Neutral Citation Number: [2021] EWCA Civ 193

Case No: C4/2020/0113, 0665, 0669

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Jay
[2019] EWHC 3536 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 February 2021

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE SINGH
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

THE QUEEN (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))	**Respondents /Claimants**
-and-	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant/ Defendant**
-and-	
(1) THE SPEAKER OF THE HOUSE OF COMMONS (2) THE CLERK OF THE PARLIAMENTS	**Intervenors**

- -
- -

Sir James Eadie QC, William Hansen and Nicholas Chapman (instructed by the **Government Legal Department**) for the **Appellant**
Richard Drabble QC, Miranda Butler and Isabel Buchanan (instructed by **Maria Patsalos, Mischon de Reya LLP**) for the **First Respondent**
Richard Drabble QC, Jason Pobjoy and Admas Habteslasie (instructed by **Solange Valdez-Symonds, Cardinal Hume Centre**) for the **Second Respondent**

Hearing dates: 6 and 7 October 2020

- -

Approved Judgment

Covid-19 Protocol: In accordance with the Covid-19 protocol for handing down judgments, this judgment has been handed down by Lord Justice David Richards remotely by circulation to the parties' representatives by way of e-mail, by publishing on www.judiciary.uk and by release to Bailii. The date and time for hand down will be deemed to be Thursday, 18 February 2021 at 10:30.

Lord Justice David Richards:

Introduction

1. At the hearing of these appeals, the court raised with the parties whether the reliance by the Secretary of State on the contents of debates in both Houses of Parliament in the court below and before us contravened Article 9 of the Bill of Rights 1689 and the rules of parliamentary privilege. Having heard brief oral submissions and received fuller written submissions after the hearing from both parties, the court considered it appropriate to inform the Parliamentary authorities of this issue and invite them to intervene, if they so wished. They did intervene and we received written submissions on behalf of the Speaker of the House of Commons and, on behalf of the House of Lords, the Clerk of the Parliaments. We received written submissions in response on behalf of the Secretary of State on 15 December 2020.

2. The substantive issues in these appeals concern the lawfulness of the fee charged to children applying to be registered as British citizens under the British Nationality Act 1981 (the 1981 Act). Under delegated legislation made under the Immigration Act 2014, the fee payable on an application by a child has been fixed since 6 April 2018 at £1,012. 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 subsidising other parts of the nationality, immigration and asylum system.

3. The level of this fee was challenged by applications for judicial review brought by three claimants.

4. Two of the claimants were individual children whose registration applications were refused for failure to pay the fee. The claim of one of them, A, has been settled, having succeeded below on a ground not relevant to the other appeals.

5. The other individual claimant, O, was born in the UK in July 2007, attends school and has never left the UK. She has Nigerian citizenship, but from her 10th birthday she has 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. She is one of three children, all living with their mother as a single parent who is in receipt of state benefits. In June 2015, the local authority began supporting O's family on the basis that they were destitute. An application for her registration as a British citizen was made on 15 December 2017. Her mother was unable to raise the full amount of the fee (£973 at that time), but she was able to raise £386**,** the administrative cost of processing the application. Because the full fee was not paid, the Secretary of State refused to process the application at that time.

6. The other claimant is The Project for the Registration of Children as British Citizens (the PRCBC), a charitable organisation which works to assist children and young adults to ascertain and establish their rights to British citizenship by way of legal advice and representation. It has lobbied Parliament in connection with the scale of the registration fee.

7. Although the registration fee for children was challenged on a number of grounds below, only two are in issue on these appeals.

8. The first issue is whether the level of the fee is incompatible with the statutory scheme under the 1981 Act. It is said that it renders nugatory for a significant number of children the entitlement to registration as a British citizen, and for that reason the fee of £1,012 is *ultra vires* the power to fix fees conferred by section 68 of the Immigration Act 2014.

9. For the reasons given in his judgment, reported at [2020] 1 WLR 1486, Jay J rejected this ground of challenge, holding that he was bound by the decision of this court in *R (Williams) v SSHD* [2017] EWCA Civ 98, [2017] 1 WLR 3283 (*Williams)*. He certified his decision on this ground under section 12 of the Administration of Justice Act 1969 for the purposes of a leapfrog appeal to the Supreme Court. The Supreme Court refused permission to appeal, observing that this court should have the opportunity to consider *Williams* in the light of the Supreme Court's decision in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 (*Unison*). Permission to appeal to this court was subsequently granted by Phillips LJ.

10. The other relevant ground of challenge was that, in fixing the fee for applications for registration by a child, the Secretary of State had failed to comply with the statutory duty, imposed on her by section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act), to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom when discharging any functions in relation to immigration, asylum or nationality.

11. In order to establish compliance with this duty, the Secretary of State relied on a witness statement of a senior official in the Home Office and also on what was said in the course of debates in Parliament. It is in this context that the issue under the Bill of Rights arises.

12. The judge held that the Secretary of State had failed to comply with her duty under section 55. He made a declaration that the Secretary of State had breached the duty under section 55 in setting the fee at £1,012 under the Immigration and Nationality (Fees) Regulations 2018. He made a similar declaration as regards the fee of £973 previously fixed by the Immigration and Nationality (Fees) Regulations 2017. The judge granted the Secretary of State permission to appeal against these declarations. The claimants asked the judge to go further and to declare the regulations unlawful and to make an order quashing them. By its respondent's notice, the PRCBC seeks additional orders in those terms.

Relevant legislation

13. The 1981 Act provides for those who are, or may become, British citizens. By section 1(1), a person born in the UK after the commencement of relevant parts of the Act on 1 January 1983 (commencement) is *ipso facto* a British citizen if at the time of birth their father or mother is a British citizen or is settled in the UK. Citizenship by descent is *ipso facto* conferred in certain circumstances on persons born outside the United Kingdom.

14. Other provisions in section 1 provide an entitlement to be registered as a British citizen, in particular in two main categories of cases. Section 1(3) provides that a person born in the UK after commencement who is not a British citizen by virtue of section 1(1) shall be entitled to be registered as a British citizen if, while they are a

minor, their father or mother becomes a British citizen or becomes settled in the UK, and an application is made for registration as a British citizen. An alternative right to be registered as a British citizen is provided by section 1(4) where a person born in the United Kingdom after commencement is entitled, on an application made at any time after they have attained the age of ten years, to be registered as a British citizen if, in each of their first ten years, they were not absent from the United Kingdom for more than 90 days.

15. Section 3(1) confers a discretionary power on the Secretary of State to register a person as a British citizen if an application is made while they are still a minor. More specific provisions for registration are contained elsewhere in the Act.

16. Section 41(2) conferred on the Secretary of State power, with the consent of the Treasury, to make provision by regulations (subject to annulment by resolution of either House of Parliament) for the imposition, recovery and application of fees in connection with, among other things, applications for registration as British citizens. The payment of fees has been required for such applications at all times since commencement. Section 42(1) provided that "a person shall not be registered under any provision of this Act as a citizen…unless any fee payable by virtue of this Act in connection with the registration…has been paid". A decision was taken at that time to achieve full cost recovery for nationality applications, and the fees were fixed accordingly.

