in respect of comparable functions;
>
> (f) any international agreement.
>
> This is subject to section 69(5)."

45. S.69(5) provides that where a Fees Order stipulates a fee in a fixed amount, it must specify a maximum amount for that fee and may specify a minimum amount. There had been no analogue to this provision in the 2004 Act.

46. The *vires* for a Fees Order is s.68(2). The relevant Fees Order is the Immigration and Nationality (Fees) Order 2016 (SI 2016 No 177) made by the Secretary of State following the affirmative resolution procedure. Article 3 requires the Secretary of State to charge the fee specified in fees regulations "in respect of the exercise of the functions in connection with immigration and nationality that are [therein] specified". Article 10 specifies the maximum amount (see s.69(5)) for registration of nationality applications as £1,500.

47. The fees regulations currently in place are the Immigration and Nationality (Fees) Regulations 2018 (SI 2018 No 330) made by the Secretary of State following the negative resolution procedure, and were the subject of the Motion to Regret in the Lords. These do not materially differ from the 2017 version, save that the fee has increased. By para 19.3.1 of Schedule 8, the prescribed fee is £1,012 for a child. The Secretary of State has not exercised her power under s.68(10) of the 2014 Act to provide any exemptions, waivers or reductions in registration cases.

The Decision in Williams

48. In *Williams*, the claimant, a ten-year-old boy who had been born in the United Kingdom to Jamaican parents, applied to be registered pursuant to s.1(4) on the basis of ten years' continuous residence. The relevant prescribed fee under antecedent provisions was £673. This amount could not be paid, and the application was rejected

on the basis that it was invalid without the fee. The issues before this Court were whether (1) the statutory scheme was *ultra vires* in that it did not include a fee exemption for applications to register British nationality by children who were in receipt of local authority assistance because of destitution, and (2) the applicant's Article 8 and/or Article 14 rights were breached. No point was taken on section 55.

49. I have already accepted Sir James' headline submission that the statutory scheme has not materially changed. It seems to me that my duty is to identify the *ratio* of *Williams* as precisely as I am able, and then to apply it.

50. Davis LJ gave the sole reasoned judgment (Underhill and Macur LJJ agreed with it). At para 16 he observed that the entitlement to registration was not automatic: it was a right to citizenship which may only be exercised on an application made. The effect of the statutory scheme was that where, as here, a fee was required, it had to be paid (para 20). The scheme itself does not permit any relaxation of that requirement although the Secretary of State's policy is to waive it to avoid a breach of the Convention (para 30).

51. On issue (1), the *ultra vires* ground, Davis LJ held that the actual language of the scheme was flat against the appellant (para 41). The basic point was that registration required an application, and that an application would be invalid unless accompanied by the prescribed fee. Thus, the entitlement at issue had to be read in conjunction with the entirety of the scheme that created it.

52. Leading Counsel for the appellant also relied on the line of authority which held that secondary legislation cannot ordinarily be used to defeat the purpose of and conflict with the relevant primary legislation: see, for example, *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513, *R v Lord Chancellor, ex p Witham* [1998] QB 575 and cf. *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597. The way in which this submission was advanced was that the entitlement to be registered was a "fundamental right". Davis LJ rejected that submission at para 45 in the following terms:

> "What is at root wrong with the argument in the present case is, in my view, this. There is no "fundamental" or "constitutional" right to citizenship registration for persons in the position of the appellant at all. The right is one which Parliament has chosen by statute to create and bestow, in certain specified circumstances. Those circumstances include, as one requirement, an application: which is then required to be accompanied by a fee if it is to be valid. There is nothing in the requirement of a fee to defeat the statutory purpose and intent. On the contrary, it is *part* of the statutory purpose and intent. Mr Knafler's argument, with respect, in effect simply subordinates the requirement for a fee-paid application to the other conditions required to be fulfilled if citizenship under s. 1(4) of the 1981 Act is to be granted. I can see no sufficient justification for that, having regard to the terms of the statutory scheme."

53. Sir James conceded before the Court of Appeal that the Secretary of State could not set the fee at, say £1M. Under the regime now in place, a fee above £1,500 would not be lawful, but as I have said the 2004 Act and Fees Order made under it was without limit. At paras 49 and 50 Davis LJ said this:

> "49. … But it [Sir James' concession] has implications: for it can be said that that connotes that the Secretary of State's powers to include or exclude exemptions and waivers are indeed not unfettered; and that she therefore cannot make regulations which will in practice make it impossible for applicants to succeed in their applications for citizenship. That, then, would lend support to Mr Knafler's overall argument, based on cases such as *ex parte Fewings* and *ex parte Witham*: that the power to make regulations under the statutory scheme cannot be exercised in such a way as to frustrate or defeat applicants (a fortiori, child applicants) who are destitute and unable to pay the required fee.
>
> 50. I do see the point here. But in my view – and really for the reasons I have already set out – it does not gain traction, given the statutory wording. Furthermore, the concession on behalf of the Secretary of State has to be assessed in the light of the following:
>
> (1) it is to be taken as a given that the Secretary of State's powers are to be exercised in good faith and not arbitrarily;
>
> (2) s. 42(1) of the 2004 Act in terms requires that the amount of fees, which may exceed the administrative costs, should reflect the benefits to the individual estimated as likely to accrue; and
>
> (3) the amount of fees required can only be exacted after prior scrutiny of both Houses of Parliament."

