Michaelmas Term
[2016] UKSC 56
On appeal from: [2016] EWCA Civ 22

JUDGMENT

R (on the application of Johnson) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

19 October 2016

Heard on 25 and 26 July 2016

Appellant
Hugh Southey QC
Paul Turner
(Instructed by Barnes Harrild and Dyer)

Respondent
Tim Eicke QC
Edward Brown
(Instructed by The Government Legal Department)

LADY HALE: (with whom Lord Kerr, Lord Reed, Lord Hughes and Lord Toulson agree)

1. The fundamental issue in this case is a simple one. Is it compatible with the European Convention on Human Rights to deny British citizenship to the child of a British father and a non-British mother simply because they were not married to one another at the time of his birth or at any time thereafter? If the parents had been married to one another, their child would have been a British citizen. If the mother had been British and the father non-British, their child would have been a British citizen. If the child had been born after 1 July 2006 he would have been a British citizen. The child is not responsible for the marital status of his parents or the date of his birth, yet it is he who suffers the consequences.

2. There are many benefits to being a British citizen, among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights. This case is about the right not to be deported on the ground that one is a "foreign criminal" whose presence here is not conducive to the public good. But the unsympathetic context in which the issue arises should not distract us from the importance of the issue to anyone who was born to unmarried parents at the relevant time.

The facts

3. The appellant was born on 18 March 1985 in Jamaica. His mother was Jamaican and his father British. His paternity is not in doubt. His parents were not married to one another. Under the law then in force the appellant became a citizen of Jamaica but not a British citizen. His father brought him to the United Kingdom in 1989, when he was aged four, and he has lived here ever since. He or his father might have made an application for him to be registered as a British citizen while he was still a child and it would have been the policy of the UK government to grant such an application provided that, if the child was 16 or over, he was of good character. But no such application was made. He was, however, granted indefinite leave to remain here in 1992, just before his seventh birthday.

4. Neither has the appellant since applied to be registered as a British citizen. It is accepted that such an application would not succeed, because the appellant cannot demonstrate that he is of good character. He has a very serious criminal record and has been convicted of offences from 2003, the year in which he reached the age of 18, until 2008, when he was convicted of manslaughter and sentenced to nine years' imprisonment.

5. In March 2011, the Secretary of State served notice upon him that he was liable to automatic deportation as a "foreign criminal" under section 32(5) of the UK Borders Act 2007. A deportation order was made in August that same year. On appeal, the First-tier Tribunal held that he had both a private and a family life in this country but that his deportation was a proportionate and lawful interference with them. The tribunal remitted to the Secretary of State the question whether his deportation was unlawfully discriminatory, given that he would not have been liable to deportation had his parents been married to one another. One year later, in August 2012, the Secretary of State set removal directions for his removal on 16 September 2012 and these judicial review proceedings were launched to challenge them, principally on the ground that he still had an extant appeal.

6. The removal directions were stayed by the court and on 19 November 2012 the Secretary of State accepted that they should not have been issued given the tribunal's decision to remit. On 23 November 2012, she reconsidered her deportation decision but decided that it was not unlawfully discriminatory and refused to revoke it. She also certified that the appellant's claim was clearly unfounded and thus that he had no right of appeal within this country against the decision. These proceedings were amended to challenge that decision and its certification.

7. In July 2014, Dingemans J held that the discrimination against a child of unmarried parents was not justified at the time of his birth and continued to be unjustified; that there had been a violation of article 14 of the Convention read with article 8; and that the certification of the claim as clearly unfounded was unlawful. He quashed the certificate, but declined either to read the relevant legislative provisions so as to entitle the appellant to British citizenship under section 3(1) of the Human Rights Act 1998 or to make a declaration of incompatibility under section 4: [2014] EWHC 2386 (Admin).

8. In January 2016, the Court of Appeal allowed the Secretary of State's appeal, finding that there had been no violation of the Convention rights at the time of the appellant's birth in 1985 and no wrong for which the UK courts could have given a remedy then. The matter had to be judged at that time rather than as a continuing act. Any violation had taken effect before the Human Rights Act came into force. Hence there was no violation of the Convention rights and thus the claim could be certified as clearly unfounded: [2016] EWCA Civ 22. The appellant now appeals to this court.

British Nationality Law

9. At all material times, section 2(1)(a) of the British Nationality Act 1981 provided (and still provides):

> "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 ..."

10. However, until amended by the Nationality, Immigration and Asylum Act 2002, section 50(9) of the 1981 Act provided the following definition of a person's mother and father:

> "For the purposes of this Act - (a) the relationship of mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her; but (b) … the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him; and the expressions 'mother', 'father', 'parent', 'child' and 'descended' shall be construed accordingly."