17. A significant change was made to the fees regime by section 42 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act). It provided that in prescribing fees for an application or process under statutes including the 1981 Act, the Secretary of State could, with the consent of the Treasury, prescribe an amount "which is intended to (a) exceed the administrative costs of determining the application or undertaking the process, and (b) reflect benefits that the Secretary of State thinks are likely to accrue to the person who makes the application, to whom the application relates or by or for whom the process is undertaken, if the application is successful or the process is completed". The instrument prescribing such fees was subject to the affirmative vote of each House of Parliament: section 42(7).

18. A further change was introduced by section 20 of the UK Borders Act 2007, which inserted sub-section (2A) into section 42 of the 2004 Act. It enabled fees to reflect costs referable to other specified applications and functions, in addition to the costs of the application itself.

19. The powers for levying fees across the full range of immigration and nationality claims and applications were rationalised by the Immigration, Asylum and Nationality Act 2006 (the 2006 Act) which replaced the powers contained in a number of statutes, including the 1981 Act, with a single power in sections 51-52. Section 51(1) provided that the Secretary of State "may by order require an application or claim in connection with immigration or nationality (whether or not under an enactment) to be accompanied by a specified fee". Section 51(3) provided, among other things, that where such an order was made, regulations made by the Secretary of State "(a) shall specify the amount of the fee, (b) may provide for exceptions, (c) may confer a discretion to reduce, waive or refund all or part of a fee". Section 52(3) provided, among other things, that an order or regulation under section 51 "(a) may make provision generally or only in respect of specified cases or circumstances" and "(b)

may make different provision for different cases or circumstances". An order was subject to the affirmative vote procedure in each House, while regulations specifying the amounts of fees payable, and any waivers or exceptions, were subject to the negative vote procedure. This was the relevant statutory scheme in *Williams*.

20. Section 42 of the 2004 Act and sections 51-52 of the 2006 Act were replaced by the more detailed provisions of sections 68-74 of the Immigration Act 2014 (the 2014 Act), which apply to the present case and remain in force.

21. Section 68(1) and (2) provide:

> "(1) The Secretary of State may provide, in accordance with this section, for fees to be charged in respect of the exercise of functions in connection with immigration or nationality.
>
> (2) The functions in respect of which fees are to be charged are to be specified by the Secretary of State by order ("a fees order")."

22. Section 68(3) and (4) provide for the calculation of fees and section 68(5) provides that where a fees order provides for a fee to be a fixed amount, the order must specify a maximum amount for the fee and may specify a minimum amount.

23. Section 68(7) provides for the fees to be fixed by regulations made by the Secretary of State (fees regulations). A fee may not exceed the maximum set for that category of application by the fees order and may not be less than any specified minimum but "subject to that, may be intended to exceed, or result in a fee which exceeds, the costs of exercising the function": section 68(8). Section 68(10) provides that fees regulations may provide for exceptions and for the reduction, waiver or refund of all or part of a fee.

24. Section 68(9) provides:

> "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 other countries in respect of comparable functions;
>
> (f) Any international agreement."

25. Importantly for the purposes of the present appeals, section 71 provides that:

> "For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children)"

26. Fees orders and regulations are to be made by statutory instrument, subject (in the case of fees orders) to the affirmative vote procedure in each House and (in the case of fees regulations) to the negative vote procedure in each House: section 74.

27. The Immigration and Nationality (Fees) Order 2016 was made under the 2014 Act, and came into force, in February 2016. Article 3(1) provides that the Secretary of State "must charge the fee specified in fees regulations" for the functions specified in the Order and article 3(2) provides that a fee specified in regulations must not exceed the maximum amount specified for that function in the Order. Table 7 in article 10 specifies £1,500 as the maximum amount that may be charged for an application for registration as a British citizen.

28. The current fees regulations, which are applicable to O's case, are the Immigration and Nationality (Fees) Regulations 2018. They set out the fees for a wide range of applications. The fees for an application for registration as a British citizen are £1,126 where the applicant is an adult and £1,012 where the applicant is a child: Table 19.2 and 19.3 in schedule 8. As earlier noted, these Regulations replaced Regulations made in 2017 which specified the equivalent fees as £1,083 and £973. There are no exceptions nor any discretionary powers to waive fees, unlike for example in the case of fees for entry clearance or leave to remain.

29. The following features of this statutory fees scheme may be noted:

    i) It has at all times been a feature of the scheme that a fee is payable for an application for registration as a British citizen.

    ii) Since the 2004 Act, fees may be set at a level that exceeds the cost of dealing with the application. The 2004 Act also provided that the fee might reflect the benefits that the Secretary of State thought were likely to accrue to the applicant, if the application succeeded.

    iii) The criteria for fixing the amount of fees were expanded by the 2014 Act to comprise those matters set out in section 68(9), which include benefits that the Secretary of State thinks are likely to accrue to any person in connection with registration as a British citizen and "the costs of exercising any other function in connection with immigration or nationality". Fees could therefore be set at a level which would subsidise other parts of the immigration and nationality system.

    iv) Fees could not be set at a level that exceeded the maximum specified in a fees order made by the Secretary of State and approved by affirmative vote of both Houses of Parliament.

v) Fees regulations may provide for exceptions and for the reduction, waiver or refund of the whole or part of a fee.

vi) The duty of the Secretary of State under the 2009 Act to have regard to the need to safeguard and promote the welfare of children, when exercising any function in relation to immigration, asylum or nationality is expressly made applicable to the fixing of fees by section 71 of the 2014 Act.

vii) The 2016 Fees Order requires the Secretary of State to charge the fee specified in the regulations. The 2018 Fees Regulations specify different rates for registration applications by adults and children, but makes no relevant provision for any exceptions, reductions or waivers as regards those fees.

The effect of the application fees

30. The fee charged for an application for registration by children rose from £35 in 1983 to £200 in 2005. Following the changes made by the 2004 and 2007 Acts, the fee rose to £400 in 2007 and then by stages to £699 in 2014. Following the introduction of the new powers by the 2014 Act, the fee rose annually to its current level of £1,012 in 2018.

31. There is no issue but that the recent and current levels of fees have had a serious adverse impact on the ability of a significant number of children to apply successfully for registration. This is not disputed by the Secretary of State. The judge noted at [20] that there was "a mass of evidence supporting the proposition that a significant number of children, and no doubt the majority growing up on low or middle incomes, could only pay the fee by those acting on their behalf being required to make unreasonable sacrifices". I would only add that in cases such as that of O, one of three children of a single parent on state benefits, it is difficult to see how the fee could be afforded at all.

The status of citizenship

32. Equally, it is not disputed by anyone, least of all by the Secretary of State, that British citizenship is a status of importance to those that hold it and that the entitlement to be registered as a British citizen is likewise a right of importance. The evidence filed on behalf of the Secretary of State in these proceedings describes British citizenship as "something of considerable significance". The Secretary of State has stated in Guide T (March 2019), which deals with registration under section 1(4) of the 1981 Act that:

> "Becoming a British citizen is a significant life event. Apart from allowing you to apply for a British citizen passport, British citizenship gives you the opportunity to participate more fully in the life of your local community."

33. In *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166, Lady Hale referred at [32] to "the intrinsic importance of citizenship" and quoted with approval a statement that "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". In *R (Johnson) v SSHD* [2016] UKSC 56, [2017] AC 365, Lady Hale said at [2] that there are "many benefits to being a British citizen, among them the right to vote, the right to

live and to work here without needing permission to do so, and everything that comes along with those rights" and at [27] that "the denial of citizenship, having such an important effect upon a person's social identity, is sufficiently within the ambit of article 8 [of the European Convention on Human Rights] to trigger the application of the prohibition of discrimination in article 14".