54. I read the second sentence of para 50 as containing the Court of Appeal's first reason for rejecting the submission on impossibility: viz. the wording of the statutory scheme, and an implied reference back to para 45. I read the remainder of para 50 as containing the Court of Appeal's second reason: it is also part of the *ratio*. The existence of a ceiling set at £1,500 lends force to Sir James' submission that the second reason is now less important, and that it may be giving a Parliamentary steer as to the level of fee which may be appropriate.

55. Finally, at para 51 of his judgment Davis LJ set out further reasons for holding that the imposition of the registration fee at the level in question was *intra vires*. Specifically:

> "Moreover, there is this additional, and in my view important, consideration. As Hickinbottom J pointed out, children in a position similar to that of the appellant are most likely first to have become entitled (if it would not be reasonable to expect them to leave the United Kingdom) to a grant of leave to

> remain under paragraph 276ADE of the Immigration Rules. If that is so, then most likely the child's parents will also be granted leave to remain, with a right of work; and so will not be destitute when the child attains the age of 10. That, I accept, will not always be so. But even then, and importantly, the prospective entitlement to registration as a British citizen is not lost. It remains. As Hickinbottom J put it:
>
> "The requirement for payment of a fee for those children in receipt of local authority assistance is therefore more akin to a postponement of the ability to register."
>
> I agree. Moreover such a consideration would extend generally to those unable, at a given moment in time, to pay the required fee for a citizenship application by reason of destitution. Destitution is not, after all, to be assumed to be a permanent state. Further, there may be the possibility of a gift or loan from other family members or well wishers. It is also relevant that the mandatory requirement of a fee for s. 1(4) applications has not, on the evidence, precluded any very significant number of applicants wishing to apply from so applying. Moreover, in any residual case (which perhaps may be hard to envisage in practice) there is the concession of the Secretary of State that she would be bound on an application for citizenship registration not to require payment of the fee if an interference with an individual's Article 8 rights otherwise would be involved."

56. For present purposes I think that it is sufficient to say that, although all of Davis LJ's reasons are expressed in cumulative terms, the *ratio* of the case includes what I am calling his first reason, the language of the statutory scheme. This by itself would have led the Court of Appeal to hold that the scheme was *intra vires* and to dismiss the appeal. The second and third reasons were deployed to fortify the first; by themselves, they would not have been conclusive.

57. I must not leave *Williams* without noting that Leading Counsel for the Appellant advanced submissions directed to the best interests of the child and the advantages which citizenship can confer (para 47). The evidence available to him was far less extensive than the copious materials placed before me, and these submissions were not put forward under the rubric of section 55.

58. I now turn to address the Claimants' Grounds.

Ground 1

59. At this stage I must set out the essential steps of Mr Drabble's powerful and sustained argument.

60. His point of departure was that the whole scheme of the BNA 1981 confers, insofar as is material for present purposes, a series of entitlements to be registered subject to the fulfilment of specified conditions. One of these conditions is that the prescribed fee

must be paid. However, the setting of the fee cannot be such that the very entitlements the Act confers are rendered in practical terms nugatory.

61. Mr Drabble accepted that the rights in question were not "fundamental" or "constitutional" in the sense explained in the line of cases beginning with *Raymond v Honey* [1982] AC 1. However, these are undeniably important rights to which the principle of legality applies (see, for example, Lord Hoffmann in *Bancoult*, cited at §14 above). The submission is buttressed by the additional consideration, not drawn to the Court of Appeal's attention in that case, that para 3 Schedule 2 was enacted to give effect to an international treaty obligation.

62. In *Williams* the case was advanced on the basis of impossibility. The Court of Appeal was therefore required to address the case on that premise. However, impossibility is not the relevant test. It probably was not at the time *Williams* was decided (see, for example, *R v Social Security Secretary, ex parte JCWI* [1997] 1 WLR 275), but the position has been definitively set forth by the Supreme Court in *UNISON* which was not available in February 2017 when the Court of Appeal handed down judgment. I will be returning to this, but the test in a nutshell is one of affordability.

