Neutral Citation Number: [2014] EWHC 2386 (Admin)

Case No: CO/9792/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2014

Before :

THE HONOURABLE MR JUSTICE DINGEMANS

- -

Between :

R(Eric Erron Johnson)	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Hugh Southey QC and Paul Turner (instructed by **Barnes Harrild & Dyer solicitors**) for the **Claimant**
Tim Eicke QC (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 8 July 2014 and 9 July 2014

- -

Judgment

Mr Justice Dingemans :

1. This case raises an issue about whether the Claimant's proposed deportation to Jamaica, following his conviction and imprisonment for a very serious criminal offence, involves a violation of article 14 in conjunction with article 8 of the European Convention on Human Rights ("ECHR"), contrary to the Human Rights Act 1998 ("the Human Rights Act"). The discrimination is said to arise because the Claimant did not become a British citizen when he was born in Jamaica as the illegitimate child of a British citizen, whereas he would have been a British citizen if he had been a legitimate child, and a British citizen cannot be deported.

Background

2. The Claimant's father was born in London on 27 February 1962. At that time the Claimant's father was a citizen of the United Kingdom and the Colonies pursuant to the British Nationality Act 1948 ("the 1948 Act"). On 1 January 1983 the Claimant's father became a British citizen pursuant to the provisions of the British Nationality Act 1981 ("the 1981 Act").

3. The Claimant's father went to Jamaica and had a relationship with the Claimant's natural mother. They did not marry. The Claimant was born on 18 March 1985 in

Jamaica. If the Claimant's father had been married to his mother, the Claimant would have become a British citizen. As it was he became a citizen of Jamaica.

4. On 3 March 1991 the Claimant, then aged 4 years and registered as a Jamaican national, came to the United Kingdom with his father. The Claimant was granted leave to enter for a period of 6 months. He lived with his father, and his father's new wife, and their children who are the Claimant's half brothers. On 13 March 1992 the Claimant was granted Indefinite Leave to Remain ("ILR"), and this was stamped in his passport.

5. The Claimant has lived in the United Kingdom ever since, and he is now aged 29 years. In 1994, when the Claimant was aged 9 years, he went to Jamaica on holiday and saw his mother. She was unable to provide him with a contact address or telephone number. This was the last contact that he had with her.

6. The Claimant left home in 2000 when he was aged 15 years. Neither the Claimant, nor his father, made an application for him to acquire British citizenship before he was aged 18 years. The documents before me show that the Claimant could have applied for registration as a British citizen up until the age of 18 years and that, under the applicable policies at that time, the Claimant would probably have been granted British citizenship.

7. The Claimant now has a very serious criminal record, and has been convicted of offences from 2003 (the year in which he became 18) until 2008. The Claimant was a supplier of class A drugs for commercial gain. The Claimant also killed a man by hitting him with a piece of wood, and then stabbing him. The Claimant was convicted of manslaughter after a trial in which he falsely claimed to have acted in self defence. On 11 August 2008 the Claimant was sentenced to 9 years' imprisonment for manslaughter.

8. On 22 March 2011 the Defendant served notice that the Claimant was subject to automatic deportation pursuant to the provisions of section 32 of the UK Borders Act 2007. This was because he was a foreign national, and had been sentenced to 9 years' imprisonment.

9. On 18 August 2011 the Defendant signed a deportation order for the Claimant, and on 8 September 2011 the Claimant appealed against the making of the order.

10. On 4 November 2011 the First Tier Tribunal (Immigration and Asylum Chamber) ("the First Tier Tribunal") allowed the Claimant's appeal on the basis that he was British. However on 14 November 2011 the First Tier Tribunal sent out a note stating that it had been mistaken in holding that the Claimant was a British citizen, and it appears that the original decision of the First Tier Tribunal was set aside.

11. There were then various adjourned hearings before a further hearing in the First Tier Tribunal took place on 27 July 2012. At that hearing the First Tier Tribunal found that the Claimant had a private life which engaged article 8 of the ECHR in the United Kingdom but that deportation was proportionate and lawful. However the First Tier Tribunal remitted the appeal to the Defendant for consideration of the issue of discrimination against the Claimant contrary to articles 8 and 14 of the ECHR. This

was because the issue about the fact that the Claimant would not have been a foreign national if he had been legitimate had been raised.