The challenge to the vires of the 2017 and 2018 Fee Regulations

34. The claimants submitted to the judge that, while the entitlement to be registered as a British citizen was subject to payment of the prescribed fee, the fee could not lawfully be set at a level that rendered the entitlement in practical terms nugatory. They submitted that the decision of this court in *Williams* was not binding authority to contrary effect because it was based on a test of impossibility to make payment, rather than affordability which the later decision of the Supreme Court in *Unison* established as the correct test for considering the legality of a fee in such circumstances. The evidence in the present case established that the fee was unaffordable for a significant number of child applicants. It was accordingly submitted that the fees set by the 2017 and the 2018 Fee Regulations were *ultra vires* the fee-setting power conferred by section 68 of the 2014 Act.

35. The judge held that he was bound by *Williams* to reject the claimants' submission. The submission could not stand with the terms of the statutory scheme. The scheme created the right to apply for registration and the scheme itself made the payment of the prescribed fee a condition of an application. The requirement of a fee did not defeat the statutory purpose and intent; it was part of that purpose and intent. Although *Williams* was argued and decided by reference to the impossibility of paying a fee, as opposed to a test of affordability, there was nothing in *Unison* that undermined the *ratio* of *Williams*.

36. Mr Drabble QC, on behalf of the claimants, essentially repeats in this court the submissions he made below. The level of fee charged to children is not reasonably affordable to a significant number of children entitled to apply for registration and thereby unlawfully cuts down this important statutory right. The claimants' case was restricted to the fee so far as it exceeded the costs of processing an application. Even a fee restricted to the amount of such costs might well be unaffordable to a significant number of children but, whatever the correct analysis as regards a fee at that level, it was unlawful to raise a surplus where the fee was unaffordable. To the extent that the decision in *Williams* might otherwise rule out this submission, it is incompatible with the Supreme Court's decision in *Unison*. While *Unison* was concerned with the fundamental right of access to the courts, which required that a fee should be reasonably affordable, the present case concerned an important statutory right. In such a case, the fee was unlawful if it was not reasonably affordable to a significant number of potential applicants. In submitting that an important right was not to be defeated by using an ancillary power to fix a fee that was not reasonable affordable, Mr Drabble drew support from paragraphs [102]-[103] of Lord Reed's judgment in *Unison*, to which I refer below. Essentially, section 1(4) created the right to citizenship on making an application, while the fee-setting power, whether contained in the statute itself (as it was until 2007) or in subordinate legislation, was an ancillary mechanism.

37. Before looking in detail at *Williams*, it is convenient to refer to an earlier decision of this court on which the claimants laid some emphasis, *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (*JCWI*). Under the Asylum and Immigration Appeals Act 1993, a person claiming asylum was given rights of appeal against a refusal of an asylum claim. Regulations were made under the Social Security Contributions and Benefits Act 1992 which provided that such a claimant would not be eligible for income support unless the asylum claim was made upon arrival in the UK or once their claim had been rejected by the Secretary of State, even if they exercised their newly granted statutory right to appeal the decision. By a majority (Simon Brown and Waite LJJ, Neill LJ dissenting), this court held the regulations to be *ultra vires* and invalid. The effect of the regulations would be either to deter through penury some genuine claimants from pursuing their appeal rights and thereby render those rights nugatory or to reduce them to a life so destitute that "no civilised nation can tolerate it".

38. Simon Brown LJ said at p.290 that "[s]pecific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act. So much is clear". He concluded at p.292 that it was "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".

39. In his concurring judgment, Waite LJ said at p.293: "The principle is undisputed. Subsidiary legislation must not only be within the vires of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation. Once that is accepted, the question in the present case becomes one of degree and extent." The effect of the regulations in issue was to deprive a very large number of asylum seekers of the basic means of sustaining life and thereby to render "their ostensible statutory right to a proper consideration of their claims in this country valueless in practice by making it not merely difficult but totally impossible for them to remain here to pursue those claims".

40. *Williams* involved, like the present appeals, a challenge to the fee fixed for an application by a child for registration as a British citizen under section 1(4) of the 1981 Act. The fee in issue was the sum of £673 fixed by regulations made in 2013 pursuant to a Fees Order made in 2011 under section 51 of the 2006 Act. It is not suggested that, for present purposes, there was any material difference between that regime and the fees regime in issue in the present appeals.

41. The claimant was a ten-year old boy born in the UK to Jamaican parents. Neither the claimant, who had been assessed as a child in need under section 17 of the Children Act 1989, nor his parents were able to afford to pay the fee. His application was rejected for failure to pay the fee. His challenge was based on grounds (i) that the scheme for fees was *ultra vires* in that it did not include a fee exception for applications by children who were in receipt of local authority assistance because of destitution and (ii) that it breached his rights under articles 8 and 14 of the European Convention on Human Rights. His claim was dismissed, and this court rejected his appeal. Before the hearing of the appeal, the circumstances of the claimant and his family changed and the application was resubmitted with the prescribed fee. The application was successful and the applicant was registered as a British citizen. This court nonetheless decided, exceptionally, to hear the appeal.

42. In his judgment, with which Underhill and Macur LJJ agreed, Davis LJ noted at [15] that registration under section 1(4) of the 1981 Act requires a number of conditions to be satisfied. As originally enacted, section 42(1)(a) provided that "a person shall not be registered under any provision of this Act as a citizen…unless any fee payable by virtue of this Act in connection with registration…has been paid". It was replaced by section 42A, to similar effect, by the 2002 Act, which in turn was repealed by the 2006 Act and replaced by sections 51-52 of that Act. The language of section 42(1)(a) and its successor, section 42A, was not precisely reproduced but section 51(1) provided that the Secretary of State might by order require an application or claim in connection with immigration or nationality to be accompanied by a specified fee and the relevant fees order stipulated in mandatory terms that an application to which the order applied "must be accompanied" by the fee specified in regulations.

43. In considering the *ultra vires* issue, Davis LJ started from the agreed proposition stated at [37]:

> "The question here is as to what Parliament has authorised. Mr Knafler and Mr Eadie were agreed that the inquiry ultimately had to be as to what Parliament intended, by reference to the language it has used."

44. Davis LJ considered that "the answer is clear enough as a matter of the actual language used". He referred to section 1(4) of the 1981 Act, requiring an application to be made before a person could be registered under that provision, to section 51 of the 2006 Act empowering the Secretary of State to require, by order, that applications (including those under section 1(4)) be accompanied by a specified fee, and to the subsequent fees order and regulations which specified the applicable fees, without including (and this was a matter for the Secretary of State) any exceptions or waivers for applications under section 1(4). The consequence for such an application unaccompanied by the specified fee was expressly covered, initially by section 42(1)(a) and then section 42A(1) of the 1981 Act, and subsequently by regulation 9 of the 2013 Fees Regulations made pursuant to section 51 of the 2006 Act. The effect of the provisions in the 1981 Act was that an applicant under section 1(4) could not be registered as a citizen unless the fee was paid, while regulation 9 provided that an application was "not validly made" unless accompanied by the specified fee.

