

## Legitimacy

### 1. Introduction

- 1.1 **Section 50(9)** of the British Nationality Act 1981 explains that, for the purposes of the Act, where a child is born before 1 July 2006 "the relationship of a mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her, but... the relationship of father and child shall be taken to exist between a man and any legitimate child born to him".
- 1.2 There is no definition of "legitimate" in the Act. However, legal advice suggests that English law, in considering questions of legitimacy, will look to the law of the domicile of the father at birth. If that law treats a child as legitimate, then English law will likewise recognise that status (Hashmi -v- Hashmi [1972] Fam 36).
- 1.3 An illegitimate child should be regarded, for the purposes of **s.47(1)** of the 1981 Act, as having been legitimated by the subsequent marriage of the parents if, by the law of the place in which the father was domiciled at the time of the marriage, the marriage can be regarded as having legitimated the child. Note, though, that **s.47(1)** only refers to legitimation through subsequent parental marriage - it does not extend to those who are "legitimated" by means of legislation passed by another country (see, for example, 5.1.2 below). Where a child, born illegitimate of a British citizen father, has been legitimated by operation of law rather than by the subsequent marriage of his or parents, it may be appropriate to consider registration under **s.3(1)** of the Act.
- 1.4 Where the father's domicile at the time of the marriage or of the birth of the child is not clear it will be necessary to make further enquiries. (See **DOMICILE**)
- 1.5 **Section 9** of the **Nationality, Immigration and Asylum Act 2002** substantially amends the British Nationality Act 1981 in these respects but only in relation to children born on or after 1 July 2006. From this date, the definition of mother and father for the purposes of the Act is revised so that an illegitimate child can derive British nationality through their father in the same way as if born legitimate. The definitions of 'mother' and 'father' from 1 July 2006 are at Annex F to Chapter 6, Volume 1 of the Nationality Instructions.
- 1.6 Legitimacy of a child born during the continuance of a marriage
- 1.6.1 A child born to a woman during the subsistence of her marriage may be presumed to be legitimate unless the balance of evidence shows that the mother's husband is probably not the father (e.g. where the parents' marriage is annulled on the grounds of non-consummation).
- 1.7 Illegitimate children born overseas to CUKC women prior to 1.1.1949
- 1.7.1 The **British Nationality Act 1948** made no provision for the transmission of citizenship in the female line, and statelessness therefore could, and did, result in respect of persons born to CUKC mothers. However, the **British Nationality Act (No 2) 1964** provided that a stateless person would be entitled to registration as a CUKC if

born to a CUKC mother (see Volume 1, **Chapter 15**).

## 2. Legitimacy law in England and Wales

### 2.1 The Family Law Reform Act 1987

2.1.1 The **Family Law Reform Act 1987** set out to remove the legal disadvantages of illegitimacy. It did not, however, alter the position in nationality law.

2.1.2 **Section 1** of the Act came into force on 4 April 1988. It establishes the general principle that there should be legal equality for children, whether or not their parents have ever been married to each other, and provides that:

"In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between 2 persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at the time"

2.1.3 The words "unless the contrary intention appears" mean that we can continue to rely on **s.50(9)** of the British Nationality Act 1981 in requiring a child who wishes to claim British citizenship through the father to be the legitimate child of the father.

### 2.2 Legitimacy and void marriages

2.2.1 A void marriage, for the purposes of the **Legitimacy Act 1976**, is one in respect of which the High Court has or had jurisdiction to grant a decree of nullity. As a consequence of **s.1** of the **1976 Act**, as amended by the **Family Law Reform Act 1987**, some children of void marriages will be able to claim British citizenship by descent in the male line. For guidance on the validity of marriages, see **MARRIAGE** and paragraphs 2.2.4 to 2.2.7 below.

