1. Discrimination in British nationality law

Alison Harvey

I recognise the Minister's phrase about not being able to rectify all the wrongs of history but I do not agree with that expression... I think that we ought to remedy the wrongs of history ... Lord Avebury HL Deb 7 April 2014, col 1205.

INTRODUCTION

This chapter is about some aspects of discrimination in nationality law: against women, against men and against those born to parents not married to each other, and about the attempts of both legislatures and courts to address these. It examines such attempts and from them draws conclusions about what has been achieved to date. It surveys where there remains work to be done. The chapter includes detailed legislative commentary and draws on cases from both the UK and Canada, on parliamentary debates and on the author's first-hand experience of the passage of UK legislation since 2002.¹

THE *JOHNSON* AND *AKINYEMI* CASES

In *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, the Supreme Court considered the case of a man born out of wedlock to a British father in Jamaica. He had lived in the UK since the age of four years and now faced deportation. Had an application to register him as a British citizen been made while he was still a child, it would have been Home Office policy to grant it.² Then, as a British citizen, he could not have been deported.

By the time of the case, the registration open to him was as a child born to a British father not married to his mother at the time of the birth, under pro-

¹ All relevant debates from the House of Lords can be found in *Hansard*: Volume Indexes to the House of Lords Parliamentary Debates at <https://publications.parliament.uk/pa/ld/ldbvindx.htm>; last accessed January 11 2019.

² *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, paragraph 3.

visions inserted into the British Nationality Act 1981 by the Immigration Act 2014, building on provisions of the Nationality, Immigration and Asylum Act 2002. But the very reasons that founded the order for his deportation meant that he did not qualify for registration under that provision.

Section 9 *Legitimacy of a child* of the Nationality, Immigration and Asylum Act 2002 provided for children to take the nationality of their British citizen fathers regardless of the marital status of their parents. It only came into force four long years later, on 1 July 2006, for children born on or after that date.³ In the meantime s 3(1) of the British Nationality Act 1981 was used to register those children waiting for the coming into force of s 9.⁴ Section 3(1) continued to be used after 1 July 2006 for children born before that date, but the over-10s registering under it were, from 4 December 2006,⁵ subject to a good character test.⁶ Those who had already attained adulthood were shut out. In 2014, sections 4E to 4I of the British Nationality Act 1981 were enacted, giving any person still living, born to a British father not married to their mother, the right to register as a British citizen.

The provisions take a different approach to those who would have been born British had their fathers been married to their mothers, from that taken toward those who could have registered as British had their fathers been married to their mothers. Both must meet a good character test and may be required to prove paternity. In the case of the latter it is also necessary to fulfil all the other requirements for registration. What this means in practice is that the person must still be a child at the time of the application for registration.

Mr Johnson could not, however, meet the requirements for registration, which included a good character test, introduced in 2006⁷ because he had a lengthy criminal record, which included grave crimes. That criminal record was the basis of the Secretary of State's decision to deport Mr Johnson. He challenged this as a breach of his rights under Article 14 of the European Convention on Human Rights read with Article 8, as unjustifiable discrimination based on his birth outside wedlock.

In *R (Johnson) v Secretary of State for the Home Department* [2014] EWHC 2386 (Admin) Judge Dingemans found for Mr Johnson, but the Court of

³ Nationality, Immigration and Asylum Act 2002 (Commencement No 11) Order 2006 (SI 2006/1498 (C.51)).

⁴ Nationality Instructions, Volume 1, Chapter 9, until 27 July 2017.

⁵ Immigration, Asylum and Nationality Act s 58, commenced 4 December 2006 by SI 2006/2838, art. 4(1) (with art. 4(2)).

⁶ Immigration, Asylum and Nationality Act 2006 s 58 *Acquisition of British Nationality & c.*

⁷ Immigration, Asylum and Nationality Act 2006 s 58.

Appeal ruled against him and in favour of the Secretary of State.⁸ The Court of Appeal held that the discrimination ‘began and ended’ at his birth, which took place prior to the Human Rights Act 1998 coming into force⁹ and had no continuing effect capable of being a violation of the Convention.¹⁰ The Supreme Court disagreed.¹¹ It focused not on the effects of differential treatment in nationality law on the present day:

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.

It held that what fell to be justified was not liability of non-citizens to deportation but

...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.

The Supreme Court held that the difference in treatment was based solely on birth status and could not be justified, relying on case law of the European Court of Human Rights including *Genovese v Malta* (2014) 58 EHRR 25.¹² The Secretary of State was not entitled to certify Mr Johnson’s appeal against his deportation as ‘clearly unfounded’ under s 94(1) of the Nationality, Immigration and Asylum Act 2002. That appeal must be allowed to proceed and was ‘certain to succeed’.¹³

⁸ *R (Johnson) v Secretary of State for the Home Department* [2016] EWCA Civ 22.

⁹ *Ibid.*, paragraph 47.

¹⁰ See *ibid.*, paragraph 28.

¹¹ *Ibid.*, paragraph 28.

¹² *Ibid.*, paragraphs 24–26.

¹³ *Ibid.*, paragraphs 34–35.