45. Davis LJ concluded at [41] that "the actual language of the statutory scheme is therefore, as a matter of ordinary construction, flat against" the claimant's case that the scheme for fees was *ultra vires*.

46. At [42], Davis LJ summarised the submission of counsel for the claimant that, properly construed, the statutory scheme rendered the specified fee for applications under section 1(4) *ultra vires* as regards children in the position of the claimant:

> "Mr Knafler, however, sought to confront this point by relying on the well-established principle that legislation ordinarily cannot be used to defeat the purpose of, and cannot conflict with, the relevant primary legislation. He submitted that in this case the power to include (or not) exemptions or discretionary waivers was not unfettered. He submitted that the entitlement of the appellant to be registered as a British citizen, he having

> been born over ten years ago in the United Kingdom and having been resident in the United Kingdom ever since, was a "fundamental right"; and the statutory entitlement to registration as a citizen was not to be denied or frustrated by the failure to make allowance in the 2013 Regulations for an individual applicant such as the appellant who simply could not afford the fee. He further submitted in this regard that any other approach would violate the principle of legality; that public powers may not be exercised to abrogate fundamental values, at all events unless sanctioned by appropriately clear primary legislation."

47. Davis LJ rejected this submission at [45]:

> "What is 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 claimant 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 section 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."

48. At [46], Davis LJ addressed a variation of the claimant's case:

> "In his closing submissions in reply Mr Knafler acknowledged that the need for a valid application was part of the scheme. However, the emphasis of his argument was that – at all events consequent on the repeal and replacement of section 42(1)(a) of the 1981 Act – the exclusion of an exemption or power of waiver with regard to applications such as these was contained solely in subordinate legislation, in particular in the form of the 2013 Regulations: and that at all events, he says, makes all the difference, I cannot agree. Subordinate legislation, as part of the scheme, had always been contemplated: see section 42 of the 1981 Act. There is no identifiable reason why the position as from 2006 should have become ultra vires the 1981 Act when it was not before. The wording and intent of the overall legislative scheme was and remained clear and consistent in this regard."

49. These paragraphs show the essential steps in this court's reasoning to be:

i) The payment of the prescribed fee was a condition to the validity of an application for registration and therefore to registration as a British citizen.

ii) The fixing of a fee, even if it could not be paid by some applicants, did not undermine the statutory purpose and intent of the 1981 Act. The requirement of a fee was part of that purpose and intent.

iii) It made no difference that, after the 2006 Act, the requirement for an application to be accompanied by the specified fee had been contained in delegated legislation, rather than in the 1981 Act itself, as had been the case from 1981 to 2007. It remained part of the statutory scheme.

iv) The entitlement to apply for registration as a British citizen was not a "fundamental" or "constitutional" right, such that it could not be denied to applicants on the basis that they could not afford the fee, without appropriately clear primary legislation. It was not therefore a case to which the decision of the Divisional Court in *R v Lord Chancellor, ex parte Witham* [1998] QB 575 applied.

50. Finally, before turning to the submissions in support of these appeals, I will refer to the decision of the Supreme Court in *Unison*. This was a challenge to the fees fixed in respect of proceedings in employment tribunals and in the employment appeal tribunal. The right to bring claims or appeals in those tribunals is conferred by a wide range of primary legislation dealing with employment and equality. The fees were fixed by an order made by the Lord Chancellor, and approved by each House of Parliament, pursuant to Part 1 of the Tribunals, Courts and Enforcement Act 2007, which is concerned generally with the structure and administration of the tribunal system. The issue was whether the fees were unlawful because of their effects on access to justice.

51. Lord Reed gave the leading judgment, with which all the other members of the court agreed. While the case below had been argued principally on the basis of EU law, in the Supreme Court it was argued primarily on the basis of the common law right of access to justice, such right having "long been deeply embedded in our constitutional law": see [64].

52. At [65], Lord Reed set out the scope of the debate before the court:

> "In determining the extent of the power conferred on the Lord Chancellor by section 42(1) of the 2007 Act, the court must consider not only the text of the provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles. In that regard, there are two principles which are of particular importance in this case. One is the constitutional right of access to justice: that is to say, access to the courts (and tribunals: *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443). The other is the rule that "specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act": *R v Secretary of State for Social Security, Ex p Joint Council for*

> *the Welfare of Immigrants* [1997] 1 WLR 275, 290 per Simon Brown LJ. In the context of the present case, there is a considerable degree of overlap between these two principles. For the sake of clarity, however, each of these principles will be considered in turn."

53. At [66] to [85], Lord Reed examined the principles underpinning the constitutional right of access to the courts, and its fundamental importance, and the approach of the courts to measures that indirectly, as well as directly, impede access to the courts. Turning to the power to fix fees, Lord Reed said at [87]:

> "The Lord Chancellor cannot, however, lawfully impose whatever fees he chooses in order to achieve those purposes. It follows from the authorities cited that the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals. That is indeed accepted by the Lord Chancellor."

54. At [90] – [98], Lord Reed considered whether, on the evidence before the court, the fees order effectively prevented access to justice. He concluded that it did. The relevant test was affordability. He said at [91]:

> "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. The evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met. In the first place, as the Review report concludes, "it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees". While the Review report fairly states that there is no conclusive evidence that the fees have prevented people from bringing claims, the court does not require conclusive evidence; as the *Hillingdon* case [2009] 1 FLR 39 indicates, it is sufficient in this context if a real risk is demonstrated. The fall in the number of claims has in any event been so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable."

55. Thus, between [66] and [102], Lord Reed considered in detail, and accepted, the claimant's case that the fees order was *ultra vires* on the first of the grounds summarised at [65], namely that the fees were fixed, without statutory authority, at a level which had the effect of preventing access to justice. It was unnecessary to consider the second ground and Lord Reed only touched on it at [103]-[104] under the heading "Does the Fees Order cut down statutory rights?":

> "103 As explained earlier, the lawfulness of the Fees Order is also challenged on the basis that it contravenes the rule that

> specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act: *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 290. That case was concerned with subordinate legislation which deprived asylum seekers of income-related benefits if they appealed against the Home Secretary's refusal of their claim. The Court of Appeal found that, if deprived of benefits, some asylum seekers with genuine claims would be driven by penury to forfeit them, either by leaving the country before their determination or through an inability to prosecute them effectively. That being so, the legislation was held to be unlawful. Simon Brown LJ stated at p 292 that "these Regulations for some genuine asylum seekers at least must now be regarded as rendering these rights [of appeal] nugatory".
>
> 104 In the circumstances of the present case, this ground of appeal does not add anything to the ground based on the common law right of access to justice. In so far as the Fees Order has the practical effect of making it unaffordable for persons to exercise rights conferred on them by Parliament, or of rendering the bringing of claims to enforce such rights a futile or irrational exercise, it must be regarded as rendering those rights nugatory."

56. I have earlier stated Mr Drabble's primary submission that the level of fee charged to children applying to register as British citizens is incompatible with the statutory scheme under the 1981 Act, because the fees are not reasonably affordable for a significant number of applicants and thereby cut down important statutory rights under the 1981 Act. To the extent that this submission is inconsistent with *Williams*, the court is invited to follow *Unison*.