12. The Defendant reconsidered the Claimant's case on 23 November 2012. The Defendant maintained the decision to deport the Claimant to Jamaica, and certified his human rights claim as being clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

13. On 14 May 2014 the Immigration Act 2014 ("the 2014 Act") received Royal Assent. Section 65 of the 2014 Act provides that a person in the Claimant's position will be entitled to be registered as a British national if provisions as to character are satisfied. Section 65 will, pursuant to section 75(3) of the 2014 Act, be brought into force "on such day as the Secretary of State may by order appoint". It has not yet been brought into force, and the Claimant will not be able to satisfy the character provisions when it comes into force.

The proceedings

14. The removal directions set for 16 September 2012 were challenged in pre-action correspondence and, after proceedings had been issued and an application for a stay had been made, on 14 September 2012 Nicol J. granted a stay of the removal directions. On 19 November 2012 the Defendant accepted that the proposed removal on 16 September 2012 was unlawful.

15. As noted above on 23 November 2012 the Defendant reconsidered the Claimant's case pursuant to the remission from the First Tier Tribunal and refused the application and certified that it was "clearly unfounded" pursuant to section 94(2) of the 2002 Act.

16. On 19 December 2012 the Claimant applied to amend his grounds to challenge the decision dated 23 November 2012, and permission to make the amendment was granted on 13 February 2013. Summary grounds of defence were served on 18 March 2013.

17. On 6 June 2013 Mostyn J. granted permission to apply for judicial review on the ground "*whether articles 2 and 3 of the Nationality, Immigration and Asylum Act 2002 (Commencement Number 11) Order 2006 SI 2006 No. 1498 are compatible with article 14*" of the ECHR.

18. Following correspondence sent to Mostyn J. following the grant of permission on 25 June 2013 Mostyn J. confirmed the grant of permission and the reasons for the grant of permission stating "*Arguably, in choosing 2006 the [Defendant's] decision discriminates against the Claimant on the grounds of age and/or status (i.e. (il)legitimacy)"*.

19. On 23 July 2013 the Defendant filed detailed grounds of defence. On 19 June 2014 Hayden J. granted the Claimant permission to amend his grounds for judicial review.

The issues

20. I am grateful to Mr Southey QC and Mr Turner on behalf of the Claimant, and to Mr Eicke QC on behalf of the Defendant, for their submissions. Following refinements in the course of legal submissions it now appears that the following matters are in issue:

20.1 whether there has been a violation of article 14 in conjunction with article 8 of the ECHR, either because the Claimant was treated differently on the ground that he was illegitimate, or because he was treated differently on the ground that he had a different immigration status;

20.2 if so, whether: (a) the provisions of the 2002 Act can be interpreted to ensure conformity with the Human Rights Act; (b) the 2002 Act commencement order should be quashed; and (c) whether any other relief ought to be granted;

20.3 whether the decision certifying the Claimant's human rights claims as "clearly unfounded" should be quashed.

Relevant statutory provisions

21. The 1981 Act provides at section 2(1) that a person born outside the United Kingdom shall be a British citizen "*if at the time of the birth his father or mother (a) is a British citizen otherwise than by descent* …". Section 50(9) of the 1981 Act provided that "*the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him*". The effect of these two provisions meant that the Claimant was not a British citizen because he was not a legitimate child.

22. The Claimant could have, before he was aged 18 years, applied for registration as a British citizen under section 3(1) of the 1981 Act. The relevant policy then operated by the Defendant provided that if the Claimant was a child living in the United Kingdom, his father was a British citizen and the Defendant was satisfied about paternity and the child was, if 16 or over, of good character, he would be made a British citizen. Provision was made for both parents to consent to that process, but the provision for parental consent of both parents might be waived if there had been no contact for many years.

23. Section 9 of the 2002 Act was brought into force on 1 July 2006 by the Nationality, Immigration and Asylum Act 2002 (Commencement Number 11) Order 2006 No. 1498 ("the 2002 Act commencement order"). Section 9 of the 2002 Act amended section 50(9) of the 1981 Act to make, among other matters, provision for a child's father to be a person who had satisfied prescribed requirements as to proof of paternity. It appeared from submissions that these prescribed requirements included birth certificates showing the father's name on the child's birth certificate, and it is common ground that the Claimant's father would have satisfied the prescribed requirements as to proof of paternity.