2.2.2 **Section 1**, as amended, provides that the child of a void marriage should be treated as the legitimate child of the parents if at the time of:

- the insemination resulting in the birth, or
- where there was no such insemination, the child's conception, or
- the celebration of the marriage, if the marriage takes place between conception and birth,

either, or both, of the parents reasonably believed themselves to be validly married in English law (see paragraph 2.2.7 below) and the father was domiciled in England and Wales. This applies even where the belief that the marriage was valid was due to a mistake as to law. (If the father was domiciled outside England and Wales the child will be regarded as legitimate in English law only if legitimate or

legitimated under the law of the country concerned.)

2.2.3 This provision does not benefit children born to a couple before a void marriage is contracted (Re Spence dec'd [1990] 2 WLR 1430).

2.2.4 Polygamous marriages

2.2.4.1 The courts did not have jurisdiction to grant a decree of nullity in respect of polygamous [the term includes potentially polygamous] marriages until 29 June 1972, when the **Matrimonial Proceedings (Polygamous Marriages) Act 1972** was enacted. However, the effect of this Act is to allow the courts to exercise jurisdiction in respect of any polygamous marriage, irrespective of the date on which it was contracted.

2.2.5 Actually polygamous marriages

2.2.5.1 Actually polygamous marriages contracted abroad whilst either party was domiciled here at the time of celebration may be assumed to be void.

2.2.6 Potentially polygamous marriages

2.2.6.1 Until 8 January 1996, when **Part II of the Private International Law (Miscellaneous Provisions) Act 1995** came into force in England, Wales and Scotland (or 14 February 1996 under an Order in Council in Northern Ireland), a potentially polygamous, but de facto monogamous, marriage celebrated on or after 1 August 1971 was held to be valid in United Kingdom law only if:

- the man was domiciled in the United Kingdom; and
- the marriage was entered into overseas

2.2.6.2 Any marriage celebrated on or before 31 July 1971 was regarded as void if, despite having taken place in a country whose law permits polygamy, it was:

- polygamous in form; and
- at the time of the marriage, either party was domiciled in the United Kingdom or in another country whose law did not permit polygamy

2.2.6.3 The **1995 Act**, which has retrospective effect, provides that a potentially polygamous, but de facto monogamous, marriage is valid in United Kingdom law if either the man or the woman is domiciled here and the marriage was entered into in a country whose law permits polygamy. The marriage would not, however, be valid where, in the case of a marriage celebrated before commencement of the new legislation, either party has (before commencement) remarried or obtained a decree of annulment. Nor would the **1995 Act** have any effect

where the marriage was considered void under the law of the country in which it was celebrated or of any other country in which either party was domiciled at that time.

2.2.6.4 The retrospective nature of the legislation may mean that some automatic claims to British nationality which were rejected because they hinged on the validity of a potentially polygamous marriage will need to be reassessed. The position on citizenship applications, rejected due to our inability to regard a potentially polygamous marriage as valid, is different. Since those applications were refused in accordance with the law as it stood at the time, they cannot be re-opened (Nationality Policy and Special Cases Unit (NPSCU) should be consulted if a request is received to re-consider a decision to refuse). However, fresh applications may now be able to succeed.

## 2.2.7 The test of reasonable belief

2.2.7.1 If the marriage is void, it should be determined whether the parents reasonably believed it to be valid. In the case of a child born after the coming into force of **s.28** of the **Family Law Reform Act 1987** (i.e. 4.4.88), we must assume that the parents reasonably believed that the marriage was valid unless there is evidence to the contrary. It may be appropriate to assume reasonable belief in other cases (e.g. on the part of a woman married in a country whose law permits polygamy).

2.2.7.2 The Court of Appeal held in Azad -v- Entry Clearance Officer Dhaka (December 2000, unreported) that a reasonable belief that the marriage was valid in English law was required. It was not sufficient that, for example, one of the parents believed it to be valid in Bangladeshi law.