57. Mr Drabble did not submit that the entitlements to apply for registration as a British citizen created by the 1981 Act constituted fundamental or constitutional rights, akin to the right of access to justice that lay at the heart of the Supreme Court's decision in *Unison.* That submission was rejected by this court in *Williams* (see Davis LJ's judgment at [45]), which is binding on this court; there is nothing in *Unison* to cast doubt on the rejection of that submission. Whether the entitlement constituted a fundamental or constitutional right was of importance because, if it were, it would be subject to the common law principle of statutory construction that such rights are to be curtailed only if and to the extent authorised by primary legislation in clear and unambiguous terms: see *Unison* at [76]-[79], *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at p.131 per Lord Hoffmann and *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [159] per Lady Hale.

58. Instead, Mr Drabble submitted that an important right conferred by primary legislation could not lawfully be cut down by delegated legislation, in this case by fixing a fee at a level that was not affordable to many applicants, without express authority in clear terms contained in primary legislation. Reliance was placed on *JCWI*, which was not cited in the judgment in *Williams*, although it was cited in

argument. In *JCWI*, Simon Brown LJ referred to "specific statutory rights", language used by Lord Reed in *Unison* at [65]. The principle of legality, Mr Drabble submitted, applies to all statutory entitlements and plainly encompasses the important rights conferred by the 1981 Act.

59. The principle advanced and applied in *JCWI* was stated to be that specific statutory rights are not to be cut down by subordinate legislation passed under the *vires* of a *different* Act: see the judgment of Simon Brown LJ at pp.290A and 292H and Waite LJ at p.293E.

60. The submission was made in similar terms in *Unison*: see Lord Reed at [65] and [103], where in each place he recorded it as grounded in *JCWI*. At [104], Lord Reed said that the submission did not add anything to the first ground, based on the common law right of access to justice. The practical effect of the tribunal fees was, for some potential claimants, to render their statutory rights nugatory. As in *JCWI*, the rights in question, arising in that case under primary legislation dealing with employment and equality, were being cut down by subordinate legislation under a different statute.

61. The question in each case where it is said that delegated legislation has illegitimately curtailed rights conferred by primary legislation is whether, on a proper construction of the primary legislation and, if different, the primary legislation under which the subordinate legislation has been made, the delegated legislation was authorised in the terms that it was made. In a case, such as *JCWI*, where the power is contained in separate and unconnected primary legislation, it is highly likely, perhaps inevitable, that the power contained in the unconnected legislation will not authorise the making of subordinate legislation that curtails a right conferred by other primary legislation.

62. Where the power to make subordinate legislation arises under the same primary legislation as confers the right, the issue remains one of statutory construction: if the subordinate legislation does curtail the right in the manner suggested, does the statute authorise the making of subordinate legislation in those terms?

63. That was the question that this court asked in *Williams*: see above, where I have quoted para [37] of the judgment of Davis LJ. The answer given in that case is that the fee, fixed at a level substantially in excess of the administrative cost of processing the application, was authorised by primary legislation. At [45] Davis LJ held that: "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". Parliament had chosen to create the right to apply for registration subject to the requirement to pay a fee. In my judgment, the submission advanced by Mr Drabble is inconsistent with the decision in *Williams*, which is of course binding on us.

64. Mr Drabble also argued that, in this case, the rights under the 1981 Act are being cut down by subordinate legislation under a different statute, section 68 of the 2014 Act, which is expressed in general terms applicable to "the exercise of functions in connection with immigration or nationality". The same argument was made in *Williams* as regards section 51 of the 2006 Act and rejected by Davis LJ at [46]. There is no material difference in the legislation.

65. On a separate basis, Mr Drabble submitted that *Williams* was inconsistent with *Unison* and should not therefore be followed. At [49], Davis LJ considered the possibility that the Secretary of State might make regulations "which will in practice make it *impossible* for applicants to succeed in their applications for citizenship" (emphasis added), whereas in *Unison* the Supreme Court held the relevant test to be one of reasonable affordability. Where the exercise of a statutory right is made conditional on fees that are not reasonably affordable, this constitutes a violation of the principle in *JCWI*.

66. This alternative submission runs into the same difficulty as the other submissions. This court held in *Williams* that the fees charged for registration applications are part of the statutory scheme creating those rights and part of its intent. Davis LJ directly addressed the argument in the context of fixing fees at a level that was impossible for some applicants to pay and rejected it for the reasons he gave at [50]-[51]. It makes no difference to that reasoning if "not reasonably affordable" is substituted for "impossible".

67. In view of Mr Drabble's careful submissions, and the Supreme Court's indication that this court should have the opportunity to consider *Williams* in the light of *Unison*, I have sought to consider in detail the decisions in those two cases and the grounds on which it is said that *Williams* has been overtaken by *Unison.* For the reasons given, I have concluded that *Williams* remains binding on this court, such that the claimants' challenge to the *vires* of the 2017 and 2018 Fees Regulations must be dismissed.

The challenge under section 55 of the Borders, Citizenship and Immigration Act 2009

68. Section 55 imposes a positive duty on the Secretary of State in the following terms:

> "(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;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official."

69. The meaning and effect of section 55 has been considered by the Supreme Court in a number of cases, including *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690 and *R (MM (Lebanon)) v Secretary of State for Home Affairs* [2017] UKSC 10, [2017] 1 WLR 771.

70. There was no dispute before us as to the propositions established by those authorities which for present purposes may be summarised as follows:

    i) Section 55 was enacted to give effect in domestic law, as regards immigration and nationality, to the UK's international obligations under article 3 of the 1989 United Nations Convention on the Rights of the Child (UNCRC). The UK is a party to the UNCRC and in 2008 withdrew its reservation in respect of nationality and immigration matters. Article 3 provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Although section 55 uses different language, it is conventional and convenient to refer to a duty under section 55 as being to have regard, as a primary consideration, to the best interests of the child.

    ii) The duty is imposed on the Secretary of State. She is bound by it, save to the extent (if any) that primary legislation qualifies it; we were not referred to any qualifying legislation.

    iii) The duty applies not only to the making of decisions in individual cases but also to the function of making subordinate legislation and rules (such as the Immigration Rules) and giving guidance. The fact that subordinate legislation or rules are subject to the affirmative vote of either or both Houses of Parliament does not qualify the Secretary of State's statutory duty under section 55.

    iv) The best interests of the child are *a* primary consideration, not *the* primary consideration, still less the paramount consideration or a trump card. This does, however, mean that no other consideration is inherently more significant than the best interests of the child. The question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it.

    v) This in turns means that Secretary of State must identify and consider the best interests of the child or, in a case such as the present, of children more generally and must weigh those interests against countervailing considerations.

71. The claimants' case, reflected in the declarations made by the judge, is that the Secretary of State had not complied with the obligation imposed on her by section 55. The evidence did not demonstrate that she had identified and considered where the best interests of children who wished to be registered as British citizens lay and, assuming those interests would not be best served by a requirement to pay the fees

fixed by the 2017 and 2018 Fees Regulations, how and by reference to which factors those interests were outweighed.

72. The judge said at [96]:

> "I consider that it is clear…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 interest are, and has treated them as a primary consideration."

73. I did not understand Sir James Eadie QC, on behalf of the Secretary of State, to take issue with that approach, which in any event in my judgment was correct.

74. At [98], the judge recorded that 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". This was also Mr Drabble's submission before us.

