Neutral Citation Number: [2025] EWHC 246 (Admin)

Case No: AC-2024-LON-003045

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2025

Before :

DEPUTY HIGH COURT JUDGE AIDAN EARDLEY KC

- -

Between :

THE KING on the application of APD	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Jay Gajjar and Ahmad Badar (instructed by **SAJ Legal**) for the **Claimant**
Tom Tabori (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 22 January 2025

- -

Approved Judgment

Aidan Eardley :

1. This is a judicial review of the Defendant's decision to refuse the Claimant's application to be registered as a British Citizen pursuant to section 4L of the British Nationality Act 1981 (**the 1981 Act**). That is a relatively new provision, inserted by section 8 of the Nationality and Borders Act 2022 (**the 2022 Act**). I am told that it has not yet received judicial attention.

2. The section provides:

> **4L Acquisition by registration: special circumstances**
>
> (1) If an application is made for a person of full age and capacity ("P") to be registered as a British citizen, the Secretary of State may cause P to be registered as such a citizen if, in the Secretary of State's opinion, P would have been, or would have been able to become, a British citizen but for—
>
> (a) historical legislative unfairness,
>
> (b) an act or omission of a public authority, or
>
> (c) exceptional circumstances relating to P.
>
> (2) For the purposes of subsection (1)(a), *"historical legislative unfairness"* includes circumstances where P would have become, or would not have ceased to be, a British subject, a citizen of the United Kingdom and Colonies or a British citizen, if an Act of Parliament or subordinate legislation (within the meaning of the Interpretation Act 1978) had, for the purposes of determining a person's nationality status—
>
> (a) treated males and females equally,
>
> (b) treated children of unmarried couples in the same way as children of married couples, or
>
> (c) treated children of couples where the mother was married to someone other than the natural father in the same way as children of couples where the mother was married to the natural father.
>
> (3) In subsection (1)(b), *"public authority"* means any public authority within the meaning of section 6 of the Human Rights Act 1998, other than a court or tribunal.
>
> (4) In considering whether to grant an application under this section, the Secretary of State may take into account whether the applicant is of good character.

3. My judgment is structured as follows:

A. Factual background (paras 4-12)

B. The Claimant's application and the Defendant's decisions (paras 13-20)

C. The legal framework (paras 21-34)

D. The grounds and the issues for determination (paras 35-42)

E. Issue 1: meaning and effect of *"would have been able to become…"* (paras 43-50)

F. Issue 2: materiality (para 51)

G. Issue 3: the "but for" question (paras 52-62)
H. Issue 4: procedural irregularity (paras 65-68)
I. Conclusion (para 69)

A. FACTUAL BACKGROUND

4. The Claimant is a Pakistani national. She married her husband in 2014. He too was a Pakistani national at the time. He lives and works in the UK and he has a son from a previous marriage. His son was the citizen of another EAA state but has taken British citizenship and lives in the UK. The Claimant and her husband now have two children of their own.

5. The Claimant and her husband have complicated immigration histories. I need only set out some of the details. The Claimant came to the UK in August 2014 and was able to enter as the dependant of her husband who, at that time, had a "Tier 2 (skilled worker)" visa. The Claimant went back to Pakistan in February 2015 for medical reasons and gave birth to her first child there before returning to the UK in July 2015.

6. In early 2016, the Claimant's husband wished to leave his employment and set up in business on his own. This meant that he would lose his Tier 2 visa but he intended to apply for a "Tier 1 (entrepreneur)" visa. He was able to remain in the UK pending the grant of a Tier 1 visa on the basis that he was the parent of his (British National) son. As I understand it however, the Claimant would not have had any right to remain in the UK between her husband's Tier 2 visa expiring and his Tier 1 visa being granted (when she could again enter and remain as her husband's dependant). In the interim the Claimant and her husband decided that she should go back to Pakistan with their first child and await the grant of the Tier 1 visa. She and the child left the UK in March 2016.

7. The Claimant's husband applied for a Tier 1 visa in May 2016 but the Defendant refused his application on 11 May 2016. Judicial review proceedings followed and the Defendant eventually reconsidered and granted the husband his Tier 1 visa on 27 July 2017.

