Joint Briefing of Immigration Law Practitioners' Association, Coram Children's Legal Centre, and CoramBAAF for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 1: Nationality, Clause 7 Proposed Amendment – Acquisition of British Citizenship by Adoption

Summary

British nationality law is not in alignment with adoption law in England, Wales, and Scotland[1]:

- In England and Wales, an adoption order may be made where a child has made an application before reaching the age of 18, so long as they are not yet 19.
- In Scotland, an adoption order may be made in respect of a person over the age of 18, as long as the application was made when the person was under the age of 18.
- However, an adoption order only confers British citizenship automatically where the person adopted is under the age of 18 on the day it was made.

It is axiomatic that a young person who is adopted should be able to automatically acquire the British nationality of their adopted parent. This inconsistency generates victims in real life. One of ILPA's members represented a young woman who was a victim of this legislative misalignment.

Case Study: "Sofia" is the pseudonym for a young woman who completed her degree at the University of Oxford last year. Earlier, her mother died of cancer. Her maternal aunt, a British citizen, resident in the United Kingdom and deeply rooted here, applied (before Sofia turned 18) to adopt her in England. The English High Court was hugely impressed with Sofia and her aunt and ordered the adoption (when Sofia was 18 but not yet 19). The High Court order created a new nuclear family. The Secretary of State for the Home Department was represented and did not oppose the adoption. Section 1(5) of the British Nationality Act 1981 did not operate to confer British citizenship on Sofia as she was already 18 on the date of the adoption order. Sofia was left with student status, which was due to end shortly after her degree in 2021. She had no basis on which she could continue to enjoy family life in the UK with her new adoptive mother. The Immigration Rules make no provision for someone in Sofia's predicament, as she did not yet have 10 years of continuous lawful residence in the UK.

Section 1(5) of the British Nationality Act 1981 was drafted more than forty years ago. It has yet to be aligned with the Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007 to give people like Sofia an automatic basis to live in the UK in their new parent/child nuclear family.

[1] This briefing only covers England, Wales and Scotland. Our understanding is that in Northern Ireland there is no provision for an adoption order to be granted in respect of someone over the age of 18, even where the application is lodged prior to them turning 18.

ILPA, Coram Children's Legal Centre, and CoramBAAF recommend an amendment to bring the British Nationality Act 1981 in line with adoption law. The position needs correcting. The Nationality and Borders Bill is the perfect vehicle to make this correction.

The correction is not controversial and the amendment tabled by Lord Russell and supported by Baroness Hamwee should command support across the House of Lords.

Background

The Immigration Law Practitioners' Association

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Coram Children's Legal Centre

Coram Children's Legal Centre ('CCLC'), part of the Coram group of charities, promotes and protects the rights of children in the UK and internationally in line with the UN Convention on the Rights of the Child. As experts in all areas of children's rights, immigration, child protection, education and juvenile justice, CCLC provides legal advice and representation; researches and produces evidence informing law, policy, practice and system reform; builds the capacity of professionals and practitioners through training and advice provision; and challenge laws and policies that negatively impact on children and their rights. CCLC provides free legal information, advice and representation to children, young people, their families, carers and professionals, as well as international consultancy on child law and children's rights.

CoramBAAF

CoramBAAF is an independent membership organisation for professionals, foster carers and adopters, and anyone else working with or looking after children in or from care, or adults who have been affected by adoption. It is a successor organisation to the British Association for Adoption and Fostering (BAAF). It has adoption agency and fostering service members across the UK from local authorities and the voluntary and independent sector. Other organisations that also work in the field, for example legal practices and children's organisations, benefit from associate membership. It also has almost 900 individual members, including independent social workers, trainers, adopters, foster carers, therapists, lawyers, looked after children nurses, researchers and more. It works on behalf of our members and with the government and other stakeholders to ensure the very best outcomes for children in care.

The Current Law

The position under section 47(9) of the Adoption and Children Act 2002

> (9) An adoption order may not be made in relation to a person who has attained the age of 19 years.

The position under section 28(4) of the Adoption and Children (Scotland) Act 2007

> (4) An adoption order may be made in respect of a person aged 18 or over if the application for the order was made when the person was under 18.