75. Before the judge, the Secretary of State relied on three sources of evidence to establish that there had been compliance with the duty under section 55. First, the current regime for fees had 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, although it must of course be noted that the amount of the fixed fees has greatly increased over that period. A consultation document about the fee structure was issued in November 2013 and no responses were received as regards these fees. However, the judge discounted this on the grounds that the document did not address or raise questions concerning the fees for registration, and the same was true of three policy equality statements on which some reliance was placed. In my view, he was right to do so.

76. Secondly, the Secretary of State relied on a witness statement made in these proceedings by Richard Bartholomew, the head of the Fees and Income Planning Team within the Financial Planning Unit of the Home Office. The judge addressed this evidence at [107] – [111] and concluded at [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.**"**

77. The judge said at [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 had 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".

78. I agree with the judge's assessment of Mr Bartholomew's witness statement. It is not necessary to go over that ground here. Before us, Sir James placed little weight on it. Indeed, in his skeleton argument, he placed no reliance on it at all. Instead, as before the judge, he based his case principally – before us, almost exclusively – on the Parliamentary debates.

79. The judge considered the debates in some detail and concluded that they did not demonstrate that the Secretary of State had performed her statutory duty.

80. In his skeleton argument, Sir James referred to over twenty passages in a number of debates in both Houses to show that the "regime as a whole, and its effect on the best interests of children in particular, was subject to detailed and robust Parliamentary debate", which "included debate specifically about the s.55 duty and the best interests of children in the specific context of nationality fees". It is said that, despite the points made in the debates, "the Secretary of State and Parliament considered the public policy factors justifying fees at this level for particular services to be very powerful and, having regard to the overall scheme, to outweigh the interests of children. That conclusion necessarily follows from the enactment of the scheme in its current form in the light of the actual debates in Parliament".

81. The skeleton argument went on to state that the "jurisprudence on Article 3.1 [of the UNCRC]…establishes that, notwithstanding the absence of any mention by the Government of the interests of children affected by the measure in question, the debates in Parliament may be such as to show that there has been no breach of Article 3.1 of the UNCRC, even where the measure in question is contrary to the best interests of children, if that consideration is outweighed by the strength of the countervailing considerations and that view is endorsed by Parliament in enacting the legislation".

82. The skeleton argument acknowledged that the section 55 duty is placed on the Secretary of State but "that does not imply or import a requirement, in a context and on facts such as the present and in the light of the Parliamentary debate, to provide the sort of detailed reasoning, or some kind of balanced scorecard from the Secretary of State herself, which Jay J evidently considered necessary…The debates occurred, the points raised by way of objection to the level of nationality fee and the interests of children were squarely raised and debated."

83. It emerged clearly from the skeleton argument that the Secretary of State was proposing to rely on the Parliamentary debates, as she had before the judge, to establish that she had weighed the best interests of children but concluded they were outweighed by other factors in fixing the fees for applications by children.

84. It was on account of this proposed reliance that at the start of the hearing we raised with counsel the question whether such reference and reliance was permitted under Article 9 of the Bill of Rights and was compatible with Parliamentary privilege. We received detailed written submissions on this from the parties after the hearing. The Secretary of State submitted that such use of the Parliamentary debates was permissible, while the claimants submitted that it was not.

85. In the light of these submissions, we invited the Speaker of the House of Commons and the Clerk of the Parliaments in the House of Lords, if they so wished, to intervene and make such submissions as they saw fit on this issue.

86. A joint submission on their behalf, by the Speaker's Counsel and Counsel to the Chairman of Committees, was lodged, for the express and sole purpose of assisting the court with the application of Parliamentary privilege, and in particular Article 9, to material before the court.

87. The submission states that the Speaker and the Clerk are of the view that the Secretary of State's use of the materials does not fall within any of the exceptions previously identified by the courts to the application of Article 9. They see the Parliamentary material as "being cited not as background factual information to identify matters that either House of Parliament had in mind, but as evidence for the Appellant's contention that she has complied in full with a statutory requirement". They "note that the proposed use of the Parliamentary material places the court and the other party in the position of being unable to challenge that assertion without impeaching or questioning proceedings in Parliament, contrary to Article IX". After citing a passage in *R (Heathrow Hub) v Secretary of State for Transport* [2020] EWCA Civ 13 (*Heathrow Hub*) at [158] which set out the Speaker's submission in that case as to the permitted uses of Parliamentary material established by the authorities, they submit: "Those exceptions do not allow for the possibility of extensive use of Parliamentary material that is in dispute between the parties, as here".

88. In a short submission in response, the Secretary of State states that on the points of principle, there is much agreement with the submissions of the Speaker and the Clerk of the Parliaments. However, the submission emphasises "the very limited purpose for which the Secretary of State seeks to refer to what was said in Parliament", which is "simply to show that matters were raised and debated in Parliament as part of the ordinary legislative debate; and considered and responded to by the Government". That is explained in the rest of the submission:

> "4. The context is one in which the key question is whether the best interests of children were considered by the Secretary of State prior to the legislative provisions in issue being made. Reliance on the debates is simply in order to demonstrate the fact (which is not controversial) that there was extensive debate about that very subject, with section 55 being directly raised: no more and no less.
>
> 5. It will still, of course, be for the Court to rule on whether, even taking the fact of those debates into account, there was compliance with the section 55 duty by the Secretary of State. That does not involve questioning or assessing the quality of

> any reasons given in Parliament (which it is accepted would be impermissible as both the Respondents and the Speaker note). The debates speak for themselves in terms of what was said, by whom."

89. Article 9 provides that: "…The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The interpretation and application of Article 9 is ultimately a matter for the courts. Lord Browne-Wilkinson, giving the judgment of the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, explained at p.332 that:

> "If article 9 is looked at alone, the question is whether it would infringe the article to suggest that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.
>
> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & El.1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D.271; *Pickin v. British Railways Board* [1974] A.C 765; *Pepper v. Hart* [1993] A.C 593. As Blackstone said in his *Commentaries on the Laws of England*, 17th ed. (1830), vol.1, p.163:
>
> 'the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'

90. The courts have recognised a number of uses to which Parliamentary material may be put without contravening Article 9. These were set out in the Speaker's submission in *Heathrow Hub* and summarised by this court in its judgment at [158]:

> "The Speaker accepts that there are circumstances in which reference can properly be made to proceedings in Parliament and where therefore this will not constitute impermissible "questioning" of statements made in Parliament:
>
> (1) The Courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious: see *Prebble v Television New Zealand* Ltd [1995] 1 AC 321, at 337

> (2) Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights: see *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, at paragraph 65 (Lord Nicholls of Birkenhead)
>
> (3) The Courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation: see *Pepper v Hart* [1993] AC 593, at 638.
>
> (4) The Courts may have regard to Parliamentary proceedings to ensure that the requirements of a statutory process have been complied with. For example, in this case, the Courts may admit such material in order to be satisfied that the steps specified in section 9 of the Planning Act have been complied with.
>
> (5) The Courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the Courts to agree if possible: see the decision of Stanley Burnton J (as he then was) in *Office of Government Commerce v Information Commissioner* [2010] QB 98, at paragraph 61.
>
> (6) An exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree".