That the effect of the good character requirement was to get rid of registration by entitlement was also considered in the case of *Remi Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236. Mr Akinyemi was born in the UK on 21 June 1983, at a time when neither of his parents were settled. His father subsequently did settle and his late mother is assumed to have done so.¹⁴ Mr Akinyemi could, at the time as his parents settled, have been registered under s 1(3) of the British Nationality Act 1981 and from the age of 10 been registered by entitlement under s 1(4) of that Act. But no steps were taken to register him. His right to register under s 1(3) ceased on his attaining the age of majority. The imposition of a good character requirement in December 2006,¹⁵ meant that as an adult with a criminal record, including convictions for importing heroin, he would not pass the good character test that forms part of the requirements to register under s 1(4). For those convictions, he faced deportation.

The Court of Appeal rejected the characterisation of his presence in the UK as unlawful within the meaning of s 117B of the Nationality, Immigration and Asylum Act 2002, which purports to give effect to Article 8 of the European Convention on Human Rights in domestic law and to strike the balance between private rights and the ‘public interest’ as expressed in Article 8(2). The court held that, given Mr Akinyemi’s presence was in breach of no specific provision and that he had had, from the ages of four to 23, ‘an absolute right at any time to acquire British nationality simply by making the necessary application’,¹⁶ the judge below had misdirected herself as treating his presence as unlawful. The Court of Appeal was not, however, persuaded that the only possible conclusion was that Mr Akinyemi’s human rights would be breached by his deportation, given his ‘serious and persistent’ record of offending. The question of whether his deportation would be proportionate fell to be determined again in a rehearing *de novo*.

R (on the Application of David Fenton Bangs) v Secretary of State for the Home Department

Prior to 1 January 1983, British nationality law did not accord women equal rights with men with respect to the nationality of their children. Women could not pass on their nationality to children born overseas.¹⁷ This was addressed

¹⁴ *Remi Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236, paragraph 2.

¹⁵ Immigration, Asylum and Nationality Act 2006, brought into effect 4 December 2006 by SI 2006/2838, art 4(1) read with art 4(2).

¹⁶ Paragraph 43 of the judgment.

¹⁷ British Nationality Act 1948, s 5(1).

for children born on or after that date by s 2(1) of the British Nationality Act 1981.¹⁸ In the Nationality, Immigration and Asylum Bill of session 2001 to 2002 the government acceded to representations made by Lord Avebury¹⁹ and made provision for a new s 4C of the British Nationality Act 1981,²⁰ giving certain children born overseas to British mothers on or after 7 February 1961, and before 1 January 1983, the right to register as British citizens.

The arguments that succeeded in *Johnson* could be applied to the imposition of a good character requirement in these cases: that *Johnson* involved discrimination on the grounds of birth status, while these cases involved discrimination on the grounds of the gender of the parent, was not a reason to differentiate between them, and indeed, *Johnson* can be characterised as a case of discrimination against men in passing on their nationality to their children.

Therefore, following *Johnson*, it was only a matter of time before this provision was challenged on the same grounds. A consent order and accompanying declaration of incompatibility of the application of the good character requirement to registration pursuant to section 4C were made in similar terms to those in *Johnson* in the case of David Fenton Bangs.

British Nationality Act 1981 (Remedial) Order 2018

The government response to *Johnson* was tardy but came at last in the British Nationality Act 1981 (Remedial) Order 2018, published on 15 March 2018, which also dealt with the declaration of incompatibility in Bangs.²¹ The order removed the good character requirement in cases where a person would have been born British but for the discrimination against those whose fathers were not married to their mothers or who were born to British mothers overseas, but retained it, save in statelessness cases, for persons who would have been entitled to register as British under sections 1(3), 3(2) and 3(5) of the British Nationality Act 1981 but for the discrimination addressed.²² Both the draft order and the order in its final form retained a requirement that such persons be of ‘good character’, otherwise the Secretary of State has no power to register them.

¹⁸ Read with s 50(9) to (9C), as amended.

¹⁹ See HL Deb 08 July 2002, vol 637 cc476-477; HL Deb 09 October 2002, vol 639 col 267.

²⁰ Inserted by s13(1) of the Nationality, Immigration and Asylum Act 2002 as of 30 April 2003 (SI 2003/754).

²¹ See <https://www.gov.uk/government/publications/good-character-requirement-a-remedial-order>.

²² Addressed in s 4F of the British Nationality Act 1981.

Not all those discriminated against find a remedy in the Order. Anyone who had turned 18 before it was made and had no pending application on that date has been forever denied the chance to register. Many, certain of rejection, would not have bothered to apply. Similarly, for those whose parents, who could have benefited from the provisions in the remedial order, have died since the judgment of the Supreme Court in *Johnson*. Some of these persons will have been cut out of a route to British citizenship which required the prior registration of their parents.

These were among the concerns addressed by the Joint Committee on Human Rights in its report on the draft Order.²³

Overall the Committee welcomed the draft Order,²⁴ but it highlighted that discrimination remained. In its report the Committee invited the Home Secretary to consider using the forthcoming Immigration Bill to address remaining discrimination in British nationality law.²⁵ It recommended that the government bring forward the necessary legislation to remedy this remaining discrimination at the first available opportunity.²⁶

The Order has yet to be made. The government anticipates its coming into effect in early 2019, subject to parliamentary scrutiny.²⁷

The Approach in Canada

In both *Johnson* and *Akinyemi*, the courts were attempting to right the wrongs of history applying broad principles. We can look, for comparative purposes, to the way in which the courts of Canada have grappled with similar questions in a series of citizenship cases.²⁸ These have turned on the application of the Canadian Charter of Rights and Freedoms which does not have retrospective effect.²⁹ *Benner v Canada (Secretary of State)*, [1997] 1 S.C.R. 358 concerned provisions put in place to allow those born outside Canada to Canadian

²³ *Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018*, Joint Committee on Human Rights Fifth Report of session 2017–2019, HC 196, HL Paper 146.