63. Paras 45 and 49 of *Williams* must be read in the light of this subsequent Supreme Court authority. The reasoning in these paragraphs, predicated as it is on the concept of impossibility, cannot stand (and see also para 79(iii) of Hickinbottom J's judgment on the same theme). If one were notionally to substitute the concept of affordability for impossibility, it may readily be seen that in real and practical terms the imposition of a registration fee at so high a level has the effect of frustrating the exercise of the right. Although as a matter of language the fee is within the scope of the scheme, the principle of legality impels a different conclusion.

64. The principle of legality operates because s.68(9) is general and undifferentiated in its terms. This is the case either because the sub-section applies across the board to all immigration and nationality contexts, and is not confined to registration of nationality, or because it does not contain a specific power to set a fee which is unaffordable in practice.

65. So that Mr Drabble's argument is fully appreciated, I consider that it is necessary to dwell on just two authorities.

66. In *JCWI*, asylum applicants had a right of appeal after their claims had been adversely determined by the Secretary of State (see the Asylum and Immigration Appeals Act 1993 which introduced a right of appeal for asylum applicants) but under a different statutory scheme their welfare benefits were effectively removed pending the hearing of their appeals. The Court of Appeal, by a majority, held that the principle in *Raymond v Honey*, as applied in *R v SSHD, ex parte Leech* [1994] QB 198 to what were explicitly characterised as "principles of fundamental importance", was also apt to accommodate cases where the right in question was not caught by the terms of *Leech* but was conferred by statute. As Simon Brown LJ put it (at 292E-H):

> "After all, the 1993 Act confers on asylum seekers fuller rights than they had ever previously enjoyed, the right of appeal in particular. And yet these Regulations for some genuine asylum seekers at least must now be regarded as rendering these rights

> nugatory. Either that, or the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention of Human Rights to take note of their violation. Nearly 200 years ago Lord Ellenborough, C.J. in *R v Inhabitants of Eastbourne* (1803) 4 East 103 said this:
>
> "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving."
>
> True, no obligation arises under Article 24 of the 1951 Convention until asylum seekers are recognised as refugees. But that is not to say that up to that point their fundamental needs can properly be ignored. I do not accept they can. Rather I would hold it unlawful to alter the benefit regime so drastically as must inevitably not merely prejudice, but on occasion defeat, the statutory right of asylum seekers to claim refugee status."

67. Mr Drabble draws, I think, three propositions from these passages. First, the relevant power may not be exercised in a manner which renders *statutory* rights nugatory. The right in question does not have to be "fundamental". Mr Drabble glossed this slightly to the extent that the right in question must be "important", reflecting the language of Lord Hoffmann in *Bancoult*. Secondly, the test is not as high as "impossible of exercise" but "prejudice [and] on occasion defeat". Thirdly, the statutory right to appeal (which was being frustrated) was not the same as refugee status itself, but the former could not be envisaged without reference to the latter. In my opinion, applicants to be registered under the relevant provisions of the BNA 1981 may well be in a stronger position because the registration provisions are easier to satisfy than refugee status, subject always to the objective criteria being met.

68. I would add that had the issue in *JCWI* been a requirement in the nature of a precondition that the notice of appeal to the tribunal be accompanied by an unaffordable fee, the Court of Appeal would surely have come to the same conclusion, effectively for the same reasons.

69. In *UNISON*, the right at issue was the fundamental one of access to justice. That being so:

> "In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission." (per Lord Reed JSC at para 91)

70. The evidence before the Supreme Court was that "a significant number of people who would otherwise have brought claims have found the fees to be unaffordable" (*ibid.*). The test outlined by Lord Reed JSC was as follows (para 93):

> "The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can *reasonably* be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable."

71. Mr Drabble submitted that this criterion is directly applicable, and that the evidence before me demonstrates that a sufficient number of child applicants find the registration fee unaffordable. He also pointed out that the Supreme Court expressly considered *JCWI* (para 103), although Lord Reed JSC observed that it added nothing to the primary submission.

72. My only observation about *UNISON* is that I do not think that it necessarily follows that in a case such as the present which does not involve fundamental rights, the Secretary of State would be acting unlawfully unless each and every child applicant could afford the registration fee. However, I appreciate the force of the contention that even with a slightly different test tailored to address important statutory rights the Claimants have demonstrated that a fee as high as £1,012 is unaffordable.

73. I have set out Mr Drabble's submissions in some detail but with limited comment. In my opinion, the case he is advancing is significantly different from that put forward in *Williams*; and the evidence before me is certainly more comprehensive. *Williams*, after all, was only about the individual child claimant; here, I am asked to consider the position of many thousands of children.