24. Section 162(5) of the 2002 Act provided that "*section 9 shall have effect in relation to a child born on or after a day appointed by*" the Defendant by order. By the 2002 Act commencement order, the day appointed by the Defendant was 1 July 2006. As the Claimant was born before 1 July 2006 he was not covered by amendments to the 1981 Act made by the 2002 Act. It was the 2002 Act commencement order which had been

the subject of Mostyn J.'s grant of permission, before the further order made by Hayden J.

25. Section 65 of the 2014 Act provides that a person is entitled to be registered as a British citizen on application if he was born before 1 July 2006, his mother was not married, and he would have become a British citizen if his mother had been married and character provisions are satisfied. This has not yet been brought into force.

26. Section 32(5) of the UK Borders Act 2007 ("the 2007 Act") provides that the Defendant must make a deportation order if the Claimant is a "*foreign criminal*", and section 32(4) provides that the deportation of a foreign criminal is conducive to the public good. The Claimant is a foreign criminal if he is not a British citizen.

27. Section 33 of the 2007 Act provides exceptions to section 32, and exception 1 is where removal of the foreign criminal would breach ECHR rights. Section 33(7) provided that the application of an exception did not prevent the making of a deportation order, and that section 32(4) continued to apply.

28. Article 8 of the ECHR provides that everyone has a qualified right to "*respect for his private and family life, his home and his correspondence*".

29. Article 14 of the ECHR provides "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

The approach to article 14

30. A number of approaches to article 14 cases have been suggested in the authorities. It appears that following *Michalak v London Borough of Wandsworth* [2003] 1 WLR 617 at paragraph 20, *R(S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39; [2004] 1 WLR 2196 at paragraph 42; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434 at paragraphs 23-27, that it is usually convenient to approach an issue involving article 14 in a structured way. The parties have identified the 5 questions as: (1) whether the facts fall within the ambit of one or more of the substantive ECHR provisions; (2) if so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other; (3) if so, was the difference in treatment on one or more of the proscribed grounds under article 14; (4) were the chosen comparators in an analogous situation to the complainant's situation; (5) if so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved.

31. A rigidly formulaic approach to the questions should be avoided. The Court's scrutiny may sometimes best be directed to considering whether any differentiation has a legitimate aim and whether the means chosen to achieve the aim are appropriate and not disproportionate in their adverse impact, see *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173. It might be noted that there is a general principle of the common law that comparable situations must not,

without justification, be treated differently. In the common law treating like cases alike and unlike cases differently is a feature of rational behaviour.

Claims with the ambit of article 8

32. Judicial understanding about whether a decision relating to the grant of nationality falls within the ambit of article 8 has developed. In *K and W v Netherlands* (1985) 43 D&R 216, in a decision dated 1 July 1985, the European Commission on Human Rights declared inadmissible a complaint by a family about the effect of an Act on Dutch citizenship. That Act provided that a woman married to a Dutch man could obtain citizenship by writing a letter to the local mayor, but such an arrangement was not available for a man married to a Dutch woman. The Commission dismissed the complaint of a violation of article 14 stating "*it is true that the applicants have invoked article 8 of the Convention, read in conjunction with article 14 to the Convention, but the Commission finds that the right to acquire a particular nationality is neither covered by, nor sufficiently related to, this or any other provision of the Convention*".

33. In *Karassev and family v Finland* (1999) 28 EHRR CD132, in a decision dated 12 January 1999, the Commission considered complaints made by an applicant about the failure of Finnish authorities to regularise his stay in Finland. The Commission noted that a right to citizenship was not guaranteed by the ECHR and referred to *K and W*. However the Commission went on to say, at page CD133 *"... the Court does not exclude that an arbitrary denial of citizenship might in certain circumstances raise an issue under article 8 of the Convention because of the impact of such a denial on the private life of the individual"*. This was therefore a material development of the law, because it contemplated that an arbitrary denial of citizenship might have sufficient impact on the private life of the individual to fall within article 8.