²⁴ *Ibid.*, paragraph 5.

²⁵ *Ibid.*, paragraph 32.

²⁶ *Ibid.*, paragraph 40.

²⁷ See <https://www.gov.uk/government/publications/good-character-requirement-a-remedial-order>.

²⁸ *Benner v Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Dubey v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 582, 222 F.T.R. 1; *Wilson v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1475; *Augier v Canada (Minister of Citizenship and Immigration)*, 2004 FC 613; *Minister of Citizenship and Immigration v Joseph Taylor* [2007] FCA 349 (Canada).

²⁹ *Benner v Canada (Secretary of State)*, [1997] 1 S.C.R. 358, paragraph 40.

mothers before 15 February 1977, before which date women could not pass on their nationality to their children born overseas, to register as Canadian. There are close parallels with the *Johnson* case: those registering were required to undergo a security check and to swear a citizenship oath and it was alleged that these discriminated against them. The court held that the subject of the challenge was not the legislation that had prevented women from passing on their citizenship but rather

*The appellant's quarrel is purely with the operation of the current Act and the treatment it accords to him because only his mother was Canadian. To the extent that the current Act carries on the discrimination of its predecessor legislation, it may itself be reviewed under s. 15, which is all the appellant has asked us to do*³⁰

In *Augier v Canada (Minister of Citizenship and Immigration)*, 2004 FC 613 the court held that s 5(b) of the Citizenship Act 1970, as amended, unlawfully discriminated on the grounds of race and gender contrary to the Canadian Charter of Rights and Freedoms. At the time of Mr Augier's birth, a child born outside Canada whose parents were not married to each other did not take the citizenship of his father and s 5(b), while changing the law for those born after 15 February 1977, did nothing for those in his position. The Court held that the applicant was discriminated against on two grounds: the marital status of his parents at the time of his birth and the gender of his Canadian parent. This denied him the benefit of claiming Canadian citizenship and was found to be unconstitutional.

Minister of Citizenship and Immigration v Joseph Taylor [2007] FCA 349 (Canada) also concerned the child of an unmarried father, but one born in 1944, before 'Canadian citizenship' was a citizenship, rather than an immigration status. The Federal Court of Appeals held that, unlike the appellants in *Benner* and *Augier*, Mr Taylor was complaining of the effects of s 4(b) of the Canadian Citizenship Act 1947, which created Canadian citizenship as a nationality, and not of provision of the Citizenship Act 'live and in force'³¹ as relied upon in *Augier*. It held that therefore his argument based on the Canadian Charter of Rights and Freedoms could not succeed.

Mr Taylor further contended that he was discriminated against by the provisions of the 1977 Act³² because of his date of birth, and that this amounted to age discrimination. The Federal Court of Appeals did not agree. It held that this argument sought to read the repealed paragraph 4(b) into the current legis-

³⁰ Paragraph 76 of the judgment.

³¹ *Minister of Citizenship and Immigration v Joseph Taylor* [2007] FCA 349 (Canada), paragraph 103.

³² Paragraphs 3(1)(d) and (e).

lation. It overturned the judgment of the Federal Court of British Columbia,³³ and found against him, highlighting the legal and evidential complexities of the approach he advocated:

...it would be unfair to the Parliament and to the government of that day to judge moral values of a distant past in the light of today's values. It could also be an unbearable burden on today's government to demonstrate today that the measures taken then were then justified in a free and democratic society. ...All this is to suggest that courts may not be the best instruments for rewriting history.³⁴

The case did not progress to the Supreme Court of Canada because the government of Canada agreed to amend the law.³⁵

The Different Approaches, in *Johnson* and in the Canadian Cases, Evaluated

Differential treatment is the point of nationality law, eloquently summed up by Robin White of the University of Dundee in his paper for the second European Conference on Nationality in 2001 as 'The point of human rights is that all humans have them. The point of nationality is that all humans do not.'³⁶ Some of the grounds of differentiation used in the past today constitute unlawful discrimination. Gradually, they are eradicated from current rules on acquisition and loss. But their effects play out in the present and decisions must be taken as to whether, and how, to attempt to address those effects.

The Supreme Court expressed its decision in *Johnson* in terms of the effect of the law and the ultimate cause of differential treatment in the present day, which it found to be discrimination on the grounds of birth status. It could have adopted the approach of the Canadian courts and come to the same conclusion,

³³ *Taylor v Canada (Minister of Citizenship and Immigration)* [2006] FC 1053. <http://www.canadianwarbrides.com/taylor-joe-bio.asp> (accessed 16 September 2017).

³⁴ *Minister of Citizenship and Immigration v Taylor* [2007] FCA 349 at paragraph 107.

³⁵ Section 3(1)(b) of the Citizenship Act, as amended by Bill C-37 of 9 January 2008, allows Canadian nationality to be transmitted to the first generation born abroad, while s 3(1)(j) permits those in Mr Taylor's position to resume citizenship. See Bill C-37: An Act to amend the Citizenship Act of 9 January 2008 https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C37&Parl=39&Ses=2&source=library_prb (accessed 16 September 2017). The subsequent amendments were nonetheless criticised for preventing citizenship from being passed to the second generation born or adopted abroad to, or adopted from a foreign country by Canadian parents.

