approach and awards compensation amounts that are generally consistent with the value assigned to loss of life or injuries in other cases and multiplied by the approximate number of victims. In contrast, the only thing that the ICJ makes clear in its judgment, is that the awards should not be read as being of "a punitive character" (at [102]). Beyond this, however, we do not know whether equity, moral justice or other elements motivated the valuation. Although the ICJ is not alone in using the "global sum" approach to overcome evidentiary difficulties without providing more reasoning (*Pey Casado*, ICSID arbitration between Chile and Spain, ICSID Case no. ARB/98/2), the concern, going forward, is that the 2022 Reparations Judgment gives international courts and tribunals a *carte blanche* to provide no explanation or reasoning for assessment of damage in cases of mass international law violations.

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CITIZENSHIP, CHARGES AND COMMON LAW CONSTITUTIONAL RIGHTS

THE conundrum is as follows. Statute 1 offers the applicant a statutory right. Statute 2 allows the decision maker to create further subordinate legislation. If the subordinate legislation seeks to alter statute 1, we are possibly concerned with a Henry VIII clause. But what if the subordinate legislation stops short of altering statute 1, but only renders the statutory right under statute 1 practically difficult to exercise? This is the situation in *R. (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 W.L.R. 343. There section 1(4) of the British Nationality Act 1981 ("the 1981 Act") confers on certain individuals (including the applicant) a statutory right to apply to be registered as a British citizen. But this is subject to the payment of a registration fee. Section 68 of the Immigration Act 2014 ("the 2014 Act") empowers the Secretary of State to set the relevant level of the fee by way of subordinate legislation. This was done in the Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 (the 2018 Regulations), which sets the fee for registration at £1,126 for an adult and £1,012 for a child, respectively. This fee meant that the applicant (amongst many others in a similar position) could not in practice exercise her rights under the 1981 Act. The applicant thus argued that the 2018 Regulations were *ultra vires*, for they "rendered nugatory the underlying

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statutory right to become a British citizen" (at [20]–[21]). Lord Hodge (whose judgment commanded unanimous support of the court) ruled against the applicant. There were three components to His Lordship's reasoning, all of which deserve further attention.

First, Lord Hodge held that "the principle of legality" was not engaged here, for no "common law constitutional right" was engaged. This case was thus to be distinguished from *R. (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] A.C. 869 (at [33]–[36], [43]). Although this point was conceded by the applicant, the court's acceptance of this concession warrants closer examination.

In previous cases, the right to citizenship was identified as "fundamental" and accorded great weight, such that it was placed "manifestly at the weightiest end" of the sliding scale when the proportionality test was applied: see *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, at [97], [108], see also [60]; D. Greene and G. Tan, "Statutory Interpretation and Citizenship: *D4 v SSHD* and *PRCBC v SSHD*", U.K. Const. L. Blog (9 February 2022) (available at https://ukconstitutionallaw.org/2022/02/09/donnchadh-greene-and-gabriel-tan-statutory-interpretation-and-citizenship-d4-v-sshd-and-prcbc-v-sshd/). Indeed here, Lord Hodge admitted that "the right to become a British citizen is an important right as citizenship, once obtained, confers significant rights" (at [5]). Lord Hodge's conclusion on this point echoed the same finding in *R. (Williams) v The Secretary of State for the Home Department* [2017] EWCA Civ 98, [2017] 1 W.L.R. 3283, at [45] (at [52]).

But the analyses in both *O* and *Williams* are riddled with difficulties. For one, it is curious why a critical right recognised by statute and subject to statutory conditions, such as the payment of fees, cannot be concurrently recognised as a common law constitutional right. The common law right of abode (as recognised in *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 A.C. 453, at [44]–[45]) and the common law right to access tribunals (as recognised in *UNISON*, at [65]–[66]) are all recognised and regulated by statutes.

The second difficulty is that while the right to citizenship was not recognised as a common law constitutional right, the very rights flowing from citizenship – such as the right to abode in the UK – were recognised as such and thereby protected by the principle of legality: see *Bancoult*, at [44]–[45], [151]; T. Jacob-Owens, "British Citizenship as a Non-constitutional Status: The UK Supreme Court Ruling in *PRCBC*", Verfassungsblog (11 February 2022) (available at https://verfassungsblog.de/uk-citizenship-fundamental/).

For these two reasons, the court's decision here seems inconsistent with previous case law, and engages academic criticisms about the lack of "a worked-out analytical framework" for consistently recognising the "trigger norms for the [principle of legality]": see Varuhas [2020] C.L.J. 578, 582–85.