34. This development of judicial understanding was completed by the European Court of Human Right's decision in *Genovese v Malta* (2014) 58 EHRR 25, dated 11 October 2011. The applicant was illegitimate and born to a British mother and a Maltese father. Paternity had been established scientifically and in judicial proceedings. The father refused to recognise his son on the birth certificate, and the applicant's mother brought proceedings which resulted in the birth certificate being amended to show paternity. The applicant then applied for Maltese citizenship, which was denied on the basis that the applicant was illegitimate. The Court found that there had been a violation of article 14 in conjunction with article 8 regarding the difference in treatment based upon birth out of wedlock. The Court stated at paragraph 33 "*While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise of a violation of article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that article"*. At paragraph 34 the Court noted that as Maltese legislation had granted the right to citizenship by descent and established a procedure to that end the State "*must ensure that the right is secured without discrimination*". At paragraph 47 recorded that the submission on behalf of Malta was that a mother is always certain, a father is not. The Court noted that it "*cannot accept this argument ... even in cases such as the present where the father was known ... even in cases such as the present where the father was known and registered on the birth certificate, the distinction arising from the provisions of the Citizenship Act persisted*."

35. The approach in *Genovese* was considered in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin); [2014] Imm AR 32 at paragraph 44 where the effect of the decision was explained as showing that *"a breach of article 8 can arise in the context of the refusal of naturalisation where there was ... a discriminatory refusal"*. The approach also appears to have been followed in the European Court of Human Rights in the very recent judgments dated 26 June 2014 in *Mennesson v France* and *Labasse v France*. At this stage the judgment is only available in French, but I have been supplied with a non agreed translation which shows that the European Court of Human Rights has continued to follow and apply *Genovese* recording that "*even if article 8 of the Convention does not guarantee a right to acquire a particular nationality, it remains that nationality is an element of personal identity*".

36. More generally in *R(L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410 at paragraph 24 it was noted that private life extended to include "to a certain degree" the right to develop relationships.

37. In these circumstances I am satisfied that the Claimant's claim that he was denied British nationality because of his illegitimate status is within the ambit of article 8. This is because the claim involves the Claimant's social identity, as a person entitled to stay in the United Kingdom, as the child of his British father, with the relationships identified in the decision of the First Tier Tribunal.

Difference of treatment on proscribed grounds with comparators in an analogous situation

38. I now address questions (2), (3) and (4) set out in paragraph 30 above. This mirrors the approach taken in the submissions before me, and is intended to focus on whether there is any relevant difference in treatment of like situations.

39. The evidence before me establishes that when the Claimant was born in Jamaica on 18 March 1985 he would have been a British citizen if he was legitimate. However, because his mother and his father had not married, he did not acquire British citizenship. Taking as a comparator a person with exactly the same attributes of the Claimant (same mother and same British father), and assuming the comparator's parents to be married, shows that that comparator would have acquired British citizenship. Therefore the difference of treatment occurred on the grounds that the Claimant was illegitimate.

40. It is clear from the wording of article 14 "… *birth or other status"*, and the decision of the European Court of Human Rights in *Genovese* that discrimination on the basis of birth is a proscribed ground.

41. It might be noted that it has been long established that discrimination on the ground of illegitimacy has long been impermissible. The 1975 European Convention on the Legal Status of Children Born out of Wedlock represented an important development in this area, and the European Court of Human Rights in *Marckx v Belgium* (1979-80) 2 EHRR 330 at paragraphs 20 and 41 applied the approach set out in that Convention, notwithstanding that it was not yet in force in many of the relevant countries. *Genovese* at paragraph 44 shows that *"very weighty reasons would have to be advanced before what appears to be an arbitrary difference in treatment on the*

ground of birth out of wedlock could be regarded as compatible with the Convention". The requirement for very weighty reasons to be advanced to justify a difference in treatment on the ground of birth out of wedlock is long established, see *Inze v Austria* (1987) 10 EHRR 394. It has been suggested in textbooks that different treatment of children depending on whether they are legitimate has never been justified. A difference in treatment depending on whether a child is born out of wedlock is a "suspect" ground of discrimination.