91. Two of these exceptions call for comment.

92. First, the second exception concerns the use of Parliamentary material in determining whether legislation is compatible with the European Convention on Human Rights. In addressing whether such use was permissible, Lord Nicholls said in *Wilson v First County Trust* at [55] that the "starting point for any consideration of the [issue] is, indeed, the respective roles of Parliament and the courts. Parliament enacts legislation, the courts interpret and apply it. The enactment of legislation, and the process by which legislation is enacted, are matters for Parliament, not the courts…[Article 9] is part of the wider principle that the courts and Parliament are both astute to recognise their constitutional roles".

93. After referring to the appropriate use of statements made in Parliament in aid of the court's interpretative function sanctioned by the decision of the House of Lords in *Pepper v Hart*, Lord Nicholls said at [61] that the Human Rights Act 1998 required the courts to exercise a new role in respect of primary legislation, which was fundamentally different from interpreting and applying legislation. The courts were

now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. If the legislation impinged on a Convention right the court must compare the policy objective of the legislation with the policy objective which, under the Convention, may justify a prima facie infringement of the Convention right. The legislation must also satisfy a proportionality test. The court must decide whether the means used by the legislation to achieve its policy is appropriate and not disproportionate in its adverse effect. The House held that for these purposes reference may be made to Parliamentary debates and other Parliamentary material. Lord Nicholls explained why this was so:

> "63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.
>
> 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation".

94. At [65], Lord Nicholls said: "To that limited extent there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act". In the next paragraph, he said that he expected "that occasions when resort to Hansard is necessary as part of the statutory "compatibility" exercise will seldom arise". He continued at [67]:

> "Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. *The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights*. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, 386, paras 113-114" (emphasis added).

95. We were referred to two cases in which the Supreme Court had considered Parliamentary debates and other material for the purpose of challenges to legislation under the Human Right Act.

96. In *R (SG (previously JS)) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, the challenge was to subordinate legislation under the Welfare Reform Act 2012, dealing with a benefits cap. Giving the first judgment, Lord Reed at [23]-[44] set out the legislative history of the Bill which became that Act, with some detailed references to debates. He explained the basis on which he was doing so at [16]:

> "16 In considering the issues arising under article 14 in the present case, I shall begin by examining the process which led to the legislation with which we are concerned, in order to identify the aims pursued by the legislation and information relevant to the issue which the court has to determine. Consideration of the parliamentary debates for that purpose is not inconsistent with anything said in *Wilson v First County*

> *Trust Ltd (No 2)* [2004] I AC 816: the purpose of the exercise is not to assess the quality of the reasons advanced in support of the legislation by ministers or other members of Parliament, nor to treat anything other than the legislation itself as the expression of the will of Parliament".

97. In the second case, *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, the challenge was also to legislation concerning a benefits cap, this time under the Welfare Reform and Work Act 2016 and subordinate legislation made pursuant to it. In giving the first judgment, Lord Wilson referred to Parliamentary debates and other material at [81]-[87] when considering a submission that the relevant statutory scheme contravened article 3.1 of the UNCRC. As the UNCRC is an unincorporated treaty, it did not of itself give rise to rights and obligations in UK domestic law, but it was relevant to a consideration of whether the scheme breached Convention rights. It was therefore in this context that these references were made, as Lord Wilson explained at [79]-[80]:

> "79. In deciding upon the terms of the revised cap, did the Government have regard, as a primary consideration, to the best interests of children below school age of lone parents and did it evaluate the possible impact of its decision upon them?
>
> 80. In answering this question within its overarching inquiry into the alleged violation of Convention rights, the court can, without constitutional impropriety, have regard to Parliamentary materials which explain the background to the Government's decision and in particular its policy objectives: *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 A 66."

98. For at least two reasons, these are important authorities for the purposes of the present case.

99. First, the limited exception to the generality of Article 9 and parliamentary privilege introduced by these authorities is, by necessary implication, mandated by the Human Rights Act, as Lord Nicholls explained in *Wilson v First County Trust*. It follows that, but for the effect of that Act, the use made by the courts in accordance with *Wilson v First County Trust* of Parliamentary debates in cases dealing with human rights challenges would not be permissible. Were that not the case, it would have been unnecessary for Lord Nicholls to explain the basis on which reference could be made in such cases, the explanation being repeated by Lord Reed and Lord Wilson in the subsequent cases.

100. Second, and this follows from the first, the consideration in *R(DA) v Secretary of State for Work and Pensions* of proceedings in Parliament, when determining whether the Government and indeed Parliament has taken proper account of the best interests of children, was permissible because the challenge was made under the Human Rights Act, as Lord Wilson explained.

101. The present case involves no challenge on human rights grounds, and reference to and reliance on Parliamentary debates cannot be justified by reference to these authorities.

102. The second category listed in *Heathrow Hub* at [158] that calls for comment in this case is that at sub-paragraph (6), the use of ministerial statements in judicial review proceedings. This court agreed in that case with the Speaker's submission that its scope and nature had not yet been the subject of detailed analysis and that it called for careful consideration of the constitutional issues involved.

103. The first case in which use of ministerial statements appears to have occurred is *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696. A direction given by the Home Secretary to television and radio authorities not to broadcast statements made directly by members or supporters of proscribed terrorist organisations was challenged. In judgments given both in this court and in the House of Lords, there was extensive quotation of, and reference to, statements made by the Secretary of State in Parliament, setting out his reasons for issuing the directive. It was the adequacy of those reasons for issuing a directive that curtailed freedom of speech which were the subject of challenge.

104. This and subsequent cases where similar use of ministerial statements in Parliament has been used in judicial review proceedings have been taken to establish that a "minister's statement [may be] relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it": *Toussaint v A-G of St Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825. In considering the use of Parliamentary material in judicial review proceedings, the Report of the Joint Committee on Parliamentary Privilege (Session 1998-99), chaired by Lord Nicholls, which was cited by Lord Bingham in *Buchanan v Jennings* [2005] 1 AC 115 at [16], concluded that "the practice in court is for both the applicants and the government to use the official reports of both Houses to indicate what is the government's policy in a particular area". However, it must be noted that a subsequent Joint Committee on Parliamentary Privilege, in its Report published in July 2013 (HL Paper 30, HC 100), expressly did not concur with the view stated in the earlier Report that Article 9 "should not be interpreted as precluding the use of proceedings in Parliament in court for the purpose of judicial review of government decisions": see para 132. In *Warsama v Foreign and Commonwealth Office* [2020] EWCA Civ 142, [2020] QB 1076, this court (Lord Burnett of Maldon CJ, Coulson and Rose LJJ) said at [24] that: "The courts have also redrawn the boundaries of privilege to allow examination in judicial review proceedings of the reasons given by a minister in Parliament for a particular decision under challenge".

105. As it appears to me, this use of ministerial statements is permitted for the limited purpose of identifying the Government's purposes and reasons for taking or proposing the action which is being challenged in the proceedings. Those are the purposes or reasons which have been formulated outside Parliament and explain action taken by the Government outside Parliament, either, for example, by the directive issued in *Brind* or by the decision to make subordinate legislation. Essentially, it is a convenient way of putting those purposes or reasons in evidence, which may be simpler than setting them out in a witness statement by the minister or an official.