11. Nevertheless, section 47 of the 1981 Act, until its repeal by section 9(4) of the 2002 Act, provided that a person born out of wedlock but legitimated by the subsequent marriage of his parents (if their marriage operated to legitimate him by the law of the place where the father was domiciled when the marriage took place) was to be treated as from the date of the marriage as if he had been born legitimate.

12. Section 50(9) of the 1981 Act was amended, and a new section 50(9A) added, by section 9(1) of the 2002 Act, with effect from 1 July 2006, as follows:

> "(9) For the purposes of this Act a child's mother is the woman who gives birth to the child.
>
> (9A) For the purposes of this Act a child's father is … (c) … a person who satisfies prescribed requirements as to proof of paternity."

Section 162(5) of the 2002 Act made it clear that section 9 would have effect only in relation to a child born on or after the date appointed by the Secretary of State,

which was 1 July 2006. Thus persons born before that date can still take advantage of the legitimation provision in section 47.

13. These provisions define people who are automatically entitled to British citizenship, whether they want it or not. Other people can apply to be registered as British citizens. Section 3(1) of the 1981 Act provides that applications may be made while a person is a minor for him to be registered as a British citizen; and from 1987 onwards it was the policy of the Secretary of State to grant, on satisfactory proof of paternity, applications made by or on behalf of minors whose unmarried fathers were British citizens, who were living in the United Kingdom, and who, if aged 16 or over, were of good character. Section 65 of the Immigration Act 2014 has now introduced sections 4E to 4I into the 1981 Act, giving a specific right to be registered to people who were unable to acquire citizenship automatically because their father was not married to their mother. But this is subject to the general provision governing applications for registration, under section 41A of the 1981 Act, that such an application "must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character".

The progressive removal of discrimination against children of unmarried parents

14. At common law, a child of parents who were not married to one another at the time of his birth was *filius nullius* or "nobody's child". The law scarcely recognised his relationship with his mother, let alone with his father. Relationships traced otherwise than through marriage were ignored for the purpose of succession and other dispositions of property. References to children or other relationships in legislation or other legal instruments were presumed to refer only to those born within or traced through marriage. Case law and statute gradually accorded limited recognition to the relationship between mother and child but scarcely any to the relationship between father and child. The first major reform came with the Family Law Reform Act 1969, which implemented the recommendations of the Report of the Russell Committee on *The Law of Succession in relation to Illegitimate Persons* (1966, Cmnd 3051). As the Committee observed, in the archaic language of the time (pp 4-5):

> "At the root of any suggestion for the improvement of the lot of bastards in relation to the law of succession to property is, of course, that in one sense they start level with legitimate children, in that no child is created of its own volition. Whatever may be said of the parents, the bastard is innocent of any wrongdoing. To allot him an inferior, or indeed an unrecognised, status in succession is to punish him for a wrong of which he is not guilty."

Accordingly, the 1969 Act gave children of unmarried parents rights of intestate succession from both their parents, and vice versa, and enacted a presumption that references to children and other relatives in dispositions of property included references to, and to persons related through, illegitimate children.

15. The next major reform came with the Family Law Reform Act 1987, which implemented the Law Commission's *Report on Illegitimacy* (1982, Law Com No 118) with modifications recommended in its *Illegitimacy: Second Report* (1986, Law Com No 157). The object was to remove all discrimination in family law against children whose parents were not married to one another and against relationships traced otherwise than through marriage (while preserving some distinction between the parents in relation to their upbringing). The drafting technique, borrowed from the Law Reform (Parent and Child) (Scotland) Act 1986, was to avoid using adjectives such as "legitimate" and "illegitimate" to describe the child and to refer instead to the relationship between the parents. Section 1(1) of the 1987 Act provides:

> "In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two 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 any time."

16. But that, of course, does not apply to the 1981 Act, which was passed before the 1987 Act came into force. The Law Commission had considered the law of citizenship in its first Report and concluded that, as a matter of policy, a "non-marital" child should be entitled to British citizenship on the same terms as a "marital" child (Law Com No 118, para 11.20). But no clauses relating to this were included in the draft Bill annexed to that Report, or in the draft Bill annexed to the second Report, because citizenship is a United Kingdom matter affecting each part of the United Kingdom as well as England and Wales.

17. It may well be as a result of the enactment of the 1987 Act that the Secretary of State adopted the policy in relation to the registration of minor children of unmarried parents referred to above (para 13). But the law itself was not changed until the 2002 Act came into force.