8. While the refusal of his Tier 1 visa was being challenged, the Claimant's husband tried another route: on 14 April 2017 he applied for permanent residency under the Immigration (EEA) Regulations 2016 (**the 2016 Regulations**) on the basis that he was a family member

of an EEA national, i.e. his son from his first marriage (**the PR application**). On 19 September 2017, the Defendant refused the PR application on the basis that the husband's son had by then acquired British citizenship and therefore did not benefit from the terms of Directive 2004/38/EC (**the Free Movement Directive**) which the 2016 Regulations implemented. Accordingly, the Defendant said, the Claimant's husband could not benefit from a derivative right of residence. In support of this reasoning, the decision letter cited both the judgment of the CJEU in *McCarthy v United Kingdom* (C434/09) and the definition of "EEA National" as it then stood in 2016 Regulations.

9. The Claimant's husband challenged the refusal of his PR application and he was eventually granted PR on 12 July 2018, backdated to 29 January 2016. This was following another CJEU case, decided in November 2017: *Lounes v SSHD* (C-165/16). I consider the CJEU judgments and the 2016 Regulations in greater detail below.

10. While the Claimant's husband's legal challenges were continuing, the Claimant was able to spend some time in the UK with him under various types of visa.

11. Meanwhile, having obtained the backdated grant of PR, the Claimant's husband was able to apply for naturalisation under section 6(1) of the 1981 Act and his application was approved on 27 September 2018. He formally became a British citizen in October 2018.

12. In May 2020 the Claimant applied for leave to enter as the spouse of a British citizen and this was granted on 13 November 2020.

B. THE CLAIMANT'S APPLICATION AND THE DEFENDANT'S DECISIONS

13. The Claimant made her application under section 4L on 13 May 2023 using the prescribed form and enclosing written representations. The Claimant's representations set out the chronology that I have outlined above. They asserted that the Claimant has mainly been residing in the UK since August 2014 and they explained the medical reasons for her period of voluntary absence in January-July 2015. They set out the life she and her husband have in the UK (she has a UK degree, they are UK taxpayers, they own substantial property here; she has passed her "life in the UK" test). The representations argued that, had the Defendant not misinterpreted and then misapplied EU law concerning permanent residence and/or had

the Defendant not refused her husband's Tier 1 application in 2016, the Claimant *"would have been naturalised well before 2023*", because she would have remained in, or returned to, the UK under conditions that would have enabled her to obtain indefinite leave to remain and thereupon apply for naturalisation by either 2019 or early 2021.

14. The representations pointed out that the couple's two children have made successful applications for registration, under the "exceptional circumstances" provision in section 3(1) of the 1981 Act, relying on the same circumstances as are set out in the Claimant's representations.

15. The Defendant made a decision on 25 January 2024 refusing the Claimant's application (**the January 2024 Decision**). I do not need to say much about this decision because the Defendant then made a further decision on 6 August 2024 (**the August 2024 Decision**) to the same effect but with fuller and somewhat different reasoning. This came about because the Claimant had asked the Defendant to reconsider the January 2024 Decision (**the Reconsideration Request**).

16. The August 2024 Decision contains an oddity that has given rise to Ground 1 in these proceedings. On the second page, it is stated *"the decision of 25th January 2024 is withdrawn. A new consideration has now been completed"*, whereas, at the end of the document, it states *"I have reviewed the consideration given to your client's application and the decision made on it, I am satisfied that the correct procedures were followed and the correct decision was taken to refuse. There are no grounds to reopen your client's application."*

17. As to the substance of the August 2024 Decision, it states, - on the meaning and effect of s4L, that *"It is not an alternative to meeting other statutory requirements"* and that *"the key issue is whether your client has missed out on becoming a British citizen because of the original Home Office decision being overturned. The Secretary of State would point out that the wording of section 4L is about being prevented from applying, but not from applying earlier"*. The Decision continues:

> *"It is noted that you have stated that your client would have been able to naturalise had her husband's PR application been granted sooner. However, to qualify, your client would still have needed to become*

> *settled in the UK. It is only an assumption that your client would have made an application had she been able to, that she would not have left the UK, that she would have later switched into a spouse route and then accrued five years' residence. It is also an assumption that your client would then have made an application for settlement in the UK and that such an application would have been granted. The wording of the legislation is clear that there should be a causal effect between the act or omission of a public body and the person not being able to become a British Citizen*
>
> *[…] even if your client's husband had been granted PR at an earlier date, there would then have had to have been a number of hypothetical events and assumptions regarding your client's status and various applications that would have been made and that any such applications would have been granted*
> *[…]*
> *The Secretary of State does not accept that there is a clear link between your client's particular circumstances and the fact that she was not able to become a British citizen due to an act or omission from a public authority, or due to historical legislative unfairness as outlined above."*

18. Among other things, the August 2024 Decision draws attention to the fact that the Claimant's husband did not apply for PR until April 2017, and that once his PR was granted, the Claimant did not apply under Appendix FM as a partner until 17 May 2020. It also appears to argue that the Defendant was entitled or bound to reject the PR application when she first considered it in September 2017 because the *Lounes* decision had not yet been handed down.