74. In my judgment, Ground 1 must be decided on the following very narrow basis. I am not being presented with a blank slate. One of the bases for the decision in *Williams* was that the statutory scheme was clear in its wording, and that the principle of legality was either not in play at all or was not violated. Mr Drabble's submission that *Williams* cannot stand alongside *UNISON* must be assessed in line with the principles expounded by Oliver J in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch. 384 at p.417F-G:

> "It is – as I have said recently – certainly no part of the function of a puisne judge to criticise decisions of higher courts and I do not venture to do so. He does, however, have to analyse their effect and the effect upon them of general doctrines subsequently established by yet higher courts. The question I am called up to answer is whether [House of Lords authority] … so destroys the only reasoning upon which [Court of Appeal] authority rested and has since stood that I can no longer be bound, or indeed entitled, to follow it and I must apply what I conceive to be the overriding principle."

75. There are judicial statements to broadly similar effect in *Re Hodson's Settlement* [1938] 1 Ch 916 per Farwell J at p.923: "So far as I am concerned, I have here a decision of the Court of Appeal which in my view decides the problem which I am

asked to decide, and I think that I ought to follow it without expressing any view of my own". And I am not ignoring my own decision in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2017] 1 WLR 2673 at paras 91-93 (affirmed by the Court of Appeal without the need to address the doctrine of precedent at first instance).

76. Although there is some force in the contention that the legal and evidential picture has changed in connection with what I am calling the second and third limbs of the ratio of *Williams*, I am not satisfied that the first limb has been destroyed by *UNISON*. The highest that the Claimants' case may properly be put is that *UNISON* might have some impact on Davis LJ's reasoning, but to my mind the latter has not been undermined – at least, sufficiently for the Claimants' purposes. It can be only for higher courts to determine the extent and cogency of that impact, if any.

77. I should not leave Ground 1 without addressing Mr Drabble's specific submission on para 3 Schedule 2 of the BNA 1981. I follow his submission that this provision was introduced to give effect to an international treaty obligation, but the reality is that the 1961 Convention is not directly justiciable in our courts. Thus, there is no underlying or free-standing right which the Claimants' may invoke outside the ambit of the statutory scheme. In any case, it would be odd if the merits of the Claimants' *vires* challenge could sensibly pivot on this very specific provision in Schedule 2. To my mind, it does not provide the key to the unlocking of the door closed in their face by *Williams*.

78. I must therefore reject the Claimants' first ground.

Ground 2

79. Section 55 provides:

> "**55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

…"

80. In *R (MM (Lebanon)) v Home Secretary* [2017] 1 WLR 771, Baroness Hale DPSC characterised the section 55 duty as "standing on its own feet" and "apart from the HRA or the Convention". Further, the duty "applies to the performance of any of the Secretary of State's functions including the making of rules" (see para 92).

81. Although the Explanatory Notes to the 2009 Act are not explicit on this aspect, section 55 reflects but does not wholly replicate the UNCRC, to which the United Kingdom is a party. Originally, the United Kingdom had entered a reservation in respect of nationality and immigration matters, but that was removed in 2009. Article 3(1) provides:

> "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."

82. A number of points arise. First, the UNCRC is an international treaty which is not directly justiciable in our courts (cf. section 55) although in the appropriate context it falls to be taken into account. Secondly, section 55 is narrower than Article 3(1) to the extent that it applies only to the particular functions itemised in sub-s (2). Thirdly, although section 55 does not refer in terms to the best interests of children being a primary consideration, the analysis of Baroness Hale DPSC in *MM (Lebanon)*, paras 91 and 92, indicates that the same approach is applicable. The welfare of the child is *a* primary consideration, capable of being outweighed by the combined force of other countervailing considerations. Fourthly, the duty under section 55 is expressly on the Secretary of State. It applies when she makes subordinate legislation although Parliamentary oversight may be a relevant factor in ascertaining whether the duty has been discharged. Fifthly, I discern no material difference between section 55 and Article 3(1) as regards the entity on whom the obligation is imposed.

83. The key jurisprudence on the context and discharge of the welfare duty is directed to Article 3(1) and not to section 55. In my judgment, this has no implications for the destiny of this case. The core issue is whether the Secretary of State discharged her duty under section 55 by having regard to the best interests of children. The cases on Article 3(1) throw clear light on this question; and, if anything, claimants who are able to invoke the statutory provision are in a stronger position because there has been some debate as to whether the UNCRC confers a free-standing requirement.

84. In *R (JS) v Work and Pensions Secretary* [2015] 1 WLR 1449, the case before the Supreme Court concerned a benefit cap to reduce a person's housing benefit if their total entitlement to welfare benefits exceeded a stated amount equivalent to the net median earnings of working households. The focus was on child-related benefits. It was contended that the Secretary of State had indirectly and unjustifiably discriminated against women contrary to Article 14 of the Convention read in conjunction with A1P1, and that he had failed to treat the best interests of children as a primary consideration when making the relevant regulations contrary to Article 3(1) of the UNCRC. Late in the day, it was argued that compliance with Article 3(1) was determinative of the question of justification. The Supreme Court held by a bare majority that even if the Secretary of State had failed to show compliance with Article

3(1), that did not bear directly on the Convention claims because the complaint in the proceedings was that mothers had been discriminated against, not children.