Deportation law

18. British citizens cannot be deported. Non-citizens may be deported if the Secretary of State deems this "conducive to the public good" (Immigration Act 1971, section 3(5)(a)). Section 32(4) of the UK Borders Act 2007 provides that, for this purpose, the deportation of a "foreign criminal" is conducive to the public good. Under section 32(1) a non-citizen convicted in the United Kingdom of an offence for which he was sentenced to at least 12 months' imprisonment is a "foreign criminal". Section 32(5) provides that the Secretary of State must make a deportation order in respect of a foreign criminal, but this is subject to section 33. Section 33(1) provides that section 32(4) and (5) do not apply where an exception applies. By section 33(2), "Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach - (a) a person's Convention rights …" By section 33(7) the application of an exception does not prevent the making of a deportation order and section 32(4) applies despite the application of Exception 1. The net effect is that if Exception 1 applies, section 32(5) does not, and the person is not liable to automatic deportation. Deportation is nevertheless still deemed conducive to the public good and the Secretary of State *may* still make a deportation order, but it would be contrary to the person's Convention rights actually to deport him.

Immigration appeals

19. At the relevant time, in 2012, immigration appeals were governed by sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 as they then stood. Section 82(1) gave a right of appeal to the First-tier Tribunal against an "immigration decision", an expression which included a decision that section 32(5) of the 2007 Act applied to a person, but did not include the making of a deportation order which stated that it was made in accordance with section 32(5). Under section 84 of the 2002 Act, the grounds of appeal included, at (a), that the decision was not in accordance with the Immigration Rules; at (c), that the decision was unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights; and at (e), that the decision was not otherwise in accordance with the law. Under section 92, only certain appeals might be brought within the United Kingdom. These included human rights claims. But section 94 gave the Secretary of State power to prevent an in-country appeal by certifying that the claim was "clearly unfounded".

The issues

20. Much of the argument in the courts below focussed upon (1) whether the denial of automatic citizenship at birth was a "one off" act, which took place before

the Human Rights Act came into force, or whether it had continuing consequences which could amount to a violation of the Convention rights; and (2) even if it were not a "one off" act, whether the appellant's liability to deportation was caused by the initial discrimination or whether that was only one of a number of contributory factors, not least his failure to apply for citizenship when he could have done and his commission of serious crimes.

21. However, the subject matter of these proceedings is the Secretary of State's certificate that an appeal under section 82 of the 2002 Act is "clearly unfounded". It is argued that the Secretary of State has no alternative but to treat the appellant as a "foreign criminal" to whom section 32(5) of the 2007 Act applies and is therefore required to make a deportation order. This is because, by virtue of the statutory provisions described above, he is not a British citizen. Thus, it is argued, her action is not unlawful within the meaning of section 6(1) of the Human Rights Act 1998, even if it is incompatible with his Convention rights, because section 6(2)(a) provides that it is not unlawful to act incompatibly with the Convention rights if, as a result of one or more provisions of primary legislation, she could not have acted differently.

22. However, as we have already seen (para 18 above), Exception 1 does not require that there be a breach of section 6 of the 1998 Act, merely that the deportation be a breach of the Convention rights. If Exception 1 applies, then section 32(5) of the 2007 Act does not apply and a deportation order cannot lawfully be made under that provision. To similar effect is rule 397 of the Immigration Rules, which provides that "A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under … the Human Rights Convention". The grounds of appeal under section 84(1), as it stood at the relevant time, included, not only, at (a), that the decision was not in accordance with the Immigration Rules, but also, at (e), that it was not in accordance with the law. Thus it matters not that ground (c) is limited to decisions that are contrary to section 6 of the 1998 Act, provided that there is a breach of the Convention rights. Section 6(2)(a) of that Act is a red herring.

23. The issue, therefore, is whether an appeal against the decision that section 32(5) of the 2007 Act applies to the appellant, on the basis that to deport the appellant now would be a breach of the UK's obligations under the Human Rights Convention, is clearly unfounded. That depends upon (1) whether it is sufficiently within the ambit of article 8 of the Convention to bring into play the prohibition of discrimination in the enjoyment of the Convention rights in article 14; (2) whether the discrimination had a "one off effect" at birth or whether it has continuing consequences which may amount to a present violation of the Convention rights; and (3) whether such discriminatory effect can be justified. The discrimination complained of in this case is that he is liable to deportation whereas he would not be if (a) his mother and father had been married to one another at the time of his birth;

(b) his mother and father had been married to one another at any time after his birth; (c) his mother had been British and his father Jamaican; or (d) an application had been made to register him as a citizen before he was 18.