2.2.7.3 There would, of course, be reason to doubt the existence of such a belief if, for example, the couple had been told that we could not regard the marriage as valid before the insemination or conception of the child took place. The UKPS maintains an index of cases in which it has been accepted, for right of abode purposes, that:

- a child benefits under **s.1** of the **Legitimacy Act 1976**, and
- it may therefore be assumed that the parents of the child have since been aware that their marriage is regarded as void

## 2.2.8 Claims to British citizenship

2.2.8.1 A child who is treated as legitimate under the **1976 Act** will be a British citizen if the father was such a citizen (or

a citizen of the United Kingdom and Colonies with close UK connections) at the time of the child's birth, and the child would have acquired citizenship automatically at birth if, in fact, the legitimate issue of a valid marriage. If citizenship is sought or claimed, a special status letter (see draft below) should normally be issued. If however, there is doubt in a particular case (e.g. earlier correspondence about the mother's application for registration or naturalisation indicates that both parents knew, when the child was conceived, that their marriage was probably not valid in our law), and registration of the child is therefore proposed, the approval of a senior officer to that course should be sought.

2.2.8.2 In most cases where a claim to British citizenship by descent arises by virtue of **s.1** of the **Legitimacy Act 1976**, the validity of the parents' marriage will already have been investigated by the time we are ready to issue the status letter, and the child's parents will have been informed of our view. Where this has not been done, the status letter should be accompanied by a covering letter to the parents explaining:

- our doubts about the validity of the marriage; and
- the basis on which we are prepared to regard the child as a British citizen

2.2.8.3 If this procedure is followed, it will be difficult for either parent to establish to our satisfaction in future that he or she reasonably believed that the marriage was valid at the time of a subsequent child's conception.

## 2.2.9 Registration of children of void marriages

2.2.9.1 In the past, because of doubt over the extent to which **s.1** was applicable to claims to citizenship, the practice was to register children of void marriages under **s.7** or, if of full age, under other provisions of the **British Nationality Act 1948**. It is not our practice to withdraw or question certificates issued as a result of such registration. A certificate may, however, be withdrawn and replaced by a status letter if we are specifically asked to do so.

## 2.2.10 Draft status letter

"I am directed by the Secretary of State to say that nationality is a matter of law that can be determined conclusively only by the courts. Nevertheless, on the basis of such information and documentary evidence as you have been able to furnish, the Secretary of State is prepared for his part to regard you as a British citizen [under section 2(1) of the British Nationality Act 1981], by virtue of section 1 of the Legitimacy Act 1976.

This letter should suffice to establish your status for all ordinary

purposes."

#### 2.2.11 Citizenship of children of void marriages born before 1 January 1949

2.2.11.1 For the purpose of acquiring citizenship of the United Kingdom and Colonies by descent, a person treated as legitimate under **s.1** of the **1976 Act** is considered to be in exactly the same position as the legitimate child of a valid marriage, so that a person in these circumstances who was born before 1 January 1949 should be regarded as having been a British subject at birth and a citizen of the United Kingdom and Colonies on 1 January 1949.

### 2.3 Legitimation

2.3.1 The **Legitimacy Act 1926** was the first English Act under which a child born out of wedlock was, if living, legitimated by the subsequent marriage of the parents. There was, however, a proviso that neither parent was married to a third person when the child was born. The **1926 Act** made no mention of nationality, and it was not until the **British Nationality Act 1948** came into effect that a legitimated person's nationality status in UK law was made clear. **Section 23** of the **1948 Act** allowed a person, born out of wedlock and legitimated by the subsequent marriage of the parents, to be treated, from the date of the parents' marriage or 1 January 1949, whichever was the later, as having been born legitimate for the specific purpose of determining:

- whether the person was citizen of the United Kingdom and Colonies under **s.5** or **paragraph 3** of **Schedule 3** of the Act
- if born before 1 January 1949, whether the person was a British subject immediately before that date, and therefore became at commencement a CUKC or a BSWC

2.3.2 The **Legitimacy Act 1959** removed from the **1926 Act** the condition that the parents must have been free to marry at the time of the child's birth. It also amended the **1926 Act** by replacing the date of the commencement of that Act (1 January 1927) with the date of the commencement of the **1959 Act** (29 October 1959). Although the effect of **s.1** of the **1959 Act** is that an illegitimate person, who was alive on 29 October 1959, and whose parents married before that date, is legitimated only from 29 October 1959, the combined effect of the **1959 Act** and **s.23** of the **British Nationality Act 1948** is that such a person can be treated, for nationality purposes, as legitimate from the date of the marriage of the parents or from 1 January 1949, whichever is the later. The combined effect of **s.12(1)** of the **British Nationality Act 1948** and **s.1** of the **Legitimacy Act 1959** extends to any of the legitimated father's legitimate children who were born in the interval between either the marriage or 1 January 1949, whichever was the later, and 29 October 1959.