³⁶ *How does nationality integrate?* Paper for the 2nd European Conference on Nationality, 8–9 October 2001.

pointing to the good character requirement as the offending provision ‘live and in force’. For the Supreme Court in *Johnson*, it all turns on how discrimination is characterised. Find the provision that leads to differential treatment today and consider whether it is discriminatory. The approach of the Supreme Court, which does not appear to require that a provision be ‘live and in force’, but only that its effects bite in the present day, is potentially the more inclusive one, which could lead to extensive challenges to the discriminatory laws.

Other Discrimination on the Grounds of Birth Status: Adoption

Johnson concerned discrimination on the grounds of birth status. Another example of such discrimination is that the British Nationality Act 1981 also discriminates against adopted children. Section 3(2) of the Act, which makes provision for the registration of children as British on the basis of their parents’ residence in the UK prior to their birth, does not distinguish between children born to British parents by descent or adopted by them. It refers to the status of the parent at the time of the birth. This cannot be said of s 3(5) which provides for registration on the basis of residence subsequent to the birth. Section 3(5) (a) requires that at the time of the applicant’s birth, ‘his father or mother was a British citizen by descent’. Section 50(9) of the Act defines the mother as the person who gives birth to the child, and s 50(9A) identifies the father as her husband, going on to provide alternatives where this does not yield a result. Thus, the nationality of the birth parents of the adopted child will determine whether or not they can register under this provision.³⁷

DISCRIMINATION AGAINST WOMEN IN PASSING ON THEIR NATIONALITY TO THEIR CHILDREN

Discrimination against women in passing their nationality on to their children, the subject of *Bangs*, is today receiving particular attention in the context of the fight against statelessness. On 18 June 2014 an international campaign to end gender discrimination in nationality laws was launched by a coalition of civil society groups, supported by UN Women and the UNHCR.³⁸ Now the Global Campaign for Equal Nationality Rights, it has enjoyed considerable success.³⁹

³⁷ I am grateful to Marie-Christine Allaire-Rousse of South West Law for identifying this discrimination.

³⁸ Ending gender discrimination in nationality laws, UNHCR press release 18 June 2017, available at <http://www.unhcr.org/uk/news/press/2014/6/53a15cc56/ending-gender-discrimination-nationality-laws.html> (accessed 21 September 2017).

³⁹ See <http://equalnationalityrights.org/about-us> (accessed 21 September and ‘Ensuring gender equal nationality laws is key to ending statelessness’, Catherine

Article 9 of the UN Convention on the Elimination of All Forms of Discrimination against Women⁴⁰ not only requires states to afford women equal rights with men to acquire, change or retain their nationality, it requires that they be afforded equal rights with men in respect to the nationality of their children. Like the other articles of the UN Convention on the Rights of the Child,⁴¹ Article 7, the right of the child to acquire a nationality must be applied without discrimination, including on the grounds of sex or other status. It is arguable that the recognition of the rights of women to pass their nationality to their children has been a catalyst for the acceptance of dual nationality, even in times when concerns of national security might seem to point the other way.⁴² It is against this background that the discrimination in nationality law, as a result of differential treatment according to gender and marital status in the past, has received increasing scrutiny.

The mechanics of section 4C of the Nationality, Immigration and Asylum Act 2002, described in the discussion on *Bangs* above, were that the applicant had to be born within the relevant dates and prove that they could have become a citizen of the UK and Colonies under s 5 of the British Nationality Act 1948, had that section provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father and who would subsequently have had the right of abode in the UK by virtue of s 2 of the Immigration Act 1971 (c. 77).

Section 5 of the 1948 Act provided for a child, wherever born, of a father who was a British Citizen otherwise than by descent, to be born British. If the father was a British citizen by descent, s 5 required that one of four conditions (a) to (d) must be met. These pertain to (a) the child, or the father, being born in a place where the sovereign has or had jurisdiction over British subjects; or (b) for a child not born in such a place for the birth to have been registered with a UK consulate with a year of its occurrence; or (c) that the father of the child was in Crown Service at the time of the birth; or (d) that the child was born in Canada, Australia, New Zealand, the Union of South Africa, Newfoundland,

Harrington, 15 January 2015, available at <http://www.statelessness.eu/blog/ensuring-gender-equal-nationality-laws-key-ending-statelessness> (accessed 30 September 2017).

⁴⁰ UN Treaty Series, vol 1249, p. 13.

⁴¹ UN Treaty Series, vol 1577, p. 3.

⁴² See e.g., the discussions of amendments and questions tabled by Lord Marlesford at HL Deb 9 Feb 2016, col GC155; HL Deb 9 February 2009, col WA 167; HL Deb 12 January 2009, col 117W; HL Deb 11 Feb 2009, col 1158HL; HL Deb 11 Dec 2013, col WA127-8; HL Deb 7 Apr 2014, col 1202; HL Deb 6 April 2014, col 1199ff; HL Deb 9 Feb 2016, col GC157-159.

India, Pakistan, Southern Rhodesia or Ceylon where a citizenship law had taken effect, but the child had not become a citizen of one of those countries.