Article 8

24. Although article 15.1 of the Universal Declaration of Human Rights says that "Everyone has the right to a nationality", the European Convention says nothing about the right to a nationality. In *K and W v The Netherlands* (1985) 43 D & R 216, the European Commission on Human Rights declared inadmissible a complaint about Dutch citizenship law: a woman married to a Dutch man could obtain citizenship simply by writing to the local mayor; a man married to a Dutch woman could not. The Commission found that the right to acquire a particular nationality was not covered by, or sufficiently related to, article 8 or any other provision of the Convention, for article 14 to come into play. In *Karassev v Finland* (1999) 28 EHRR CD132, the Commission repeated that the Convention did not guarantee the right to acquire a particular nationality. Nevertheless, it did "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."

25. In *Genovese v Malta* (2011) 58 EHRR 25, the complaint was that the denial of Maltese citizenship to the son of a British mother and a Maltese father who were not married to one another was in breach of article 14 read with article 8. The Court held (para 33) that

> "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 to 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."

Malta was not obliged to recognise the right to citizenship by descent, but as it did so, it had to ensure that the right was secured without discrimination. The discrimination could not be justified by the argument that "motherhood is certain, whereas fatherhood is not": in that case, paternity had been established scientifically and in legal proceedings.

26. To similar effect is *Kuric v Slovenia* (2013) 56 EHRR 688, where the discriminatory erasure of the applicants' residence rights was held to be a breach of article 14 read with article 8 even though their residence had not in fact been

affected. It is well established that a person's social identity is an important component of his private life, which is entitled to respect under article 8. This includes the recognition of his biological relationships, even if the refusal of recognition has no noticeable impact upon his family life. Thus, for example, in *Menneson v France, Labassee v France,* App Nos 65192/11 and 65941/11, Judgment of 26 June 2014, it was a violation of the right to respect for private life for French law to deny the existence of the relationship between the biological father and the children born as a result of surrogacy arrangements in the United States.

27. It is clear, therefore, that the denial of citizenship, having such an important effect upon a person's social identity, is sufficiently within the ambit of article 8 to trigger the application of the prohibition of discrimination in article 14.

A continuing effect?

28. The Court of Appeal held that the denial of automatic citizenship was a "one off" event that happened at birth and had no continuing effect capable of being a violation of the Convention rights. For example, in *Posti and Rahko v Finland* (2002) 37 EHRR 158, the restriction on the applicants' right to fish in state-owned waters, imposed by a decree in 1994, obviously continued to limit their fishing, but was a single event and their complaint was out of time. However, the court reiterated that "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the state to render the applicants victims" (para 39). Thus, in *Norris v Ireland* (1988) 13 EHRR 186, it was held that the very existence of legislation penalising homosexual acts "continuously and directly" affected the applicant's private life, despite the fact that he had neither been prosecuted nor threatened with prosecution. In this case, the denial of citizenship has a current and direct effect upon the appellant who is currently liable to action by the state, in the shape of deportation, as a result.

Article 14

29. It is not in dispute that birth outside wedlock is a "status" for the purpose of article 14. It has been so regarded at the very least since the landmark case of *Marckx v Belgium* (1979) 2 EHRR 330. It is no co-incidence that the laws of both Scotland and England and Wales were changed within a few years of that decision. Nor can it be seriously disputed that there is here a difference in treatment between people who are otherwise in an analogous situation on the ground of that birth status: had the appellant's parents been married to one another he would automatically have become a British citizen and not been liable to deportation no matter how badly he had behaved.

30. As has been said many times, "For the purpose of article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, eg, *Inze v Austria* (1987) 10 EHRR 394, para 41; *Genovese v Malta*, para 43). It is also clear that birth outside wedlock falls within the class of "suspect" grounds, where "very weighty reasons" are required to justify discrimination. This was held as long ago as *Inze v Austria*, at para 41, where children born in wedlock were given priority over children born outside wedlock in the inheritance of a family farm:

> "The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member states of the Council of Europe. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock, which is presently in force in respect of nine member states of the Council of Europe [including Austria]. Very weighty reasons would accordingly have to be advanced before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."

The likelihood that a child born outside wedlock would have had less to do with the family farm, and the attitudes of the rural population, were not regarded as weighty reasons.

31. The need for "very weighty reasons" has been repeated many times since, for example, in *Fabris v France* (2013) 57 EHRR 563, at paras 58 and 59, where reference was made to "the principle of equality eliminating the very concepts of legitimate children and children born outside marriage", and in *Genovese v Malta*, at para 44, where it was noted that 22 member states were now parties to the 1975 Convention and it was irrelevant that Malta was not. The United Kingdom signed the Convention in 1975 and ratified it in 1981.