85. I draw the following propositions from the judgment of Lord Carnwath JSC.

86. First, and with reference to "General Comment No. 14" adopted by the UN Committee on the rights of the child in 2013, the obligation under Article 3(1) elevates the assessment of the best interests of the child to a primary consideration (the so-called substantive right); and in effectuating her duty the decision-maker must evaluate "the possible impact (positive and negative) of the decision on the child or children concerned" (the so-called rule of procedure). Furthermore, "state parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other consideration, be they broad issues of policy or individual cases" (para 106).

87. Secondly, the Secretary of State's evidence on the issue of compliance with Article 3(1) will require close examination (paras 109-112).

88. Thirdly, even when further written submissions were considered after the hearing, the position remained that the Secretary of State's evidence failed to demonstrate compliance with Article 3(1). The issue had been "extensively debated in Parliament" (para 122) but:

> "In considering how the Government approached that task, rather than trawling through the parliamentary debates, we are entitled to rely on the evidence given in these proceedings on behalf of the Secretary of State." (para 123)

I do not read Lord Carnwath JSC as holding that parliamentary debates will always be irrelevant to the exercise of ascertaining compliance with Article 3(1). In the circumstances of *JS*, the Secretary of State's true reasons for making the regulations emerged through his evidence; and that evidence was inadequate (para 128).

89. Sir James drew my attention to para 95 of the judgment of Lord Reed JSC which appears under the rubric of "the intensity of review". Lord Reed JSC did not consider that Article 3(1) added anything to the case (see para 90). I would read his remarks about deference and the significance of the fact that many of the issues discussed in the appeal had been debated in Parliament as directed to the Convention claims. In my judgment, the instant case is not really about intensity of review at all: the question is whether it has been demonstrated that the Secretary of State treated the interests of children as a primary consideration and then weighed those against countervailing considerations. If she did, and correctly characterised those interests, according her a very ample sphere of merits autonomy, that should be the end of the inquiry.

90. In *R (C) v Work and Pensions Secretary* [2019] 1 WLR 5687 the Court of Appeal was considering regulations which limited the award of child tax credit to parents with no more than two children. The claim was brought under the Convention and Article 3(1) was not directly in play. The Court of Appeal held that Article 3(1) considerations were relevant to the proportionality balancing exercise (para 150), and in the

circumstances of that case the child's interests *qua* primary consideration could be treated as outweighed by countervailing public interest factors.

91. Leggatt LJ examined the decision-making process and noted that "the only references to the best interests of the child in any of the statements made by government ministers or policy documents discussing the two-child limit put in evidence in these proceedings are references to the interests of children generally" (para 152). There was no evidence bearing on the distinct interests of the group of children to whom the two-child limit was applicable. However:

> "153. So far as the evidence shows, no claim was made on behalf of the government during the passage of the legislation that limiting to two the number of individual elements of child tax credit payable to a family with more than two children is in the best interests of those children themselves. Such a counterintuitive claim would have required evidence and analysis to support it and none was vouchsafed. The way in which the two-child limit is detrimental to the interests of the children in such families is obvious, particularly if their parents are not in work. …
>
> 154. Although not mentioned by the government, the interests of children who would be affected by the measure were raised during the debates by members of Parliament who opposed the Bill. For example, at the sitting of the Bill Committee on 13 October 2015 at which the two-child limit was debated, the argument that children are not responsible for their parents' choices was strongly made by the opposition MP, Ms Emily Thornberry, when she said:
>
> "The third or fourth child does not make a choice to live. The third, fourth or fifth child is not to be blamed for their existence. The sixth child is not to have no shoes because of a reckless mother who cannot keep her legs crossed. It is not the sixth child's fault that he is the sixth child. Why should he starve? How will it make a difference?"
>
> No direct answer to this argument was offered by any government representative during the debates. It is clear, however, that the government took the view that, even if imposing the two child limit is contrary – as it seems to me that it plainly is contrary – to the interests of the children who will be affected by it, that consideration was outweighed by the government's reasons for proposing the measure. By enacting the legislation, Parliament must be taken to have endorsed that view."

92. Furthermore, there was evidence in *C* that the Secretary of State had applied his mind to the UNCRC (para 152). In a situation where it was obvious where the best interests of children lay, the Court of Appeal was satisfied that these had been treated as a primary consideration.

