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Nationality Application Fee for Registration of Children Held To Be Unlawful

In *R (on the application of (1) Project for the Registration of Children as British Citizens (a company limited by guarantee) (2) O (a minor, by her litigation friend AO) v Secretary of State [2021]EWCA Civ 193,* the Court of Appeal considered the lawfulness of the application fee of £1,021 for registration of children as British Citizens

Background

Two of the claimants in this case were individual children whose registration applications were refused for failure to pay the fee. The other individual claimant O satisfied the requirements to apply for registration as a British Citizen under section 1 (4) of the 1981 Act, having been born here and having lived here for 10 years. Her mother was a single parent in receipt of benefits. She was unable to raise the full amount of the application fee, but was able to raise part of it. Because the full fee was not paid, the Secretary of State refused to process the application. The other claimant was the Project for the Registration of Children as British Citizens, a charitable organization which works to assist children and young people to establish their rights to British Citizenship.

Challenge:

The claimants in this case challenged the lawfulness of the fee charged to children applying to be registered as British citizens under the British Nationality Act 1981, which has been fixed since 6 April 2018 by the Fee Regulation 2018 at £1,021. The Government states that the administrative cost of processing an application is £372. The fee is fixed at a level which is designed to produce a surplus of over £640 to be applied in other parts of the nationality, immigration and asylum system.

It was the claimant's case that the Secretary of State failed to comply with her duty under Section 55 of the UK Border Act 2009 to have regard to the best interests of children as a primary consideration in fixing the fee level. The current fee level has had a serious adverse impact on the ability of a significant number of children to apply successfully for registration, particularly those

growing up in families on low or middle incomes, who could only pay the fee by making unreasonable sacrifices.

The Secretary of State relied on three sources of evidence to establish that there had been compliance with the duty under Section 55:

(i) The current regime for fees has been in place since 2004 and there has never been a waiver or exception for children applying for registration for whom the fee is not affordable. The court rejected this on the basis that the amount of fixed fees have greatly increased since 2004.

(ii) A consultation document about the fee structure was issued in November 2013 and no response was received in regard to these fees. This was also rejected on the basis that the consultation did not specifically address or raise questions concerning the fees for registration of children.

(iii) The Secretary of State referred to debates in both Houses of Parliament to show that the Section 55 duty and the best interests of children were considered in detail when considering the nationality fee regime as a whole. It was said that in this context, both the Secretary of State and Parliament concluded that the public policy factors justifying the levels of nationality fees were powerful enough to outweigh the interests of children. The Court of Appeal rejected this for the following reasons:

- The use of Parliamentary materials in court proceedings are not generally allowed because of the separate roles of Parliament and the courts. Parliament passes legislation, the courts interpret and apply it. The passing of legislation, and the process by which legislation is passed, are matters for Parliament, not the courts.

- Although the courts are able to refer to Parliamentary materials in determining whether legislation is compatible to the European Convention on Human Rights, the present case involved no challenge on human rights grounds and did not fall within this exception.

- The use of Parliamentary materials in this case did not fall within any of the exceptions to Parliamentary privilege. It went far beyond what is permitted. They were cited not simply as background factual information but as evidence for the Secretary of State's contention that she had complied with her statutory duty under Section 55.

Conclusion:

On the basis of the above, the Court of Appeal concluded that the Secretary of State was not permitted to rely on the Parliamentary materials to demonstrate that she had considered the best interests of children in fixing the fee, and therefore had not discharged her duty under section 55. It follows that the Secretary of State had breached her procedural duty under section 55 when deciding to set the application fee of £1,021 under the Fees Regulations 2018 for registration of children as British Citizens.

Implication of the Judgement:

The Judgement does not mean that the application fee of £1,021 will be abolished or reduced. It also does not mean that the Secretary of State will introduce a fee waiver policy. All it means is that the Secretary of State must now carry out a review and evaluate the fee level in light of the practical difficulties that it creates for many children, properly identifying where the best interests of children seeking registration lie, and decide whether they should still be outweighed by the wider public interest consideration of the nationality fee regime as a whole.

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If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

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