32. This case has, however, been bedevilled by arguments about precisely what has to be justified. If it is the initial denial of automatic citizenship in 1985, the Secretary of State can argue that it was not even recognised as within the ambit of article 8 at the time and so does not need justification. If it is the continued denial of citizenship in 2012, the Secretary of State can argue that steps have now been taken to put right the historic injustice, but that it is justifiable for these steps only to operate prospectively: it is reasonable to have a citizenship law which assigns citizenship to certain people automatically at birth and grants it later only on application. Citizenship should not be imposed upon people unless they have asked for it: it may bring disadvantages if they are also citizens of a state which does not

recognise dual nationality. The problem with that argument is that citizenship is imposed automatically at birth upon certain people, whether they want it or not and whether or not it gives rise to dual nationality problems. Furthermore it is also imposed automatically if a person is legitimated by the subsequent marriage of his parents. The appellant's problems would be over if his mother could be found and his father persuaded to marry her.

33. If what needs to be justified is the liability of non-citizens to deportation while citizens cannot be deported, the Secretary of State would have a comparatively simple task. It has always been justifiable to distinguish between citizens and aliens in matters relating to entering, remaining in and removal from the country. The right to live in one's own country is the principal right of citizenship. Further, if what needs to be justified is the liability of foreign criminals to be deported when other foreigners are not similarly liable (although their presence here may be controlled in other ways), again the Secretary of State might have a comparatively easy task.

34. But in this case what needs to be justified is the current liability of the appellant, and others whose parents were not married to one another when they were born or at any time thereafter, to be deported when they would not be so liable had their parents been married to one another at any time after their birth. That is a present distinction which is based solely on the accident of birth outside wedlock, for which the appellant is not responsible, and no justification has been suggested for it. It is impossible to say that his claim that Exception 1 applies, based on article 14 read with article 8, is "clearly unfounded".

Conclusion

35. It follows that I would allow this appeal and quash the Secretary of State's certificate. The consequence, as I understand it, is that his appeal against the Secretary of State's decision of 23 November 2012 must be allowed to proceed and, for the reasons given earlier, is certain to succeed.

Declaration of incompatibility?

36. Allowing this appeal is the consequence of the particular provisions relating to deportation which are relevant here. However, there are bound to be other people in the appellant's situation - that is, who are denied the automatic right to citizenship by reason of the fact that their British father was not married to their non-British mother at the time of their birth. There are all sorts of current consequences which might flow from that situation. An example is the right to vote, which is an aspect of citizenship and also a Convention right under article 3 of the First Protocol.

People born before 1 July 2006 are denied that right unless they are first registered as citizens. In order to do this they must pass the "good character" test in section 41A of the 1981 Act. Had their parents been married to one another at or at any time after their birth they would not have to do this. While of course all babies arrive in the world with a good character the same cannot be said of those legitimated by the subsequent marriage of their parents. The distinction is based solely on birth status and for the reasons given earlier cannot be justified.

37. Mr Hugh Southey QC, for the appellant, argued that it followed that the Nationality, Immigration and Asylum Act 2002 (Commencement No 11) Order 2006, SI 2006/1498, bringing into force the 2002 amendments to section 50(9) of the 1981 Act was incompatible with the Convention rights. It should have operated retrospectively so as to grant automatic citizenship to all people previously denied it because of their parents' marital status. Mr Tim Eicke QC, for the Secretary of State, argues that it is contrary to principle for legislation to have retrospective effect, in particular where it effects an automatic change of status. Citizenship should not be imposed upon people unless they have asked for it.

38. As already mentioned, Mr Eicke's argument cannot be taken too far: there are many people who are entitled at birth to the citizenship of more than one country whether they like it or not: they may be born in a country, such as the United States of America, which still recognises the *ius soli*, the right to citizenship of all persons born within the territory; and they may be entitled to citizenship by descent from either or both of their parents, as is the case under the 1981 Act. But where a person has not automatically acquired citizenship at birth, it is reasonable to expect him to apply for it, even if he is entitled to be registered if he does so. This avoids the risk of inconvenient results and provides everyone with clarity and certainty. But it is not reasonable to impose the additional hurdle of a good character test upon persons who would, but for their parents' marital status, have automatically acquired citizenship at birth, as this produces the discriminatory result that a person will be deprived of citizenship status because of an accident of birth which is no fault of his.

39. The incompatible provision, therefore, is paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserts into section 41A of the 1981 Act (the requirement to be of good character) a reference to sections 4F, 4G, 4H and 4I, which relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth. The court will make a declaration to that effect, although it is not necessary to do so in order to dispose of this case.