93. In *R (DA) v Work and Pensions Secretary* [2019] 1 WLR 3289, the issues were broadly similar to *JS* in the context of a revised benefit cap. On this occasion, the Article 14 (read in conjunction with Article 8 and/or A1P1) claim was brought on the basis that there was unlawful discrimination against single parents and against the children concerned. An issue arose as to the relevance to the claim of Article 3(1) of the UNCRC. The Supreme Court held by a majority that the Secretary of State had not breached this provision by failing to take into account the best interests of a child.

94. Lord Wilson JSC gave the lead judgment. I think that it is implicit in what he said that the best interests principle in Article 3(1) could be directly prayed in aid, and Lord Carnwath JSC said so in terms (para 122). There was evidence before the Supreme Court that the Secretary of State had addressed the best interests question, and his evaluation was thoroughly tested in Parliamentary debates (see paras 83-85). In particular, the Government's Memorandum to the Joint Committee on Human Rights stated that its obligations under the UNCRC had been fully considered, but the best interests of children overall were promoted when their parents were in work and because work remained the surest route out of poverty (para 82); and this point was repeated and developed in the Government's Equality Analysis in relation to the regulations at issue (para 87).

95. In view of this material, Lord Wilson JSC concluded as follows (at para 87):

> " By a narrow margin I am driven to conclude that, in relation to its refusal to amend the 2006 Regulations so as to exempt the appellant cohorts from the revised cap, the government did not breach article 3.1 of the UNCRC in either of the relevant dimensions of its concept of the best interests of a child. **The Parliamentary and other materials to which I have referred demonstrate that it did evaluate the likely impact of the revised cap on lone parents with young children; and that it did assess their best interests at a primary level of its overall consideration.** This court must impose on itself the discipline not, from its limited perspective, to address whether the government's evaluation of its impact was questionable; nor whether its assessment of the best interests of young children was unbalanced in favour of perceived long-term advantages for them at the expense of obvious short-term privation." (emphasis supplied)

96. I consider that it is clear from this passage that it is not incumbent on the Court to conduct the balancing exercise for itself or to become entangled in the merits. The Court must be satisfied that the correct factors have been identified by the Secretary of State and then assessed. Part of the evidential picture includes what was said in Parliament. The Court must also be satisfied in connection with the best interests of the child that the decision-maker described with reasonable accuracy what those interests are, and has treated them as a primary consideration. I also think that Lord Carnwath JSC adopted a similar approach, at para 122.

97. It may be possible to discern a slight difference in emphasis between Lord Wilson JSC in *DA* and Leggatt LJ in *C*, although in the Court of Appeal the evidence established that the Secretary of State had identified where the children's best

interests lay in general terms. My primary response to this would be to observe that the cases of this nature are very much fact sensitive. Alternatively, I would say that to the extent that Lord Wilson's approach is slightly more stringent, I should follow him and not Leggatt LJ.

98. Mr Drabble's short submission was that there is no evidence that the Secretary of State identified and characterised the best interests of his clients, treated these as a primary consideration, and then weighed them against countervailing public interest factors.

99. Sir James advanced six submissions which I set out below.

100. His first submission was that it is obvious that the best interests of children are likely to be favoured by granting citizenship.

101. His second submission was that the statutory scheme itself involves an active consideration of the interests of children and balancing them against the public interest. The result of that exercise is a detailed, finely calibrated scheme with different levels of fee across the board and varying degrees of cross-subsidisation. The system of waivers and exemptions, in place for leave to remain applications where children are favoured, reflects this intricate construction. Furthermore, the present scheme is no more than a perpetuation of a scheme which has effectively been in place, through various iterations, for a number of years; and no challenge has previously been brought.

102. Thirdly, and I would add connectedly, the judgments to be made about the degree of inquiry for the purposes of section 55 are judgments to be made across the board. These judgments must assess the fee scheme as a whole – in connection with applications for leave to enter and remain, exemptions and waivers, and so forth – and both the Secretary of State and Parliament will necessarily be taking matters into account at a tolerably high and generalised level. Sir James observed in this context that applications for registration are "voluntary".

103. Fourthly, the process of consultation to which I have already referred (see §§24-25 above) was not addressing a *tabula rasa*. Consultees were given the opportunity to set out any concerns about how the system which had already been in place for some time was operating in practice. The same point falls to be made in relation to the PESs (see §26 above).

104. Fifthly, Parliament "as the ultimate decision-maker" considered this particular fee and this specific aspect in some detail (see §§29-34 above). In principle, the Court must have regard to the terms of the Parliamentary debates.

105. Sixthly, it is clear that the countervailing, public interest considerations were weighed against the (evident) interests of the children.

106. Compellingly and attractively though Sir James' submissions were advanced, I cannot accept them. I have concluded that Mr Drabble is right, essentially for the reasons he put forward.