The existing position under s 1(5) of the British Nationality Act 1981

> (5) Where—
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> (a) any court in the United Kingdom or, on or after the appointed day, any court in a qualifying territory makes *an order authorising the adoption of a minor* who is not a British citizen; or
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> (b) a minor who is not a British citizen is adopted under a Convention adoption,
>
> *that minor shall*, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be effected under the law of a country or territory outside the United Kingdom.
>
> (*italic* emphasis added)

Proposed Amendment to Clause 7 – Acquisition of British Citizenship by Adoption

Clause 7, page 9, line 36, at end insert–

"(1A) In section 1 (acquisition by birth or adoption) subsection (5)–

(a) in paragraph (a), for "minor" substitute "person"; and

(b) after paragraph (b), for "that minor shall" substitute "that person or minor (as the case may be) shall"."

Result of Amendment

> (5) Where—
>
> (a) any court in the United Kingdom or, on or after the appointed day, any court in a qualifying territory makes an order authorising the adoption of a **person** who is not a British citizen; or
>
> (b) a minor who is not a British citizen is adopted under a Convention adoption,
>
> **that person or minor (as the case may be) shall**, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be effected under the law of a country or territory outside the United Kingdom.
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> (bold and underlined emphasis added)

Detailed Consideration of the Amendment

British nationality law has lagged behind adoption law in England and Wales, and in Scotland.

In England and Wales, since 2002, an adoption order made by a court may be made where a child *has reached the age of 18* but has not yet turned 19.

In Scotland, under the Adoption and Children (Scotland) Act 2007, an adoption order may be made by a court in respect of a person aged 18 or over if the application for the order was made when the person was under 18.

However, in both cases, such an adoption order only confers British citizenship automatically where the person adopted *is under 18* on the day the order is made.

This is a slip, an unintentional error. The Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007 were enacted some 20 years after the relevant British nationality law. Apparently, the inconsistency created was overlooked. It has never been suggested that adoption law and British nationality law should be out-of-step where a court in England, Wales or Scotland authorises a person to be adopted.

How many are affected?

The stated problem is not merely theoretical and has created victims in real life. The Department for Education's statistics for children looked after in England, who were adopted, show that in England in each year in 2019, 2020 and 2021, there were ten adoptions of persons aged 16 years and over.[2] The data does not provide a breakdown of whether they are above the age of 18, by the time the order is made, or of their nationality. However, it is clear that relatively few older children are adopted, and thus the proposed amendment would not open the floodgates of British nationality.

The same set of statistics also explains the average time involved in an adoption.[3] The total time between entry into care and adoption was four years and two months in 2021. The total average time between entry into care and date placed for adoption for a child aged seven and over, was two years and nine months in 2019 and 2020, and two years and 11 months in 2021. The average time between the date of placement and the child actually being adopted was one year in 2019, nine months in 2020, and one year and three months in 2021. These lengthy timeframes affect many children. Across all local authorities there were more than 1,050 children waiting for a placement order for 18 months or more since entering care (at 30 June 2021).[4] Adoption is not a short process.

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[2] By comparison there were 3,590 children adopted in 2019, 3,480 in 2020 and 2,870 in 2021. Department for Education, 'CLA who were adopted - NATIONAL' from 'Children looked after in England including adoptions' <https://explore-education-statistics.service.gov.uk/data-tables/permalink/6912d3a4-a0ee-43a8-9ac1-ac2704485e23> created and accessed 24 January 2022.

[3] Department for Education, CLA who were adopted - average time between the different stages of the adoption process - NATIONAL' <https://explore-education-statistics.service.gov.uk/data-tables/fast-track/90691076-386a-4ba9-9524-08d9986262b5> created and accessed 24 January 2022.

[4] Coram-i, *ASGLB Q1 2021/22 Headline Measures* <https://coram-i.org.uk/resource/asglb-q1-2021-22-headline-measures/> accessed 24 January 2022.

Therefore, even if a child is placed with their adoptive family, before their 18th birthday, it could be more than a year before they are adopted. In the interim, after going through this lengthy process of adoption, they would thus fall foul of section 1(5) of the British Nationality Act 1981 and not be able to automatically acquire British citizenship if they did not already have it.

Tom Pursglove MP, Minister for Justice and Tackling Illegal Migration, has said, 'I am aware of cases in which individuals are affected by those nationality provisions, and I have some sympathy for them.'[5]

We are aware of two recent examples (in 2020[6] and in 2021[7]) of reported cases in which the High Court in England and Wales ordered the adoption of a child after they had turned 18. Each child had made an application for adoption before their 18th birthday. Both cases raised a unique combination of circumstances resulting in complex legal issues for the court to resolve before making an adoption order. In only one of these cases, explored in detail below, was the adoptive parent a British citizen. However, the Court found the adoptee, A, was not able to acquire British citizenship automatically.