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While the court sought to respect Parliament's democratic mandate in restricting the scope of common law constitutional rights (at [43]), there are good reasons for recognising the right to citizenship as a common law constitutional right. The problem here is that the applicant was in reality denied her British citizenship – and other accompanying rights, including a right to vote – simply by reason of her impecuniosity. If Parliament's democratic legitimacy is predicated on a principle of political equality (see Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford 2013), 19, 32–34), the 2018 Regulations risk undermining it. The courts should develop common law principles – including "[c]ommon law constitutional rights" – in a way that preserves Parliament's legitimacy: see T.R.S. Allan "The Moral Unity of Public Law" (2017) 67 U.T.L.J. 1, 2, 4, 8–12.

Second, Lord Hodge further held that the inquiry here should be on whether the 2018 Regulations were ultra vires the 2014 Act (as statute 2), rather than the 1981 Act (as statute 1). The court's task was one of "ascertain[ing] the scope of the enabling power contained in statute 2" (at [40]). This cannot be read to suggest that the court is not required to interpret statute 1. For even if the court is only concerned with interpreting statute 2, the court must read it in light of its context (at [29]). Statute 1 may form part of that context (at [69]). And so to interpret statute 2 properly, one must interpret statute 1 as well. If statute 1 strongly tells against the impugned subordinate legislation, it can easily influence how statute 2 is interpreted.

But apart from this, Lord Hodge's conclusion is too quick. Prima facie, subordinate legislation must be "subordinate to the requirements of" *both* statutes 1 and 2 (since both are "an Act of Parliament"): see *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 W.L.R. 6430, at [27]. The court's assumption was that if X is permitted under statute 2, it could not really matter whether X was permitted under statute 1: for any difference between the two *necessarily* entailed that statute 2 must prevail, pursuant to the doctrine of implied repeal (at [40]). But this means that Lord Hodge's reasoning cannot be right insofar as the doctrine of implied repeal does not apply, if (say) statute 1 is a constitutional statute: see P. Craig, "Constitutionalising Constitutional Law - HS2" [2014] P.L. 373, 383–85.

The court here held that no common law constitutional right was engaged under section 1(4) of the 1981 Act. But whether the 1981 Act *as a whole* was a constitutional statute was a distinct question, and could have been separately addressed. One may question whether the 1981 Act may – through defining who counts as a British citizen – have been a statute that "conditions the legal relationship between citizen and State in some general, overarching manner": see *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151, at [62].

Third, Lord Hodge finally held that properly interpreted (without the principle of legality being applicable), the 2018 Regulations were not ultra vires the 2014 Act (at [44]–[51]). The court affirmed that in

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interpreting the 2014 Act, it "has regard to well-established prima facie assumptions" (at [41]–[42]). One of such assumptions – derived from *R. v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] EWCA Civ 1293, [1997] 1 W.L.R. 275 – was that "statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act" (at [34], [39], [41]–[42]).

The court stressed that when the decision maker was empowered by the 2014 Act to set the level of the fee, there was no express "criterion of affordability". Rather, she was allowed to set the fee in a way that (inter alia) "subsidised the wider immigration and nationality system" (at [45]–[46], [49]). The "appropriateness of imposing the [impugned] fee" was a "question of policy which is for political determination", but not that for the court (at [51]). This reasoning seemed to have ignored the abovementioned assumption in statutory interpretation. The 2014 Act states that the impugned fee may go beyond the costs for processing the application, but the question of affordability does not seem to have been directly addressed. The 2014 Act does not expressly rule out the potential relevance of affordability, when (say) the decision maker examines the "fees charged by or on behalf of governments of other countries in respect of comparable functions": see the 2014 Act, s. 68(9)(e).

There are two ways to read this legislative silence: either the decision maker can impose any fee she wants, or she must impose it in a way that must not be entirely unaffordable, albeit exceeding the costs for processing the application. The absence of an *express* criterion of affordability (per Lord Hodge) is logically consistent with either reading. Critically, the abovementioned assumption would suggest that the latter reading should be taken, and this matter should not be reduced to purely one of political determination.

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TRUST AS A CORE PRINCIPLE OF THE CONSTITUTION

IN *Craig (Appellant) v Her Majesty's Advocate (for the Government of the United States of America) and another (Respondents) (Scotland)* [2022] UKSC 6 the Supreme Court unanimously allowed an appeal against an extradition order made by the Scottish ministers. Consequently, the extradition order pertaining to the appellant was discharged under section 87 of the Extradition Act 2003 ("the 2003 Act"), because it was made in breach of his ECHR rights. On its surface, Craig is a straightforward application of Article 8 ECHR jurisprudence. However, what lies beneath the

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