The significance of the 7 February 1961 date was that persons born after that date had come within the scope of a policy introduced on 7 February 1979 to register by discretion children born overseas to British mothers who had faced discrimination on the grounds of the gender of their British parent.⁴³ Lord Filkin was pressed by Lord Avebury to remove the 7 February 1961 cut-off⁴⁴ and responded, echoing the Canadian Federal Court of Appeals in the *Joseph Taylor* case, ‘One can only go so far towards righting the wrongs of history before the number of “what ifs” to be taken into account becomes unmanageable.’⁴⁵

Lord Filkin appears to be complaining of the difficulties for the legislature in making provision for the myriad consequences of past laws. Here, the courts have the advantage over the legislature as they are asked to apply legal principles to a particular factual situation and can concentrate on a particular effect of legal provision, tracing its consequences to the present day, without having to envisage all possible effects.

Section 4C as originally enacted provided for registration as of right, and, following a direct appeal from Michael Tuberville of the CAMPAIGNS⁴⁶ group promoting the change in the law to the Rt Hon Theresa May MP,⁴⁷ no fee was payable.⁴⁸ The Explanatory Memorandum to the Immigration and Nationality (Fees)(No.2) Regulations 2010 SI 2010/2807 gives as its rationale equal treatment with those born to British fathers:

7.17 We propose introducing a fee waiver where a person makes an application for a Nationality registration in reliance upon section 4C of the British Nationality Act 1981 to better align the position of those applicants to that of applicants born to British fathers Registering [sic.] as British Citizens.

⁴³ See *Fransman*, British Nationality Law, 3rd edition, Bloomsbury Professional (London), s 17.7 and note 65.

⁴⁴ Lord Avebury had tabled a version of the amendment without the cut-off date, Amendment 88, see HL Deb 08 July 2002, vol 637 col 476. The author and Laurie Fransman QC worked closely with him on these attempts and advocated tabling amendments both with and without the cut-off date.

⁴⁵ HL Deb 31 October 2002, vol 637 col 298, Nationality, Immigration and Asylum Bill, Third Reading.

⁴⁶ Children and Maternal Parents against Immigration and Nationality Situation.

⁴⁷ Personal communication to the author. Mr Tuberville’s email was bold and memorable in its conversational tone, but did the trick. More detail can be found on the CAMPAIGNS page of www.tuberville.org (accessed 30 September 2017).

⁴⁸ Immigration and Nationality (Fees)(No.2) Regulations 2010 SI 2010/2807, paragraph 22.3.

On 31 March 2008,⁴⁹ David Davies MP raised the case of Ms Deborah Philips, a constituent affected by the February 1961 cut-off date.⁵⁰ In response, the Minister, Liam Byrne MP, cited Lord Filkin's comment about only going so far to right the wrongs of history, without challenging it, but 'nevertheless' committed to a legislative solution. The 2008 document *Making change stick: an introduction to the immigration and citizenship bill*⁵¹ confirmed the intention. It gave no further explanation of the rationale, but the confirmation sits under a subheading 'Fair rights to citizenship'. Arguably, it was felt that no rationale was needed. Mr Phil Woolas MP, the Minister, introducing the clause that removed the cut-off date⁵², declared

*We concur with the other place, again, on this point about descent through the female line, and we accept that we should right that wrong... At the moment there is a cut-off date of 1961, but we are righting that wrong.*⁵³

The restriction was removed.⁵⁴ By then, however, registration under s 4C was no longer by entitlement. In 2006, the ease with which David Hicks, then detained in Guantanamo Bay, registered under s 4C⁵⁵ had been was one of the spurs to an introduction of the 'good character' requirement for all registrations.⁵⁶ David Hicks was an Australian, born to a British mother. With Australia failing to defend him from appearance before a US military commission, he attempted to acquire British nationality, divest himself of Australian nationality, and hold on to his British nationality because, at the time,⁵⁷ persons could not be deprived of British nationality where this would leave them stateless. The Secretary of State originally sought to refuse to register him on character grounds, but Mr Justice Collins quashed this decision on 13

⁴⁹ HC Deb 31 March 2008, vol 474 cols 601–6.

⁵⁰ I am grateful to Ms Philips' lawyer, Trevor Wornham, for alerting me to the parliamentary question.

⁵¹ UK Border Agency 2008, available at <http://webarchive.nationalarchives.gov.uk/20100406060916/http://www.ukba.homeoffice.gov.uk/managingborders/simplifying> (accessed 16 September 2009).

⁵² Clause 46 of Bill 83, session 2008–2009.

⁵³ HC Committee 11 June 2006, col 126.

⁵⁴ See Borders, Citizenship and Immigration Act 2009 s 45 *Descent through the female line*, inserting new s 4C into the British Nationality Act 1981.

⁵⁵ *Secretary of State for the Home Department v David Hicks* [2006] EWCA Civ 400.

⁵⁶ Immigration, Asylum and Nationality Act 2006 s 58 *Acquisition of British Nationality & c.* See *Secretary of State for the Home Department v David Hicks* [2006] EWCA Civ 400.

⁵⁷ Before the coming into force of s 66 of the Immigration Act 2014, amending s 40 of the British Nationality Act 1981.

December 2005 because the section made no provision for this. Section 58 of the Immigration, Asylum and Nationality Act 2006 imposed a good character test on all registrations, with the exceptions of children under 10 years old,⁵⁸ in cases of statelessness⁵⁹ and in cases under s 4B of the British Nationality Act 1981.