The size of the cohort affected by this misalignment should not deter remedying the anomaly on the statute books. Even if it affects one adopted person, that is one too many.

Real Life Examples

In the anonymised case studies below, "Sofia" and "Nadia" were represented by ILPA members, and "A" was a case in the High Court with the details taken from the reported decision. They demonstrate the real impact caused by the current drafting of section 1(5) of the British Nationality Act 1981:

"Sofia" - England

"Sofia" is the pseudonym for a young woman who completed her degree at the University of Oxford last year. Earlier, her mother died of cancer. Her maternal aunt, a British citizen, resident in the United Kingdom and deeply rooted here, applied (before Sofia turned 18) to adopt her in England. The English High Court was hugely impressed with Sofia and her aunt and ordered the adoption (when Sofia was 18 but not yet 19). The High Court order created a new nuclear family. The Secretary of State for the Home Department was represented and did not oppose the adoption.

Section 1(5) of the British Nationality Act 1981 did not operate to confer British citizenship on Sofia as she was already 18 on the date of the adoption order. Sofia was left with student status, which was due to end shortly after the completion of her degree in 2021. She had no basis on which she could continue to enjoy family life in the UK with her new adoptive mother. The Immigration Rules make no provision for someone in Sofia's predicament, as she did not yet have 10 years of continuous lawful residence in the UK. Representations were made to the Home Office, asking

[5] HC Deb 19 October 2021, vol 701, col 182 <https://hansard.parliament.uk/Commons/2021-10-19/debates/69c8f9cb-4500-4595-bae4-3b06d5823063/NationalityAndBordersBill(SixthSitting)> accessed 24 January 2022.
[6] *Re A (A Child: Adoption Time Limits s44(3))* [2020] EWHC 3296 (Fam) <https://www.bailii.org/ew/cases/EWHC/Fam/2020/3296.html> accessed 26 January 2022.
[7] *YP (Adoption of 18 Year Old)* [2021] EWHC 3168 (Fam) (26 November 2021) <https://www.bailii.org/ew/cases/EWHC/Fam/2021/3168.html> accessed 26 January 2022.

(among other things) for the Home Office to agree at least to grant her indefinite leave to remain to avert a travesty of justice, but these representations were summarily refused and Sofia had no alternative but to start expensive and time consuming judicial review proceedings. At this point, with her limited student leave about to expire, one of her lawyers intervened personally at a very high level and directly with the Secretary of State (to avert the looming travesty) and she was granted indefinite leave, but only exceptionally, outside the Immigration Rules, and only because of a highly unusual intervention to circumvent judicial review proceedings. She is yet to be eligible for British citizenship.

"Nadia" - Scotland

"Nadia" is the pseudonym for a young woman born overseas. Her mother and step-father married when she was a child. Several years later, when she was 14, her step-father adopted her so that she could be formally and legally recognised as his child. She was adopted in an overseas adoption, but there was no mechanism for the statutory recognition of the adoption order in Scotland, since it did not meet the definition of "overseas adoption" in section 67 of the Adoption and Children (Scotland) Act 2007 (as it was not a country detailed in the relevant regulations[8]). Furthermore, the country of adoption was not a signatory to the Hague Convention[9].

Nadia's adoptive father was a British citizen by birth. Thus, when her parents returned to live permanently in the UK, Nadia obtained a student visa.

The Scottish courts considered the matter of her adoption when Nadia was in her early twenties, and ordered recognition of the historic foreign adoption order under common law in Scotland. Once her adoption had been recognised in Scotland, Nadia sought confirmation of her British nationality pursuant to section 1(5) of the British Nationality Act 1981. However, the Home Office refused to recognise her as British.[10]

Nadia sought a review of the refusal to recognise her as a British citizen, and then challenged delay in this review by way of judicial review. The Home Office conceded the judicial review with costs. It was agreed that Nadia would submit an application for settlement 5 years early, and simultaneously submit an application for naturalisation as a British citizen which would be considered once the expedited application for the settlement was granted. Thus, the Home Office avoided the need to further consider section 1(5).

