

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

Misalignment of Nationality and Adoption Law

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

- In England and Wales, an adoption order made by a court may be made where a person *has reached the age of 18* but has not yet turned 19.¹
- 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 18.²
- 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.

Our understanding is that in Northern Ireland there is currently 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. However, Northern Ireland has a draft Adoption and Children Bill which would bring its adoption law in line with England and Wales, permitting adoption before a person has turned 19.³

Our proposed amendment, to refer to “person” instead of or in addition to “minor” in section 1(5) of the British Nationality Act 1981, was tabled but not moved at Committee Stage in the House of Lords. We are grateful to the noble Baroness, Lady Williams of Trafford, for her attention to the issue which our proposed amendment seeks to address. We note her concerns in respect of the effect that this amendment would have and we seek to allay them.

Jurisdiction and certainty

Our proposed amendment will not result in uncertainty depending on the jurisdiction of adoption. It is well established that adoption law may be different in the different devolved nations of the United Kingdom. This is not considered to cause prohibitive uncertainty. Our proposed amendment will bring greater certainty by aligning nationality law with adoption law in each of the jurisdictions of the United Kingdom through a simple change.

¹ Section 47(9) of the Adoption and Children Act 2002.

² Section 28(4) of the Adoption and Children (Scotland) Act 2007.

³ Clause 44 of the Draft Adoption and Children Bill currently in Committee

<<http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/health/primary-legislation/adoption-and-children-northern-ireland-bill/adoption-and-children-bill/#a43>> accessed 15 February 2022.

Nationality law: no bright line at 18

During Committee Stage in the House of Lords, Baroness Williams stated, ‘under British nationality law, a person is no longer considered a minor once they reach the age of 18’.⁴ However, we would respectfully emphasise that existing nationality law does not so neatly divide people according to whether they are under or over the age of 18. Section 1(4) of the British Nationality Act 1981, for example, is a provision that primarily applies to children, born in the UK, who are entitled to register as British citizens, *at any time* after they have attained the age of ten years, if during the first ten years of their life they were not absent for more than 90 days in each year. This *entitlement* continues to apply into adulthood. There is no bright line at the age of 18 in this key plank of British nationality law.

Similarly, sections 4C, 4G, 4H and 4I and the new proposed section 4L of the 1981 Act, all entail a power to register adults as British citizens.

It is clear that our nationality law system accepts the importance and enables the acquisition of British citizenship in adulthood. Accordingly, our proposed amendment would not be anomalous within this framework. The aim of consistency in nationality law would be best served by recognising that section 1(5) likewise needs to be one of the planks of nationality law that continues into adulthood.

Over 18s in the immigration system

We take heed of the Government’s concern that the ‘automatic conferral of nationality to someone who is legally an adult is out of step with [...] wider immigration systems’.⁵

Tom Pursglove MP, Minister for Justice and Tackling Illegal Migration, stated 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’.⁶ However, there are situations when young people over the age of 18 can rely on other family members for a claim to residence. First, the BN(O) route permits adult children born on or after 1 July 1997 to come to or remain in the UK as household members of a British national, even if they have their own partner and children. Second, the legacy of EU law rights means the concept of dependency up to 21 persists in Appendix EU. Third, the UK’s Immigration Rules cover situations of adult dependency themselves. Fourth, adult children who began on their route to settlement when under the age of 18 can continue and settle on that route.

Therefore, there is no one size rule fits all, in either the immigration or nationality law system.

⁴ HL Deb 27 January 2022, Vol 818, Col 503

<<https://hansard.parliament.uk/Lords/2022-01-27/debates/9B12A59D-38A4-4DB1-8C21-9E694BE50BAE/NationalityAndBordersBill>> accessed 10 February 2022.

⁵ *ibid.*

⁶ HC Deb 19 October 2021, vol 701, col 191

<[https://hansard.parliament.uk/Commons/2021-10-19/debates/69c8f9cb-4500-4595-bae4-3b06d5823063/NationalityAndBordersBill\(SixthSitting\)](https://hansard.parliament.uk/Commons/2021-10-19/debates/69c8f9cb-4500-4595-bae4-3b06d5823063/NationalityAndBordersBill(SixthSitting))> accessed 24 January 2022.

The importance of citizenship for adopted young people

The importance of British citizenship to young persons (over and above indefinite leave to remain) was emphasised by Lord Hodge in a Supreme Court judgment at the beginning of February 2022:

‘There is no dispute as to the importance to an individual of the possession of British citizenship. It gives a right of abode in the UK which is not subject to the qualifications that apply to a non-citizen, including even someone who has indefinite leave to remain. It gives a right to acquire a British passport and thereby a right to come and go without let or hindrance. It can contribute to one’s sense of identity and belonging, assisting people, and not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large.’⁷

As noted in that judgment, this principle is well recognised by the Home Secretary at the outset of her Guidance: ‘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’.⁸

Eighteen is an age when holding British nationality is likely to have a key bearing on what these adopted young people can achieve: nationality can be important for progression in education including to university, for example, through facilitating designation as a ‘home’ student. It may enable the young person to take up particular educational opportunities, such as scholarships or study trips. It might enable them to represent the UK in sport or other areas or take up certain opportunities, such as training with a football club. Without British citizenship, young people may be unable to pursue certain career paths, such as joining the armed forces, civil service or the police. Citizenship is also important for young people’s political participation; without British citizenship, they may be unable to vote. This small number of children, who have reached the age of majority by the time they are ordered by our courts to be adopted by a British parent, should not be needlessly disadvantaged in pursuing their potential. This small change in the law would be part of the Government doing all it can to give adopted young people every possible chance to succeed.