The difference in treatment is occurring in July 2014

42. Mr Eicke submits that the relevant difference in treatment occurred on 18 March 1985, that any complaint at the time would have failed, that the Claimant could have applied for British citizenship before he was 18 and did not do so, and that any complaint about that treatment is far too late. Mr Eicke points to the steps taken by the Defendant to avoid impermissible discrimination for persons in the Claimant's position born after 1 July 2006 under the 2002 Act Commencement Order.

43. It is therefore necessary to identify whether the Claimant's position, as he faces deportation, shows that there is any current impermissible difference in treatment.

44. I accept that the reason that the Claimant did not become a British citizen was because of the policy of the 1981 Act to distinguish between legitimate and illegitimate children, and that this affected the Claimant on his date of birth on 16 March 1985. This does not, however, show whether there is a current difference of treatment.

45. It does not seem to me that Mr Eicke's point that any claim made on behalf of the Claimant in 1985 would have failed, takes the case on either side any further. Any such claim would have pre-dated the Human Rights Act 1998. Further as noted above the European Commission on Human Rights declared the complaint in *K and W v Netherlands* inadmissible on the basis that the right to acquire nationality was not covered or sufficiently related to any other article in the ECHR. However the approach in *K and W v Netherlands* was not followed in later decisions, and was an impermissibly narrow approach to the ECHR.

46. In *Bowe and another v The Queen* [2006] UKPC 10; [2006] 1 WLR 1623 the Privy Council considered the effect of a provision providing for the deemed constitutionality of "existing laws" in force in July 1973, under article 30 of the current Constitution of the Commonwealth of the Bahamas. One of those existing laws was the mandatory sentence of death for murder. That law had not been previously declared to be unconstitutional, and previous challenges to the constitutionality of the mandatory sentence of death for murder had failed. The Privy Council stated, at paragraph 42, that it was not the task of the court to conduct a factual inquiry into the likely outcome had the challenge in that case been presented on the eve of the 1973 Constitution noting "*that would be an inappropriate exercise for any Court to adopt, perhaps turning on personalities and judicial propensities"*. The Court stated that it should ascertain what the law, correctly understood, was at the relevant time. I accept Mr Eicke's submission that *Bowe* is a case concerning written constitutions, but it does establish the proper approach to be taken to submissions about the extent to which Courts should become involved in attempting to predict the outcome of human rights litigation at a time before the full width of the relevant human rights provisions had been appreciated. If a similar approach to that taken in

Bowe is adopted in this case, the answer would be that the correct understanding of article 14 read in conjunction with article 8 in 1985 is as it was explained in *Genovese*, and has been since at least from the time of the decision in *Marckx v Belgium*. I say this because, properly analysed, decisions relating to nationality have always been within the ambit of article 8, and it has been clear, since the judgment in *Marckx v Belgium,* that discrimination on the basis of birth out of wedlock is impermissible unless there are very weighty reasons to justify it.

47. It is also apparent, and I find that neither the Claimant, nor his father, made an application for British citizenship between the ages of 4 and 18. The materials before me show that, on the balance of probabilities, citizenship would have been granted to the Claimant if he had made such an application. It seems, in the light of the witness evidence before me, that the Claimant had simply not given any thought to his status as a Jamaican national with ILR, at relevant times.

48. I also find that the Defendant has made attempt to put matters right for the future by making provision for children in the Claimant's position born after 1 July 2006 to obtain citizenship in the 2002 Act and the 2002 Act commencement order. I accept that the Defendant's attempts to correct matters have been largely successful, because no one is aware of other persons in the same position as the Claimant.

49. However, in my judgment the Claimant is in July 2014 facing deportation for three main reasons. The first is because he has committed very serious criminal offences, meaning that he is liable to be deported as a foreign criminal under the UK Borders Act. The second reason is because he was illegitimate, which meant that he did not automatically become a British citizen on birth. The third reason is that he did not apply to become a British citizen before he was 18.