2.3.3 Since **s.1** of the **Legitimacy Act 1926** includes the words "if living", a person who was not alive on 29 October 1959 cannot be legitimated and the person's legitimate children therefore cannot acquire British

nationality by descent. Where the marriage of the parents takes place after 29 October 1959, the person concerned can only be legitimated under this section if alive at the date of the marriage.

2.3.4 The **Legitimacy Act 1976** re-enacted the provisions of the **1926** and **1959 Acts**. **Section 1** of the **1976 Act**, in turn, has been modified by **s.28** of the **Family Law Reform Act 1987**, to take account of recent developments in human embryology. **Section 28** substitutes for the words "...the act of intercourse resulting in the birth", the words "...the insemination resulting in the birth or, where there was no insemination, the child's conception", thus allowing for all other means of conception in addition to the conventional one.

### 3. Legitimacy law in Scotland

3.1 It has always been part of the common law of Scotland that a child of a void marriage may be regarded as legitimate if at least one of the parents reasonably believed the marriage to be valid. On 8 June 1968, the **Legitimation (Scotland) Act 1968** came into force and approximated Scottish law on legitimation to English municipal law. **Section 4** of the **1968 Act** removed the previous bar to legitimation which existed where the parents were not free to marry at the time of the child's conception.

### 4. Legitimacy law in Northern Ireland

4.1 Northern Ireland law regarding legitimation is contained mainly in **s.19** of the **Legitimacy Act (Northern Ireland) 1928**, as amended on 1 September 1961 by **s.1** of the **Legitimacy Act (Northern Ireland) 1961**. Under this law, the subsequent marriage of the parents operates to legitimate the person even where one of the parents was not free to marry until after the person's birth.

### 5. Legitimacy law in other countries

#### 5.1 Children born abroad, out of wedlock

5.1.1 Many countries no longer distinguish between legitimate and illegitimate children, including Jamaica (from 1.11.76) and New Zealand (from 1.1.70). For detailed advice on the legitimacy laws of other countries, consult NPSCU.

#### New Zealand

5.1.2 Taking New Zealand as an example, and assuming the father in each case is UK born:

- A child born out of wedlock in New Zealand before 1 January 1970 (when the **Status of Children Act 1970** abolished the concept of illegitimacy and legitimacy) whose parents' marriage before that date legitimated the child (see paragraph 1.3) could, from the date of the marriage have a claim to British citizenship by descent through the father
- A child born out of wedlock in New Zealand after 1 January 1970 should be regarded as legitimate, and would have a claim to British citizenship by descent through the father, if both parents

were domiciled in New Zealand at the time of the child's birth

- A child born out of wedlock in New Zealand before 1.1.1970, legitimated by the New Zealand **Status of Children Act 1970**, would not have a claim to British citizenship (**s.47** of the 1981 Act, which re-enacts **s.23** of the **1948 Act**, refers specifically to legitimation by marriage and does not include legitimation by operation of law)
- A child born out of wedlock in New Zealand before 1.1.1970, legitimated on that date by the 1970 Act, whose parents subsequently marry, has no claim to citizenship for the reasons in paragraph c. Having been legitimated by operation of law a child cannot be further legitimated by the parent's marriage

5.1.3 As there is no equivalent to **s.47** of the British Nationality Act 1981 in the **Immigration Act 1971**, a child would be recognised as having the right of abode under **s.2(1)(d)** through the father if the child falls into the circumstances referred to in the last 2 categories above.