Although the facts of Nadia's case presented a unique set of circumstances regarding recognition of adoption in the common law, the principle is similar. Her adoption application had been made when she was under the age of 18. It was later recognised as lawful in Scotland. However, she was not conferred British citizenship automatically. Instead, she had to pursue the lengthy and costly process of judicial review, and make a further discretionary application for British citizenship. *Other persons*

[8] Adoption Recognition of Overseas Adoption (Scotland) Regulations 2013/310.
[9] Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, concluded at The Hague on 29 May 1993.
[10] The Home Office stated that recognition at common law did not constitute an adoption order by a court in the United Kingdom, even though it was covered by the meaning of adoption in section 39(1)(g) of the Adoption and Children (Scotland) Act 2007. Nadia's representatives argued that section 1(5) simply needed to be read purposively.

who are adopted by a British citizen, but fall awry of section 1(5) due to their age, may need to follow a similar process to Nadia to ensure they can live in the UK with their British adoptive parent.

"A" - England

The birth-parents of "A" did not feel able to care for her. Ms Z, the cousin of A's birth father, is a British citizen of St Lucian origin who had lived in England for her entire life. She works as an ambulance care assistant and had four children of her own. In 2002, Ms Z, when attending the funeral of her grandmother in St Lucia, agreed to take A, a recently born baby, back to England and care for her alongside her children ensuring her emotional, physical and other needs were met.

As A reached her teenage years, Ms Z began to think about formalising their relationship given that A's birth-parents had not taken any part in her life. Ms Z provided notice to the London Borough where she lived that she intended to adopt A in June 2018. This triggered inquiries into her suitability by a social worker. Delayed by bereavement, it was not until February 2020, with the encouragement and support of the social worker, that Ms Z signed the adoption application and sent it to the court. It contained errors and missing information, and thus a second application was made in August 2020.

Accordingly, the adoption application was made and issued by the court before A reached the age of majority in September 2020. In November 2020, the High Court considered it 'manifestly in the welfare best interests of A for an adoption order to be made',[11] and stated the following:

> *42. The making of an adoption order in this case would be genuinely transformative for A and the applicant. It would give life-long legal recognition to the factual mother-daughter relationship that A has had with the applicant for her entire childhood. It is the only way in which the reality of A's family life can be given any legal recognition. The emotional and psychological consequences for the applicant and subject child in the particular circumstances of this case if the application is not allowed to proceed are enormous.*
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> *43. The making of an adoption order in this case may also assist with formalising A's immigration status and enabling her to remain living in England. This is a legitimate consideration bearing in mind that A's welfare throughout her life is paramount in the substantive application: see S v Bradford Metropolitan District Council and another [2015] EWCA Civ 951 and Re N (A Child) [2016 EWHC 3085. Because A has already attained the age of 18 before the making of any adoption order, she is not likely to obtain automatic British nationality under ss.1(5) and 1(5A) of the British Nationality Act 1981 as amended by the 2002 Act. However legal status as an adopted child of a British citizen is likely to assist with any immigration application she needs to make, which is ultimately in her welfare best interests.*[12]

The case of A demonstrates the complexity and length of the adoption process: it commenced formally in June 2018, yet an adoption order was not made until November 2020. Furthermore, it shows the failure of section 1(5) of the British Nationality Act 1981 to provide automatic acquisition of citizenship for an adopted person who is 18 when the adoption order is made.

[11] *Re A (A Child: Adoption Time Limits s44(3))* [2020] EWHC 3296 (Fam) [48].
[12] ibid [42]-43].

The Reasoning

The position needs correcting. Such a legislative misalignment should not be left on the statute books. The Nationality and Borders Bill is the perfect vehicle to make this correction. The correction is not controversial or on an issue that divides legislators on party lines.

This amendment was tabled and moved at Committee Stage in the House of Commons.[13] The Government rejected the amendment, but its reasons are misconceived. Its stance is that an adult 'will normally be capable of making their own life choices' and should abide by the general requirements applicable as regards immigration routes (even though family reunion routes are not generally available to children who are no longer minors) and as regards acquisition of British nationality (where naturalisation on application following a period of UK residence is the default position).[14]

However, this misunderstands the nature of the problem. The whole point of adoption is that a person is becoming a family member, in this case the family member of a British citizen. Even though, an 18 year old 'can purchase alcohol, accrue debt, join the Army, or vote in an election' and 'can theoretically live independently of other family members',[15] the law enables the courts to order their adoption. As in the case of "A", an adoption is about formalising the emotional and psychological connection and legally recognising that parent and child are family even if the child has reached the age of majority. As part of a newly formed family unit, it is axiomatic that an adopted person should acquire the citizenship of their new British parent. Without the ability to share their parent's British citizenship, and have a lifelong unfettered right to reside in the UK with said parent, they may be deprived of a deep sense of belonging, undermining the 'psychological relationship of parent and child with all its far-reaching manifestations and consequences'[16] created by the adoption order.