No alternative solution

There is no clear route for an adoptee to apply to remain in the UK under the Immigration Rules once they are 18. If they do not independently meet the requirements for an immigration category (such as Skilled Worker, or Student), they must make discretionary applications outside the Rules, or they will be forced to leave, or barred from entry, and thus separated from their adoptive parent who has the right of abode in the UK.

⁷ *R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 at [26].

⁸ Home Office, Guide T: Registration as a British citizen - a guide for those born in the UK on or after 1 January 1983 who have lived in the UK up to the age of ten (March 2019) page 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788498/Guide_T.pdf> accessed 10 February 2022.

This was the case for “Sofia”, referred to by Baroness Hamwee during Committee Stage.⁹ Unfortunately, her case was not ‘resolved through existing rules.’¹⁰ Her case was resolved and she was granted indefinite leave to remain outside of the existing Immigration Rules on a discretionary basis, due to the personal intervention of one of her lawyers at a very high level and directly with the Home Secretary.

We also highlight below the case of “Chris”, a client of an ILPA member, who remains outside the UK, away from his new British adoptive mother, without any immigration status in the UK, and with a refused application for a British passport.

Neither “Sofia” nor “Chris” has yet to acquire the British citizenship of her/his new British mother. They, and any others in their circumstances, *may* not be able to apply for registration as a British citizen as an adult at the Home Secretary’s discretion under proposed section 4L of the British Nationality Act 1981 (found in Clause 7 of this Bill). As noted by Baroness Williams, there is no assurance that an adult who genuinely missed out on British citizenship because an adoption order was made when they were aged 18 will be able to benefit, only that they ‘*may* be able to benefit’ as ‘each case will be considered on its merits’.¹¹ They would need to be able to show historical legislative unfairness; an act or omission of a public authority; or exceptional circumstances.

We agree with the Government that Section 4L in Clause 7 is a positive step and very welcome as a means to address historical injustice through *discretionary* grants of British citizenship. However, this particular anomaly in respect of young people whose adoption is finalised after they have ceased to be a minor would be better systemically addressed by conferring on this small¹² number of over 18s the right to *automatically* obtain the British citizenship of their adoptive parent(s). It warrants no case-by-case consideration. It is simply a matter of tidying up the law so that this small group of adoptive families do not lose out compared to other families.

Outcomes for adopted children and young people are a priority and adopted young people should face no additional hurdles. Although the biggest evolution in a person’s life may happen when they turn 18, the court may still order their adoption after their 18th birthday in England, Wales and Scotland. Therefore, it is clear that Parliament did not consider that this evolution, at which point the individual may vote, marry without consent, or enter into legally binding contracts, ought to prevent the formation of a legal relationship of parent and child. Parliament also intended in enacting section 1(5) of the 1981 Act, to confer British citizenship automatically on adopted children.

ILPA, Coram Children’s Legal Centre, and CoramBAAF recommend this 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.

⁹ (n 3) col 499.

¹⁰ (n 3) col 503.

¹¹ *ibid.*

¹² As an example of the small size of this cohort, in England in each year in 2019, 2020 and 2021, there were only ten adoptions of persons aged 16 years and over. 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.

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—

(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

(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.

(bold and underlined emphasis added)

Case Studies

In the anonymised case studies below, “Sofia”, “Chris”, and “Nadia” have been 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 (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.

“Chris” - Scotland

“Chris” is the pseudonym for a young person born overseas. A petition for Chris’s adoption in the UK by his older brother and his brother’s wife was presented to the Court in Scotland when Chris was 17 years old, but the adoption order was only made under section 29 of the Adoption and Children (Scotland) Act 2007 when Chris was 19 years old. Chris’s adoptive mother is a British citizen from birth. Chris is currently residing in Jordan. Following his adoption in Scotland, Chris’s adoptive father made an application for a British passport for Chris, to enable him to join his adoptive parents in the UK. However, in November 2021, Chris was notified by HM Passport Office that “it would appear that you are not a British national”. The letter from HM Passport Office informing him that his British passport application had been unsuccessful did not make any reference to Chris having been adopted by a British citizen by order of a court in the UK. Chris therefore remains apart from his adoptive family and they have engaged a lawyer to seek to resolve the situation, since he has no other basis on which to move to the UK.

“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 regulations¹³). Furthermore, the country of adoption was not a signatory to the Hague Convention¹⁴.

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.¹⁵

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 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.*

¹³ Adoption Recognition of Overseas Adoption (Scotland) Regulations 2013/310.

¹⁴ Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, concluded at The Hague on 29 May 1993.

¹⁵ 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.

“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’,¹⁶ 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.

*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.¹⁷*

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.

¹⁶ *Re A (A Child: Adoption Time Limits s44(3))* [2020] EWHC 3296 (Fam) [48].

¹⁷ *ibid* [42]-43].

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.