#### Australia

5.1.4 With regard to Australia, **s.89(1)** of the **Commonwealth Marriage Act 1961** seeks to legitimate children born out of marriage where the parents subsequently marry. Where the parents do subsequently marry, the child is legitimated back to the time of birth or the commencement of the **1961 Act**, whichever is the later. Various **Equality of Status Acts** passed by the States do not operate to abolish the concept of legitimacy, nor do they operate to legitimate children in any situation. The effect of the States' Acts is simply to remove most of the legal disabilities of the illegitimacy in regard to State law.

5.1.5 Where the parents of a child born out of marriage:

- marry subsequent to the introduction of the relevant **Equality of Status Act**, the child is still legitimated by the **Commonwealth (Federal) Act** and not by **State Act**
- never marry, the **Marriage Act** does not apply, and the **State Acts** do not operate to remove the status of illegitimacy

#### Israel

5.1.6 A child born out of wedlock in Israel is not necessarily illegitimate. Rabbinical law recognises 2 types of child:

- "lawful child", which includes a child born in wedlock and a child born to a couple neither of whom have been married
- "bastard child"

5.1.7 A "bastard child" is one born as a result of an illegal relationship (e.g. an incestuous union or a relationship between a man and married woman - a "married woman" is defined as a woman married

according to Jewish law and not otherwise). A child born to a married man and an unmarried woman was not forbidden by the Torah and is called "a child of the unmarried" not a "bastard". Such a child is treated as a "lawful child" (i.e. legitimate).

5.1.8 NPSCU will consult the Foreign and Commonwealth Office, when necessary, about the validity in foreign law of any relevant marriages and divorces, and the guidance of the Home Office Legal Adviser may sometimes be necessary on difficult legal points.

5.2 Procedures to be followed when we conclude that a child born abroad has been legitimated

5.2.1 When a provisional conclusion about the child's status has been reached, a letter on the lines of the example shown below, but adapted to suit the case, should be prepared and tagged to the file. It will be seen that the letter makes acceptance of the child as a British citizen dependent upon the making of statutory declaration by each parent or, if the parents are dead, by someone who knows the circumstances of the child's birth. Specimens of the required form of statutory declaration are shown in the Annex to this section. Any solicitor may assume the role of Commissioner for Oaths for the purpose of witnessing a statutory declaration, unless acting as a solicitor for the person concerned. On receipt of the completed declarations the claim may be acknowledged by means of a status letter (see Annex H to **Chapter 2** of Volume 1 for issuing procedure).

5.2.2 The statutory declaration is not a necessary precondition to legitimation under the **Legitimacy Act 1976** - the parents' marriage is sufficient - and it may be that we are offered alternative evidence of paternity which is equally acceptable (e.g. DNA test results). Any case where it is proposed to accept that legitimation by parents' marriage has taken place without sight of the usual statutory declarations should be referred to NPSCU.

5.2.3 If the child's birth was registered at a post abroad, it is possible for the original entry to be cancelled and the birth to be re-registered to reflect the child's legitimated status. Similarly, it is open to the parents to apply to have the birth registered where:

- a child appears to have been legitimated, and has a claim to nationality only through the father; or
- where a claim through the father gives the child a more beneficial status than a claim through the mother

5.2.4 In either case, the possibility of having the birth registered/re-registered should be mentioned and the parents advised to write to the Foreign and Commonwealth Office.

5.2.5 Where:

- one of the parents is a member of the British armed forces at the time of the child's birth; and

- the child is legitimated by the parents' subsequent marriage,

the parents may apply for the registration/re-registration of the child's birth in the Service Departments Register by writing to the Overseas Registration Section, Office for National Statistics, General Register Office, Smedly Hydro, Trafalgar Road, Birkdale, Southport, PR8 2HH. NB. Registration in the Service Departments Register does not establish a claim to British citizenship.