106. That is not, however, the use which the Secretary of State seeks to make of the debates in both Houses in the present case. The Secretary of State has filed a witness statement by an official, designed to demonstrate that the duty under section 55 was performed. As already explained, it fails to do so. The Secretary of State has to rely on the debates in an attempt to fill the evidential gap left by that failure. The

submission was that, by examining the speeches made and questions asked by members of both Houses and the responses given by ministers, she could show that in the course of the debates she had performed her statutory duty. It requires the court to determine whether the Secretary of State performed her duty by weighing the adequacy of the responses made by ministers against the requirements of the statutory duty. As the judge said at [96], quoted above, the court "must be satisfied that the correct factors have been identified by the Secretary of State and then assessed…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".

107. In carrying out that assessment, the judge examined the Parliamentary materials in detail, as he was invited to do by the Secretary of State, and found at [114] that "nowhere on the Government's side of the debate has there been any recognition of where the best interests of children might repose". Following that examination, his conclusion at [116] was that "the Secretary of State has failed to have regard to the best interests of [children]".

108. This use of Parliamentary materials went far beyond just informing the court of, for example, the reasons for a particular decision. Nor was it a case in which reliance was placed on a statement by a minister as to the interests and factors that had been addressed by the Secretary of State in the performance of her section 55 duty. On the contrary, the court was required to assess, by reference to questions and issues raised by members of both Houses and by reference to the answers and statements given and made by ministers, whether the Secretary of State had in the course of the debates performed her duty. In my judgment, it was a use which was prohibited by Article 9 and by the general principles of parliamentary privilege and did not fall within any of the recognised exceptions. It fell squarely within what Lord Nicholls said in *Wilson v First County Trust* at [67], which is italicised in the passage quoted above but which, for convenience, I will repeat: the court is not called upon to evaluate "the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights".

109. The Secretary of State was not therefore permitted, either before the judge or before us, to rely on the Parliamentary materials nor was the court permitted to have regard to them.

110. I would only add that it was surprising that the Secretary of State had not conducted the review necessary for the performance of her duty under section 55 outside Parliament. If she had done so, she would have been able to give evidence of it in a witness statement, and the issue of Article 9 and Parliamentary privilege would not have arisen. I would echo what was said by Lord Carnwarth in *R (SG (previously JS) v Secretary of State for Work and Pensions* at [123], in a passage also cited by the judge:

> "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."

Relief

111. The judge made declarations that the Secretary of State "breached the procedural duty" under section 55 when deciding to set the fees for applications by children for registration as British citizens at £973 and £1,012 under the 2017 and 2018 Fees Regulations respectively.

112. The Claimants submitted to the judge that he should make declarations that the Fees Regulations were unlawful and should quash them, on the grounds that this would properly reflect his decision that they had been made in breach of the section 55 duty. The Secretary of State submitted that no relief should be granted because it was highly likely that the fees would not have been substantially different if the Secretary of State had complied with the section 55 duty.

113. The judge explained his reasons for the declarations he made at [119]:

> "It does not flow from my conclusion…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 had not occurred…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 the same, absent the breach that has occurred; but in the exercise of my discretion…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."

114. Although the Secretary of State's submissions were repeated in the skeleton argument for this appeal, Sir James submitted in oral argument that the judge was right in the relief he granted for the reasons he gave.

115. Mr Drabble, on behalf of the Claimants, repeated the submissions made to the judge, adding that the judge had been wrong to treat section 55 in the circumstances of this case as imposing only a procedural duty.

116. In my judgment, the judge was entitled in his discretion to give relief in the form of the declarations that he made, and that it was clear from his reasons that he had regard to the relevant considerations. I do not think that in the circumstances of this case it is necessary to examine whether the section 55 duty was procedural only, which was in any event not the subject of oral argument before us, as I do not consider that it would make a material difference to the appropriate relief.

Conclusion

117. It follows that the Secretary of State's appeal, against the finding that she had made the 2017 and 2018 Fees Regulations in breach of her duty under section 55, must be

dismissed, as must the Claimants' cross-appeal against the decision that those Regulations were not *ultra vires*.

Lord Justice Singh:

118. I agree that this appeal by the Secretary of State must be dismissed, for the reasons given by David Richards LJ in relation to the second issue, which concerns section 55 of the 2009 Act. I would like to add a few words of my own about the first issue, which concerns vires.

119. If the matter were free from authority, I would see considerable force in the submissions made by Mr Drabble QC on behalf of the Respondents but I agree with David Richards LJ that the decision of this Court in *Williams* is binding on this Court.

120. In my view, it is important in this context not to become distracted by reference to the language of "fundamental" or "constitutional" rights. Those concepts are of the greatest importance in their proper context. In the present context, while Mr Drabble accepts that there are no fundamental or constitutional rights in play, what is in play is a statutory right conferred by Parliament in primary legislation. In my view, that does potentially give rise to the principle of statutory construction illustrated by the decision of the majority in this Court in *JCWI*. That decision was not referred to by this Court in its judgment in *Williams*, although it was cited in argument. It was mentioned, with approval, by Lord Reed in *Unison* at [103]-[104] but, as David Richards LJ has explained, it was unnecessary for Lord Reed to consider it in detail, since he had already concluded that the regulations under challenge in that case were ultra vires on the ground that they unacceptably interfered with the constitutional right of access to courts and tribunals. I agree with David Richards LJ that the ratio of *Williams* is binding on this Court and has not been affected by the ratio of *Unison*.

121. At first sight the *JCWI* principle might be thought to be confined to cases in which there is subordinate legislation made under *different* primary legislation from that which confers the statutory right which is said to be rendered nugatory. That is how the principle was formulated in that case but, in my view, that is simply because that was the context in which the issue arose there. I do not consider that the principle is so limited. It may be a matter of chance whether secondary legislation is made under the same primary legislation or under other legislation. What is crucial, as a matter of principle, in my view, is that there is a hierarchy of legislation: primary legislation is enacted by Parliament and is superior to secondary legislation, which is made by the executive pursuant to powers delegated to it by Parliament. If there is a conflict between primary legislation and secondary legislation, it is the latter which must give way.

122. In the end, as Sir James Eadie QC submitted before us, the question is one of statutory interpretation: what is the will of Parliament in conferring the power to make secondary legislation on the executive? In answering that question, one has to read all the relevant legislation and consider whether it was the intention of Parliament that a statutory right which it itself has conferred on a person is capable of being rendered nugatory by secondary legislation made by the executive. The fact that the secondary legislation is made in exercise of powers conferred by the same primary legislation may be relevant in answering the question of statutory interpretation which arises but,

in my view, it does not automatically mean that the *JCWI* principle has no scope to operate at all.

123. In *R (Al-Enein) v Secretary of State for the Home Department* [2019] EWCA Civ 2024, [2020] 1 WLR 1349, at [28], I made a similar point as follows:

> "In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, it was held that regulations which had been made could be held to be unlawful if they contravened "the express or implied requirements of a statute": see p. 292 (Simon Brown LJ). At p. 293, Waite LJ said that the principle was undisputed that:
>
> "Subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."
>
> In my view, the same principle would apply to subsidiary legislation which is in conflict with statutory rights conferred by the same primary legislation under which the subsidiary legislation is made. A fundamental point of principle is that subsidiary legislation will be *ultra vires* if it seeks to cut down or negate rights which have been created by primary legislation. The same would also apply to a governmental policy, which does not have the force of legislation. This is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament."

124. That all said, in the present case it is not open to this Court to take a different view from that reached in *Williams* and so we must reject Mr Drabble's submissions on the vires issue.

Lady Justice Nicola Davies:

125. I agree with both judgments.