50. All three matters are causative of the Claimant's current situation and would even satisfy a "but for" test (if it were necessary to do so) in the sense that "but for" each factor, the Claimant would not be facing deportation. This appears from the fact that even if the Claimant had committed the very serious criminal offences that he has committed, he would not be facing deportation if he had not been illegitimate. The daily experience of the criminal Courts is that there are British citizens who commit very serious offences, but British citizens cannot be deported. If the Claimant had not been illegitimate he would not have needed to make an application to become a British citizen before he was 18.

51. In these circumstances I find that the Claimant's current treatment is due in material part to his illegitimate status, or to use the phrase in *Genovese*, because he is a child born out of wedlock.

52. The fact that the Claimant is facing current discrimination is part supported by those cases which considered whether pension schemes which had originally been restricted to spouses and which were subsequently extended to long term unmarried partners, discriminated against unmarried partners. In *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39; [2009] ICR 762 the Claimant was an unmarried long term partner of an officer in the Royal Navy who had died in 2004. The Claimant was not a widow for the purposes of the existing scheme, but in 2005 new provisions were made for unmarried dependent partners. The Claimant complained of a violation of article 14 in conjunction with article 1 of the First Protocol of the ECHR. The claim

and appeals were dismissed on the basis that the difference in treatment was justifiable. However the Court of Appeal considered that the time for determining whether there was discrimination was at the time of the claim for a pension made by the Claimant. Adopting a similar approach in this case means that the time for determining whether the Claimant is suffering discrimination is the time that the Claimant is facing deportation because he is not a British citizen.

53. I do not consider that the decision on admissibility dated 22 January 2007 made by the Committee on the Elimination of Discrimination against Women in *Salgado v United Kingdom* (communication No.11/2006) is inconsistent with that conclusion. The applicant in that case complained that her son, whose father was Columbian, and who was born in September 1954 in Columbia, had been refused British citizenship in 1954. A later son, born in 1966, acquired British citizenship in 2003 following changes made to the statutory provisions. An option protocol came into force in 2004 giving the right to make complaints. The Committee considered, at paragraph 8.4, that the discrimination in that case was historic and pre-dated the coming into force of the optional protocol in 2004. The applicant was not the son, and there was no evidence that the son was suffering any current adverse effect.

No justification for discrimination on the suspect ground

54. I now turn to consider whether the Claimant's current treatment can be justified. This involves an analysis of whether the law pursued a legitimate aim and whether the differential treatment bears a reasonable relationship of proportionality to the aim sought to be achieved.

55. In my judgment there is no justification for treating the Claimant differently because he was illegitimate. As the European Court of Human Rights explained in *Genovese* at paragraphs 46 and 47 it is not permissible to treat children born out of wedlock as having no link with their parents, and it is not permissible to rely on the submission that "while a mother is always certain, a father is not". In this case, as in *Genovese*, the Claimant's father's paternity is established.

56. Mr Eicke submitted that the situation had arisen because of the past statutory regime, and that it was permissible for the Defendant not to remedy the situation because legislation needed to create bright lines, and the Defendant had been entitled to put right the situation for children born after 1 July 2006, and not address the situation for persons in the Claimant's position. Similar considerations had arisen in *Ratcliffe v Secretary of State for Defence*. In that case the Court of Appeal had considered that the current discrimination suffered by the Claimant was justified because the Defendant was able to justify a failure retrospectively to cure such discrimination. This was because the decision as to the point in time from which unmarried partners were to be put in substantially the same position to that of spouses in the field of pensions was a decision for Government. There was no absolute principle preventing the Courts from ordering retrospective payments, as appears from paragraph 87 of the judgment. It was held at paragraph 89 that the case "*falls squarely within the now-well established principle that where alleged discrimination in the field of pensions is based on non-suspect grounds, courts will be very reluctant to find that the discrimination is not justified*".

57. In *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] QB 373 the Court of Appeal considered a challenge to provisions of the Fatal Accidents Act 1976 which prevented unmarried partners from claiming unless they had lived together as man and wife for a period of two years. It was noted, at paragraph 24 of the judgment, that the case did not involve a suspect ground of discrimination. Lord Dyson MR referred to the case of *Stec v United Kingdom* (2006) 43 EHRR 1017 and noted the distinction drawn between (i) discrimination based exclusively on the ground of sex (requiring very weighty reasons in justification) and (ii) general measures of economic or social strategy (where a wide margin is usually allowed). In *Swift* the discrimination was justifiable because the decision as to which cohabitees should be able to claim damages for loss of dependency raises difficult issues of social and economic policy, which Parliament was entitled to take.