The other spur was the perceived need to be seen to act in response to the 7 July 2005 bombings in London, which imposed a good character test on all those registering as British citizens under s 4C of the British Nationality Act 1981, and other provisions of British nationality law.⁶⁰ It was the imposition of that requirement that was attacked in *Bangs*.

The Case of *Romein*

The 'good character' requirement was not the only barrier facing those who sought to register under s 4C as amended by the Borders, Citizenship and Immigration Act 2009. The rewriting of the provision went much further than removing the cut-off date. In the new s 4C, a much more restrictive approach was taken to registration, purporting to reflect the experience and policy of the Nationality Directorate of the Home Office in dealing with applications between 2003 and 2009.⁶¹ For example, it required that where acquisition would not have been automatic had the child been born to a British father, then the mother had to have fulfilled all the steps that a father would have had to fulfil. This is also the approach taken in sections 4E to 4I of the British Nationality Act 1981, inserted by the Immigration Act 2014 and dealing with children born out of wedlock.

Challenging the restrictive elements of the redraft of s 4C, Lord Avebury drew attention⁶² to Article 9(2) of the UN Convention on the Elimination of

⁵⁸ The Bill that became the Immigration, Asylum and Nationality Act 2006 was taken through the House of Lords by the then Minister for Children, the Baroness Ashton of Upholland. The author met with her and she was persuaded that the requirement was both foolish, (for example in the case of babies under 12 months old, as in the registration provisions s 3(2) of the British Nationality Act 1981 then in force) and inappropriate, (for example in the case of children under six registering under that provision). The age of 10 was subsequently selected, being the age of criminal responsibility in the UK.

⁵⁹ Cases under Schedule 2 to the British Nationality Act 1981.

⁶⁰ Immigration, Asylum and Nationality Act 2006 s 58 *Acquisition of British Nationality* & c. The provisions were subsequently consolidated into the British Nationality Act 1981 s 41A. Section 41A was inserted (13 January 2010) by the Borders, Citizenship and Immigration Act 2009 (c. 11), ss. 47(1), 58; S.I. 2009/2731, art. 4(f).

⁶¹ Communication from the Home Office to the author.

⁶² HL Deb 2 March 2009, col 610.

All Forms of Discrimination Against Women. This provides ‘States Parties shall grant women equal rights with men with respect to the nationality of their children’. He also drew attention to the UK’s reservation to that Article which continued in force until it was withdrawn on 22 March 1996:

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom’s acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

Lord Brett, for the government, indicated that the reservation was not ‘linked to this clause’⁶³ but Lord Avebury doubted this, given the terms of the reservation.

The draft did recognise and attempt to deal with further provisions of the 1948 Act under which discrimination might have bitten: ss 12(2) (3)(4) or (5) read with s 5.

The challenge to the requirements introduced in 2009 to meet all other requirements for registration was put in a much more conservative way than the challenges in *Johnson* and *Bangs*. The requirement to meet a condition imposed by s 5(1)(b) of the 1948 Act, that to pass nationality to a child born to a British citizen by descent the birth of that child must have been registered at a British consulate, was tested in the case of *Shelley Elizabeth Romein* [2016] CSH 24,⁶⁴ which went to the Supreme Court as *The Advocate General for Scotland v Romein* [2018] UKSC 6.

Ms Romein was prevented from registering under s 4C because her mother had not registered her birth at the British consulate in Johannesburg, where the family lived, during the first 12 months of her life. But Shelley Romein’s mother provided evidence that she had indeed approached the consulate about registering the birth of her daughter, only to be told that because she was a woman, it would serve no purpose.⁶⁵

⁶³ *Ibid.*, col 608.

⁶⁴ See <https://www.scotcourts.gov.uk/search-judgments/judgment?id=1ac50fa7-8980-69d2-b500-ff0000d74aa7> (accessed 16 September 2017). I am grateful to Darren Stevenson of McGill and Co., solicitor in the case, for alerting me to it at an early stage and sharing his analysis of it.

⁶⁵ Paragraph 2 of the judgment.

The Court of Session took a purposive approach to the construction of the section:

Both parties were agreed that a purpose of the 1981 Act, as subsequently amended in terms of both the enactments of section 4C, was to reduce gender discrimination in the acquisition of citizenship. We accept that achieving that purpose retrospectively may introduce practical difficulties and that Parliament may reasonably have accepted an imperfect legislative outcome. Nevertheless, given the accepted purpose, as reinforced by the international obligation, we would see that the intention of Parliament is more likely to have been to achieve a greater rather than a lesser degree of reduction in discrimination.⁶⁶

That court analysed the section, following counsel's suggestion, in terms of counterfactuals, the 'what ifs' of which Lord Filkin had complained when urged by Lord Avebury to right the wrongs of history. The first: a legal counterfactual, that the 1948 Act provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father. The second: 'what would have been done by the applicant's parents had the law actually been as the first counterfactual assumes it to have been?'⁶⁷

The court held the question of registration was a matter of proof on the balance of probabilities in the same way as requirements (a)(c) and (d) of s 5(1) which were matters of historical fact: 'Each of the exceptions is a set of factual circumstances which, if disputed, would have to be established on a balance of probabilities as a matter of fact.'⁶⁸

The court held that the applicant for registration under s 4C who needs to rely on the counterfactual of registration of the birth must prove that the birth would have been registered had s 5 of the 1948 Act provided for citizenship by descent from a mother or a father in equal terms. There is no assumption that a British mother by descent would have registered her child's birth, but it is open to her to prove that she would have done so.