107. It is true that the 2018 Regulations cannot be seen in isolation, and that the Secretary of State's institutional mind cannot be expected to throw itself back to the very beginning. However, the Secretary of State has been asked on more than one occasion whether an impact assessment has been carried out for the purpose of her section 55 duty or more generally, and these requests have drawn a blank. I am sure that Mr Bartholomew's witness statement faithfully sets out the Secretary of State's thinking on the topic of registration fees which has remained constant, no doubt with some refinements, over the years. In my judgment, all the evidence demonstrates that the imposition of significantly higher registration fees has arisen for three reasons: first, because the Secretary of State's overarching policy, probably since 2004 but the precise date matters not, has been to move towards a system which is self-financing; secondly, because the Secretary of State is of the opinion that registration is "voluntary"; and, thirdly, because she believes that leave to remain, in particular indefinite leave to remain, accords benefits which are broadly equivalent.

108. These reasons emerge very strongly from Mr Bartholomew's witness statement. He speaks for his Secretary of State, and his witness statement, if I may be permitted to put the matter in this way, is a primary consideration when her overall decision-making process is assessed. To my mind, there are three further matters which are highly noteworthy.

109. First, and flat contrary to Sir James' first submission, Mr Bartholomew is of the opinion that "it cannot be said as a generalisation that it is in a child's best interests to acquire British citizenship" (see §27 above). In my view, there will be situations, as Mr Bartholomew explains, where the preservation of links with another country will be in a child's best interests; but that is not so as a general rule. Sir James both admits and avers that my assessment is correct, but I do not agree with him that the point is so obvious it barely needs be articulated. In contrast to *C*, the issue requires an understanding of nationality and immigration law and practice, and there must be some room for a reasonable, contrary view (*per* Mr Bartholomew).

110. Secondly, and relatedly, applications to register are made as a matter of choice, not compulsion, because individual circumstances vary. However, the children with whom this present application is concerned wish to be able to exercise that choice, and the same applies to all children in like case (I do not think that PRCBC necessarily speaks on behalf of all aspirant child registrants). The whole philosophy of the BNA 1981 in connection with registration is that it is a choice; but, if a child wishes to exercise that choice, then she is seeking something to which she is entitled. At this stage of the analysis it is not fruitful to seek to draw out the difference between an entitlement, absolute or otherwise, and one which is conditional on the payment of a fee. Overall, I do not think that this important factor is one that the Secretary of State has recognised. Indeed, the reference to the "voluntary" nature of registration applications rather undermines it: either it contains a tautology, or it ignores the policy and objects of the BNA 1981.

111. Thirdly, Mr Bartholomew states that "many of the benefits of citizenship are realised in later life". That is true as far as it goes, but it skirts around the practical benefits which can be enjoyed whilst a child (e.g. unimpeded travel) and completely ignores the intangible benefits of "being British", and being fully subscribed to "British values", to which the evidence before me rather compellingly speaks. This is an undeniably powerful factor: see the statements of highest authority collected under

§§11-13 above. Moreover, Mr Bartholomew also ignores the fact that the benefits which flow post-majority may well be harder to secure at that stage because the regime for children under the BNA 1981 is more generous.

112. I take Sir James' point that the position falls to be addressed at a reasonably high level of generality. However, there is no evidence in the voluminous papers before me that his client 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 fact that the adverse impact is to some extent ameliorated by the grant of leave to remain, tilts the balance.

113. If the matter rested there, I would unhesitatingly conclude that the Secretary of State has fallen far short of satisfying me that the section 55 duty has been discharged. But Sir James invites me not to stop there but to pay careful attention to the Parliamentary debates; and I have done so.

114. In my judgment, it cannot be denied that the essential elements of the Claimants' case before me were rehearsed in the Parliamentary debates, particularly in the House of Lords where section 55 was expressly addressed. Further, the Ministers of State both in the Commons and the Lords made some of the arguments that have come from Sir James. However, nowhere on the Government's side of the debate has there been any recognition of where the best interests of children might repose. The closest one comes to this is in Baroness Manzour's speech in the Lords in response to Baroness Lister's "Motion of Regret". She does recognise that "citizenship is important as a part of civic society" and "this is something that we should welcome". Yet the remainder of her speech rather suggests that in her view the best interests of children are not served, or are only weakly served, by facilitating the acquisition of British nationality by registration – "a child's strongest entitlement is to preserve links with his or her parents and, where they exist, with his or her country of origin". Here, Baroness Manzour recognises that some children may be stateless, but no special provision has been made for them. In any case, the policy of Parliament is that children meeting the qualifying conditions are entitled to be registered here, presumably because it considered back in 1981 that these children enjoyed at least as strong an entitlement to be registered as citizens of the United Kingdom as to be regarded as nationals of anywhere else. Finally, I note that Baroness Manzour repeats the argument that the grant of leave to remain confers sufficient status in the United Kingdom.