58. In *T v Secretary of State for the Home Department* [2014] UKSC 35 there was some discussion about difficulties created by the need for bright lines in legislation, and what is and is not permissible, see paragraphs 46-48.

59. It might be noted that the difference in treatment in *Ratcliffe v Ministry of Defence* and *Swift v Secretary of State for Justice* did not involve discrimination on suspect grounds. That is different from the position in this case. In *Stec v United Kingdom* there had been a difference in treatment on suspect grounds, but the position was different because of the historic discrimination suffered by women, the need to address that discrimination by making different provisions for women, and the fact that reasonable persons could disagree about when those different provisions should cease to have effect.

60. It is right to say that this is a case where part of the reason for the Claimant's current treatment is based on the terms of the 1981 Act as they existed in 1985. However there was never any justification in 1985 for treating illegitimate persons in the position of the Claimant differently from legitimate persons, and there is none now. The fact that the Claimant might (if he and his father had thought about matters) have applied to become a British citizen before he was aged 18 is not a sufficient answer, because it does not meet the fact that a material reason for the current difference in treatment is that he is illegitimate. This is a difference in treatment on a suspect ground, and there are no very weighty reasons to justify the difference in treatment. In these circumstances in my judgment there is no justification for the difference in treatment being suffered by the Claimant because he was born illegitimate.

61. For these reasons I find that there has been a violation of article 14 in conjunction with article 8 of the ECHR, because the Claimant is currently being treated differently on the ground that he was illegitimate, and that such treatment is not justifiable.

No other ground for difference in treatment

62. Mr Southey submitted that, because of the provisions of the 1981 Act, the Claimant, born before 1 July 2006, had a different immigration status to persons in an analogous situation to the Claimant who had been born after 1 July 2006, and that such a different legal status amounted to a ground of distinction under article 14 of the ECHR. Mr Southey relied on paragraphs 45 and 46 of *Bah v United Kingdom* (2012) 54 EHRR 21 where the European Court of Human Rights accepted that immigration status could amount to "other status" within the meaning of article 14 of the ECHR.

63. Mr Eicke responded noting that a difference in immigration status is not a suspect ground of discrimination. There can be many good reasons for differences in immigration status. In response to those points Mr Southey then went back to his first ground, noting that the difference in immigration status was because the Claimant was illegitimate. This meant that the second ground could only succeed if the first ground succeeded and it also meant that the second ground added nothing to the case. Mr Southey was unable to explain what this ground added, apart from the expenditure of further time and cost. In my judgment this ground is not independent of the first ground, and is not an independent basis for finding a violation of article 14, when read in conjunction with article 8.

Remedies

64. Mr Southey submitted that I should use the interpretative provisions set out in section 3 of the Human Rights Act to read the amended provisions of the 2002 Act so that the Claimant acquired British citizenship. It was suggested that the provisions of section 162(5) of the 2002 Act, set out in paragraph 24 above, and the provisions of the 2002 Act commencement order, could be read so that section 9 should have effect in relation to a child born on or after different days appointed by the Secretary of State. The first date referred to would mirror the current scheme, and the second date would involve establishing a scheme for others in the Claimant's position, permitting them, if they desired to opt into British citizenship. The reason for providing an opt in was because Mr Eicke had identified that if section 9 had effect to everyone born illegitimate, it might create difficulties for persons who did not want to become British citizens. This is because there are States which prohibit persons from holding dual nationality and that granting British citizenship to a person who did not want it and might lose their existing citizenship would be wrong, particularly as the loss of the original nationality might be irretrievable, or at least cause problems for persons appointed to certain public offices with nationality requirements.

65. I accept that section 3 of the Human Rights Act provides wide powers to enable the Court to interpret statutes to ensure compliance with the ECHR, as explained in *Ghaidan v Godin-Mendoza* at paragraphs 32 and 33. However I do not accept that section 3 of the Human Rights Act permits me to interpret section 162(5) of the 2002 Act to be sufficiently wide to permit the Secretary of State to set up a new scheme providing for an opt-in to British nationality. This is because any such interpretation would be inconsistent with the "*grain of the legislation*" in section 9, which is to provide for automatic citizenship.