Rather than being required to use only broad constitutional principles to right historical discrimination the court was applying the detailed provisions of a statute, albeit that it takes a purposive approach to construction.

The Supreme Court disagreed with this approach. It held that an approach based on counterfactual assumptions which included the steps which the parents would have taken, would leave it open to an applicant to say that had the law allowed citizenship by descent in the female line the mother would have moved to a British-controlled territory for the birth or that one or other parent would have entered or continued in Crown service in time for the birth

⁶⁶ Paragraph 30 of the judgment.

⁶⁷ Paragraph 18.

⁶⁸ Paragraph 24 of the judgment.

etc. It held that it seemed ‘extremely unlikely’ that parliament had intended that the operation of the provision would depend on the practically unanswerable questions about what adjustments parents would hypothetically have made to their lives with a view to obtaining British citizenship for their children.

Instead, the Supreme Court held that the solution was to treat the registration condition in the British Nationality Act 1948 by s 4C as inapplicable in applications for citizenship by descent from the mother. It held that:

Because section 4C requires one to assume that section 5 of the 1948 Act had always provided for citizenship by descent in the female line, it is not possible to apply the registration condition in section 5(1)(b) of the 1948 Act to those claiming on that basis, because its application would make nonsense of that assumption. The past is done, and cannot be undone.⁶⁹

The Supreme Court dealt with two objections to its approach,⁷⁰ both of which were based on complaints that it gave rise to fresh discrimination.

The simplest of these was that its approach left claimants through the female line in a better position than claimants through the male line. Those who could have been registered as citizens because their fathers were citizens, but for whatever reason were not, can do nothing about it, whereas those born to British mothers can. The Supreme Court held that

there is no discrimination between applicants, whether by gender or otherwise. There was historic discrimination between their parents, since a father was held to transmit his citizenship to his children while a mother was not. Section 4C simply corrects the subsisting consequences for their children of this historic discrimination. There is no question of current discrimination.

No current discrimination perhaps, but the differential treatment has consequences in the present day.

The second objection is more technical. It was argued that the approach of the Supreme Court leads to unacceptable discrimination between those born before and after the 1948 Act came into force on 1 January 1949 because s 1(1)(b)(v) of the British Nationality and Status of Aliens Act 1914 applied a condition of registration for any person born outside His Majesty’s dominions. The Advocate General argued that in the case of persons born before 1 January 1949 this ruled out claims to citizenship by descent through the female line. This was based on reading s 1(1)(b)(v) in accordance with the assumption that a provision of the law at some time before 1 January 1949, which provided for a nationality status to be acquired by descent from a father, provided in the

⁶⁹ Paragraph 12.

⁷⁰ At paragraphs 14 and 15.

same terms for its acquisition by descent from a mother, and references in that provision to a father were references to the applicant's mother. The Supreme Court held that this was not anomalous but arose from the differences between s 4C(3C) and s 4C(3D) of the 1981 Act but, ultimately, preferred not to decide the point.

Eliminating Discrimination in the British Overseas Territories

Attempts to eliminate discrimination have themselves treated persons differently depending upon the British nationality that they hold. The changes to the law on legitimacy with effect from 1 July 2006 benefited both British citizens and British Overseas Territories citizens, because they changed the definition of a parent under the 1981 Act and thus applied equally to both. The registration provisions for those born out of wedlock, 4E to 4I, however, apply only in cases of registration as a British citizen. Section 4C, providing for the registration of those born overseas to British mothers, applies only where a person is registering as a British citizen. Section 5 of the British Nationality Act 1948 provides that the status of citizenship of the UK and Colonies can only pass through the paternal line to those whose fathers are married to their mothers. Thus, those whose fathers were not married to their mothers cannot benefit from s 4H of the 1981 Act. Section 4H provides for a route to registration as a British citizen for citizens of the UK and Colonies unable to become British because it is targeted at those citizens of the UK and Colonies who did not become British citizens on commencement of the 1981 Act. But those whose fathers were not married to their mothers were not citizens of the UK and Colonies on 1 January 1983, when the British Nationality Act 1981 came into force. Section 4I is designed as a catch all provision for those who were not citizens of the UK and Colonies on commencement of the British Nationality Act 1981 but it captures only those who would have become British citizens on the commencement of the Act had their parents been married to each other, not those who would have become British dependent territories citizens.

Lord Avebury made the case for the extension of s 4E to 4I to the overseas territories. Lord Taylor of Holbeach responded, 'Changes to those provisions require consultation with the territories concerned and this has not been possible in the time available. ... the Government will look for suitable opportunities to discuss this issue with the overseas territories once the provisions are implemented.'⁷¹ With effect from 21 May 2002, s 3 of the British Nationality Act 1981 also makes provision for British Overseas Territories Citizens to acquire British citizenship. While the UK government has power to legislate on nation-

⁷¹ HL Deb 6 May 2014, col 1416 per Lord Taylor of Holbeach.

ality law without the consent of the territories, it was argued that would not be politically acceptable.