115. It is not the role of this Court to assess the broad merits of the Claimants' case. As I have already said, I need to be astute to leave the conducting of the balancing exercise to the decision-maker, but at the logically anterior stage I must also be astute to ascertain that the decision-maker has approached the section 55 exercise in the right manner. I repeat what I have said under §112 above. I have accepted Sir James' submission that the Parliamentary materials add to the evidential picture, although the way in which I would venture to express this is that the Secretary of State is the ultimate decision-maker (*pace* Sir James), and the primary focus must be on her consideration of the section 55 issue in (1) deciding whether to place the draft regulations before Parliament in the first place, and (2) deciding whether to enact this secondary legislation in the light of any insights derived from the process of

Parliamentary scrutiny. Having placed these materials in the balance, my conclusion is the same.

116. Section 55, in contrast to Article 3(1) of the UNCRC, only possesses a procedural dimension. By that I mean that a breach is established if it be demonstrated that the Secretary of State has failed to have regard to the best interests of child, being a convenient way of summarising what the section actually says. My conclusion that the Secretary of State has violated the section means that the 2018 Regulations are unlawful in that respect to the extent that they set the fee for registration applications brought by children at £1,012. It is unnecessary to go further. Whether a section 55 compliant decision-making process could properly alight on a fee of £1,012 is beyond the proper ambit of this judgment.

Ground 3

117. In the circumstances, it is unnecessary to consider the substance of this ground, for two reasons. First, it does not materially add to Ground 2. Secondly, I accept Sir James' submission that the PSED is not in play. Impecuniosity is not a protected characteristic. The Claimants either are or represent the interests of children. Mr Drabble seeks to compare children with adults for the purposes of s.149 of the Equality Act 2010 and draws attention to s.19. However, children are placed in an advantageous position *vis-à-vis* adults under the BNA 1981, and they pay a lower fee. The fact that as a general rule they have less money than adults is nothing to the point.

118. For the avoidance of doubt, if I were wrong about the PSED not being in play here, I would conclude that the Secretary of State is in breach of it. My reasons are a reprise of Ground 2.

Disposal

119. This claim for judicial review fails on Ground 1 (*vires*) but succeeds on Ground 2 (breach of the section 55 duty). I would therefore hold that the Secretary of State was in breach of her section 55 duty when the 2018 Regulations were made by her on 15th March 2018. The consequences of that finding have been the subject of written submissions filed after the parties had seen this judgment in draft. It does not flow from my conclusion at §116 above that a quashing order, as opposed to declaratory relief, must be granted. There is power to make a quashing order in a case where a breach of a procedural obligation has been made out if on the facts it is not highly likely that the decision would have been substantially the same if the breach of duty had not occurred (see Longmore LJ, albeit not quite verbatim, in *Forward v Aldwyck Housing Group* [2019] EWCA Civ 1334, at para 25). Sir James submits that in the light of the Parliamentary debates in particular I can be confident that the outcome would have been the same. I consider that this is really a rehash of the argument which has failed before me. I am not confident that the outcome would have been the same, or substantially so, absent the breach that has occurred; but in the exercise of my discretion (and in line with my preliminary view) I decline to grant the quashing orders sought. It is sufficient in this case to grant declaratory relief because, unless there is a successful appeal, the section 55 issue will need to be reconsidered and a clear indication of the outcome of that process given by the Secretary of State.

120. Mr Drabble also addressed the particular position of A. But for s.50(9A) of the BNA 1981, she would be a British citizen pursuant to s.1(1), and a declaration of incompatibility has been made in relation to this sub-section. Mr Drabble submitted that in the light of this state of affairs the Secretary of State is effectively duty-bound to cause A to be registered as a British citizen under s.3(1) of the BNA 1981 and waive the fee in order to remedy an obvious injustice: see *R (S) v SSHD* [2007] EWCA Civ 546 at para 46. On my understanding, the Secretary of State is currently giving consideration to whether to make a remedial order under s.10 of the HRA 1998. This process is ongoing, and it is unlikely that the Secretary of State's response to the declaration of incompatibility will be forthcoming in the near future.

121. Given the scope of these judicial review proceedings, I remain of the view, despite the submissions filed after the draft of this judgment was made available, that it is not within my powers to compel the Secretary of State to follow the course pressed on me by Mr Drabble. It is sufficient to say that I agree with the majority of Sir James' written submissions on this issue, and have noted the course taken by the Court of Appeal in *K*. It follows that I decline to grant any further relief in connection with Ground 6.

122. That said, the Secretary of State may feel on reading this judgment that the relatively small number of cases stymied by s.50(9A) should, before formal remedial action is taken, be fairly addressed by agreeing to waive the fee requirement in connection with applications made under s.3(1).