6. **Draft letter**

"I refer to your letter of

I am directed by the Secretary of State to say that nationality and legitimation are matters of law which can be conclusively determined only by the courts. Nevertheless if you and your wife can truthfully make statutory declarations on the lines of the specimens enclosed the Secretary of State will be prepared to regard your son/daughter as having been legitimated under the provisions of the Legitimacy Act 1976 and as having become a citizen of the United Kingdom and Colonies under the combined effect of sections 23 and 12(2)/sections 23 and 5(1) of the British Nationality Act 1948, and a British citizen on 1 January 1983 under section 11 of the British Nationality Act 1981/section 47 and section 2(1) of the British Nationality Act 1981. You may wish to write to the Foreign and Commonwealth Office and enquire whether your son's/daughter's birth may be registered in the Consular Register of Births/High Commission Register of Births. Although his/her status would not depend upon such registration a certified copy of the entry which would not disclose the circumstances of his/her birth would be useful to him/her whenever he/she needed to show evidence that he/she had acquired British citizenship by descent.

An address label is enclosed for the return of the completed declaration. On its receipt you will be sent a formal acknowledgement which should be sufficient to establish your nationality status for official purposes."

7. **Procedure to be followed when we conclude that a child has not been legitimated**

- 7.1 Where we conclude that a child has not been legitimated by any subsequent marriage of the parents, there may be a case for registration under **s.3(1)**, **s.3(2)** or **s.3(5)** of the British Nationality Act 1981 where the child concerned is the illegitimate child of a British citizen father (see **Chapter 9**, Volume 1).

FATHER'S SPECIMEN FORM OF STATUTORY DECLARATION

I,.....(full names)
of.....(address)
.....

do solemnly and sincerely declare that :

- 1. I was born at .....on the .....(date)
2. I am the natural father of .....(full names)
was born at.....(place)
on the .....(date)
3. On the .....(date) I married
.....(full names) the mother
son
of my ----- at .....(place)
daughter
4. I was domiciled in .....at the
time of the said marriage:

5.a. I had/had not been married to a third person before my
marriage to the said

Use
whichever |
paragraphs|
apply |

b. To the best of my knowledge, information and belief, the said
.....was
married to.....
before our marriage to each other.

c. To the best of my knowledge, information and belief, the said
.....was not
married to a third person before our marriage to each other.

6. At the time of the birth my occupation (or rank and regiment) was
.....

And I make this solemn declaration conscientiously believing the same to be true and by virtue
of the provisions of the Statutory Declarations Act 1835.

Declared by the above-named )
..... )
at..... )
this.....day of..... ) (Signature of Declarant)
19 .

Before me .....(signature)

A commission for Oaths, Justice of the Peace, or Notary Public.

NB. Domicile does not mean residence. Therefore your country of domicile when you married was not necessarily the country in which you were living. Generally speaking a person's domicile at any particular time is the country in which he is regarded as having his or her permanent home at that time. If you were domiciled in any of the United Kingdom, the Channel Islands or the Isle of Man when you married you should say in which part, e.g. England, Wales, Scotland, Northern Ireland. If you are in any doubt as to where you were domiciled when you married you should ask this Department before completing the declaration.

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MOTHER'S SPECIMEN FORM OF STATUTORY DECLARATION

I,.....(full names)
of.....(address)

do solemnly and sincerely declare that :

- 1. My maiden surname was.....
2. My son (or daughter).....
was born on (date) at
at .....(place of birth with full address).
3. On the .....(date), I married .....(full names of husband)
the father of my said son (or daughter) at.....
(place of marriage).

4.a. I was not married to any person (----- to the said
(before my marriage

b. I was previously married to .....(full name)
(This marriage was dissolved by divorce on
(My first husband died on

Use
Whichever
paragraphs
apply

I do solemnly and sincerely declare that the foregoing particulars stated in
this declaration are true, and I make this solemn declaration
conscientiously believing the same to be true and by virtue of the
provisions of the Statutory Declarations Act 1835.

Declared by the above-named )
..... )
at..... )
this.....day of..... ) (Signature of Declarant)
19 .

Before me .....(signature)
A commission for Oaths, Justice of the Peace, or Notary Public.

NB. If you have been previously married and divorced you should attach
For perusal and return a copy of the divorce proceedings and decree
absolute.

If you have previously married and your first husband is dead, you should attach a copy of the death certificate.

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