66. Mr Southey next submitted that the 2002 Act commencement order should be quashed. Mr Eicke pointed out that that would not assist the Claimant as it would leave the amended provisions of section 50(9) without a commencement date, so that the Claimant would not be able to take advantage of the provisions. Mr Eicke also noted that it would create a real risk of difficulties for others. I accept both those submissions, and *T v Secretary of State for the Home Department* at paragraphs 60 and 64 is an example of the unintended effect on third parties which a quashing order might have.

67. There were a number of submissions made to me about whether a declaration of incompatibility should be made in relation to any of the relevant statutes, and if so, which ones. When submissions were made by Mr Southey to the effect that the

provisions of the 1981 Act were not compatible with the Human Rights Act, Mr Eicke rightly noted that this claim had never been specified by the Claimant in the grounds or amended grounds. As it is there may be advantages for both sides in granting declaratory relief, compare *T v Secretary of State for the Home Department* at paragraph 154.

68. By the close of submissions it became common ground that I should set out my findings on: (1) the points of principle argued about whether there was a violation of article 14 read in conjunction with article 8; (2) whether section 162(5) could be read in the manner suggested by the Claimant; and (3) whether the 2002 Act commencement order should be quashed. Thereafter the parties would liaise to attempt to agree between themselves what, if any, relief would be appropriate. If the parties are unable to agree the provision will be made for a short further hearing. Such an approach means that the Defendant is not disadvantaged by the changing focus of the Claimant's submissions on remedies, and enables the Court to determine the real issues between the parties in a proportionate manner.

Letter certifying claims as "clearly unfounded" quashed

69. This leaves the final issue about whether the Defendant's certification of the Claimant's human rights claims as "clearly unfounded" should be quashed. If the certification is quashed the Claimant will be able to appeal to the relevant Tribunals against the Defendant's refusal to revoke his deportation.

70. It is common ground that the relevant test to be applied is set out in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 at paragraph 23. Whether a claim is "clearly unfounded" is only susceptible of one answer, and "*if any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded"*.

71. Mr Eicke submitted that even if I were to conclude, as I have, that there has been a violation of article 14 in conjunction with article 8 of the ECHR, because the Claimant is currently being treated differently on the ground that he was illegitimate, and that such treatment is not justifiable, the "clearly unfounded" certification should not be quashed. He submitted that this was because the Claimant would remain a foreign criminal within the meaning of section 32 of the 2007 Act, that section 32(4) provides that the deportation of a foreign criminal would be conducive to the public good, and that even though section 33 provides an exception if removal of the foreign criminal would breach ECHR rights, section 33(7) provided that did not prevent the making of a deportation order, and section 32(4) continued to apply.

72. In my judgment the provisions of section 33 of the 2007 Act would not prevent a Tribunal from concluding that the Claimant's human rights claims mean that he should not be deported. This would be because a Tribunal would be able to conclude that although deporting foreign criminals would be conducive to the public good, the treatment of the Claimant as a foreign criminal is a violation of his article 14 rights when read in conjunction with his article 8 rights, and he should not be deported in breach of his human rights, compare *George v Secretary of State for the Home Department* [2014] UKSC 28 at paragraph 7. In those circumstances the Claimant's claim is not "clearly unfounded" and the decision to certify the claim as such should be quashed.

Conclusion

73. For the reasons given above I find: (1) that there has been a violation of article 14 in conjunction with article 8 of the ECHR, because the Claimant is currently being treated differently on the ground that he was illegitimate, and that such treatment is not justifiable; (2) there is no sustainable separate ground of complaint on the basis of immigration status; (3) it is not possible to interpret the provisions of section 162(5) of the 2002 Act to permit the Defendant to establish a scheme permitting persons to opt into section 50(9) of the 1981 Act as amended; (4) the parties should liaise to attempt to agree remedies to give effect to this judgment, failing which a short further hearing will be arranged; (5) the "clearly unfounded" certification of the Claimant's human rights claims should be quashed.