For a long time, it appeared that Westminster had made no attempt to find suitable opportunities to discuss the provisions with the overseas territories. When, however, the Joint Committee on Human Rights raised the matter in its report on the British Nationality Act 1981 (Remedial) Order 2018 described above, the Minister for Immigration responded that such consultation was now on her agenda and that she was grateful to the Committee for bringing it to her attention. She stated that she would ask officials to consider this for the next draft of the Remedial Order in consultation with representatives in the British Overseas Territories.⁷²

Discrimination as a Result of the Deemed Paternity Provisions

In *K (A Child) v The Secretary of State for the Home Department* [2018] EWHC 1834 a further declaration of incompatibility of British nationality law with human rights was made.

Section 50(9A) of the British Nationality Act 1981 provides

For the purposes of this Act, a child's father is –

- (a) the husband, at the time of the child's birth, of the woman who gives birth to the child; or
- (b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or
- (ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or
- (c) where none of the paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to paternity.

K's biological father was British, but her mother was at all material times married to another man, deemed to be her father by s 50(9A)(a). Helen Mountfield QC, sitting as a deputy high court judge, dealt with the case on the basis of Article 8 of the European Convention on Human Rights, read with Article 14. She did not find it necessary to determine whether the distinctions in the case constituted discrimination on grounds of 'birth' or of 'any other status' for the purposes of Article 14.

⁷² *Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018*, Joint Committee on Human Rights Fifth Report of session 2017–2019, HC 196, HL Paper 146, Annex *Correspondence*, letter of the Minister of State for Immigration of 4 May 2018 at paragraph 13.

The judge accepted that it was a legitimate goal of social policy to achieve legal clarity as to whom the law treats as parents, and that the number of parents could be limited to two.⁷³ But she did not consider that s 50 (9A) was the least restrictive means of achieving that goal. A child should have to apply for a person other than the husband of his/her mother to be treated as his/her father but should not have to ask for an exercise of discretion in his /her favour to achieve this, by seeking a discretionary registration under s 3(1) of the British Nationality Act 1981.

The judge declared the provision which prevents a child, other than a child born under a licensed IVF arrangement, from being recognised as the child of the biological father for the purposes of acquiring his nationality, if the child's mother was married to someone other than the biological father at the time of the child's birth, was incompatible with Article 14 ECHR read with Article 8.

The government has yet to address the judgment.

CONCLUSION

As these cases identify, righting historical wrongs is a task of considerable complexity. The actions of the parents, whether stemming from disinterest or strong convictions, play out in the nationality status of the child. Knowledge of current nationality and future entitlements can shape choices persons make, for example, as to place of residence, and the counterfactuals deprecated by the Supreme Court in *Romein* multiply.

Could Shelley Romein have used the arguments that prevailed in *Johnson*? A British father who was British by descent would have had to register the birth of his child at a British consulate but this is arguably far less onerous a task than proving, many years later, that one would have done so.

The decision to require registration at all in cases under sections 4C and 4F to 4I of the British Nationality Act 1981 was taken on the basis that some persons would not wish to be British citizens. In some cases, for example, automatic acquisition of British citizenship could lead to automatic loss of another nationality. Others might already have acquired British citizenship otherwise than by descent by the time the provisions came into force.⁷⁴ This approach was not contested by those lobbying and advising on the 2002 Act. Registration is a means by which persons with some better claim on British citizenship are exempted, not only from the full rigours of naturalisation, but from the immigration controls to which discrimination and other differential

⁷³ Paragraph 79 of the judgment.

⁷⁴ See Fransman, third edition, *op. cit* at 17.7.1 referring to a Home Office letter of 4 August 2010 setting out this rationale.

treatment of an ancestor has made them subject. Registration by entitlement avoids the problems associated with automatic acquisition as well as many of those associated with conditional registration or registration by discretion. It will not eliminate all differential treatment: for example, children born in the UK prior to registration of the parent under s 4C are not born British.⁷⁵ It also gives rise to new forms of differential treatment as explored by the Supreme Court in *Romein*.

The more the legislature and the courts grapple with those complexities, the more arbitrary the distinctions in treatment between nationals and non-nationals come to seem. At the root of both the *Johnson* and the *Akinyemi* cases is that persons who have lived most of their lives in the UK and have family in the UK are regarded not as the UK's problem to solve but can instead be deported with relative ease. Immigration controls and laws pertaining to immigration status increasingly give form to unequal treatment. The UK's 'hostile environment' policy has increased the reach of those controls into many aspects of daily life: employment;⁷⁶ renting accommodation, banking and driving.⁷⁷ Differences in treatment between nationals and non-nationals are arguably too readily accepted on the grounds that they are justified because they contribute to immigration control, with insufficient attention paid to how far that justification reaches, generally and in the particular case. The UK's current restrictive immigration system and the barriers placed in the way of those wishing to naturalise, not the least of which is the substantial fee,⁷⁸ can only increase the focus on the present-day effects of discrimination in the past and on the discriminatory elements of today's laws. It is the extent of the differential treatment between nationals and non-nationals in the present that falls to be justified and to be challenged.

⁷⁵ The section confers British citizenship by descent, therefore children born outside the UK would not be born British, even after registration: see the British Nationality Act 1981 s 2 (1)(a).

⁷⁶ Immigration, Asylum and Nationality Act s 15 and see the Immigration Act 2016, Part 2.

⁷⁷ Immigration Act 2014, Part 3; Immigration Act 2014, Part 2.

⁷⁸ *Supra*, note 14 and Project for the Registration of Children as British Citizens and Amnesty International UK *Brief on fees for the registration of children as British Citizens*, 28 September 2016, revised 1 January 2017.