British citizenship is of a different order to leave to enter or remain in the UK, and thus no parallel can be drawn between nationality law and the immigration routes in the Rules (the latter of which are mere statements of practice, and have thousands of changes each year). There is significant case law to support the importance of citizenship. Lord Mance has stated '[t]he right [of abode] is fundamental and, in the informal sense in which that term is necessarily used in the United Kingdom context, constitutional'.[17] Its 'intrinsic importance' was also emphasised by Lady Hale, Lord Hope and Lord Kerr in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

It was the clear intention of Parliament in enacting section 1(5) of the 1981 Act, to confer British citizenship automatically on adopted children. Parliament has provided for this in the case of children under the age of 18. Where a child turns 18 before the actual order is made, but after the adoption application is made, those imperatives remain the same. It is wrong to treat the adoptee as an ordinary adult family member. No public policy objective is served. In fact, the benefits of adoption are frustrated by failing to make the same provision for adoptees who turn 18 as for those who are 17 when the process is completed.

[13] (n 5) col 190.
[14] ibid, col 190.
[15] ibid.
[16] *Re J (Adoption: Non-Patrial)* [1998] INLR 424, per Thorpe LJ at [429].
[17] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 [151].

As demonstrated by the cases of Sofia and Nadia, there is no clear route for an adoptee to apply to remain in the UK under the Immigration Rules once they are 18. Tom Pursglove MP touched on this lacuna in Committee Stage in the House of Commons: 'young people over the age of 18 must meet the requirements of the immigration category they are applying in, and are unable to rely on other family members for a claim to residence'.[18] If they do not independently meet the requirements for an immigration category (such as Skilled Worker, or Student), they can be forced to leave their new family in the UK behind. If they wish to stay on a familial basis, they may have to go through an arduous process of applying for leave outside of the Immigration Rules relying on human rights, for example, arguing more than the 'normal emotional ties' exist between them and their new family.[19] They are left to the discretion of the Secretary of State and further application processes before they are British. For both Sofia and Nadia this resulted or had the potential to result in unnecessary litigation.

The Government's objection fails to appreciate that adoption is to be furthered and given effect in nationality law as well as adoption law. No person should be left behind accidentally. Moreover, although an adoption order may be made in England, Wales and Scotland, after a person turns 18, the application must be made before the child reaches the age of 18. It could, therefore, be a matter of luck and court listing as to whether an application made to adopt a 17 year old results in an order before their 18th birthday resulting in citizenship, or after, which does not. As above, the latest statistics for 2021 show a year and three months on average to elapse between a child being placed with their adoptive family and the adoption order being made. Although the delay between an application being made and an order being granted may be due to no fault of their own, a child could be placed before their 17th birthday and still not meet the cut-off date in British nationality law.

The proposed amendment would bring British nationality law in line with adoption law in England, Wales, and Scotland, so that where our courts make an adoption order in respect of a person and the adoptive parent is a British citizen, British citizenship is conferred ***automatically*** on the person adopted.

It is no answer to the problem to say that an 18 year old adopted by a British citizen will be able to apply for registration as a British citizen as an adult at the Secretary of State's discretion under proposed section 4L of the British Nationality Act 1981 (found in Clause 7 of this Bill). That would require the person to show historical legislative unfairness; an act or omission of a public authority; or exceptional circumstances relating to the person.

Adoptees should be treated as British citizens *automatically* from the date of their adoption. That is what Parliament intended: automatic acquisition. Where the only solution is a subsequent application for British citizenship at the Secretary of State's *discretion*, there is a risk that such an application may be overlooked. Erroneously, it could be assumed that the adoptee would qualify for citizenship automatically; they may be subjected to the "compliant" environment if they fail to make a further application in-time. Or, the application may be refused on the basis it does not meet the high threshold for registration under the proposed section 4L. In either case, the intention of Parliament to confer British citizenship on a person adopted by a British citizen would be frustrated.

[18] (n 5), col 191.
[19] See, for example, *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630; and *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31.

Conclusion

The sole solution is to make the simple amendment proposed and to align British nationality law with adoption law.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners' Association at info@ilpa.org.uk.