19. So, the Decision is saying a number of things: first that the Claimant does not come within the ambit of the section at all, because it applies only to those who have been shut out definitively from obtaining citizenship, not people like the Claimant who can still obtain citizenship, albeit at a later date than they might have done. Second, the Decision is saying in any event that the "but for" test is not satisfied in the Claimant's case because, on the assumption that her husband was given PR at an earlier date, there were still so many steps that she would have needed to take, and so many further decisions that would have needed to be made before being in a position to become a British Citizen herself, that there is not a "causal effect" or "clear link" between the Defendant's decision making in her husband's case and her own lack of citizenship. In other words, the Claimant's application is too speculative to succeed.

20. The Claimant places some reliance on a part of the August 2024 Decision that seeks to summarise the earlier January 2024 Decision. There it says, "*It was noted that there <u>were</u>*

some exceptional circumstances in your client's case, but those circumstances did not prevent your client from becoming a British citizen". That is not an entirely accurate summary of what the January 2024 Decision said. The words used there were *"Whilst we recognise that your circumstances might be exceptional or compelling, those circumstances did not directly prevent you from becoming a British citizen. To qualify you would need to show that there was a clear link between your particular and exceptional circumstances and the fact that you were not, or could not become, a British Citizen"* (emphasis added).

C. THE LEGAL FRAMEWORK

The 1981 Act and the Immigration Rules

21. The 1981 Act defines various circumstances in which a person is or may become a British Citizen. Section 1(1) for example provides that a person "shall be" a British citizen if they are born in the UK and his father or mother is also a British citizen or settled in the UK. Other sections provide that a person who is not already a British citizen may become one through registration. They must apply to be registered. In some circumstances the Defendant must then register them if they meet the prescribed criteria ("registration by entitlement", see e.g. s.1(4)); in other circumstances, the Defendant has a discretion whether or not to register.

22. Section 6(2) is the most relevant for present purposes since the parties agree that it is the most obvious section for the Claimant to rely upon. It provides:

> **6.— Acquisition by naturalisation.**
>
> (1) […]
>
> (2) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen [or is the civil partner of a British citizen][1] , the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.
>
> […]

23. Schedule 1 relevantly provides at paragraph 3:

> […] the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it—

(a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and

(b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and

(c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and

(d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and

(e) the requirements specified in paragraph 1(1)(b), (c) and (ca) [*namely, in summary, that the person is of good character, has a sufficient knowledge of English, and has a sufficient knowledge about life in the UK*]

24. Paragraph 3(c) is significant here because, the parties agree, a person in the Claimant's position could only realistically satisfy it by obtaining indefinite leave to remain (**ILR**), also referred to as "settlement".

25. As to ILR for the partner of someone who is a British citizen or who is settled here, this is dealt with in Appendix FM of the Immigration Rules (**the Rules**). In the shorthand used in this litigation, this has been referred to as "the spouse route". They relevantly provide:

Section R-ILRP: Requirements for indefinite leave to remain (settlement) as a partner

R-ILRP.1.1. The requirements to be met for indefinite leave to remain as a partner are that-

(a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for indefinite leave to remain as a partner;

(c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability for indefinite leave to remain; and

(d) deleted

(e) the applicant must meet all of the requirements of Section E-ILRP: Eligibility for indefinite leave to remain as a partner.

[…]

Section E-ILRP: Eligibility for indefinite leave to remain as a partner

E-ILRP.1.1. To meet the eligibility requirements for indefinite leave to remain as a partner after a 5 year qualifying period all of the requirements of paragraphs E-ILRP.1.2. to 1.6. must be met.

E-ILRP.1.2. The applicant must be in the UK with valid leave to remain as a partner under this Appendix […].

E-ILRP.1.3. (1) Subject to subparagraph (2), the applicant must, at the date of application, have completed a period of continuous residence in the UK of at least 5 years (60 months) with the following:

(a) leave to enter granted on the basis of entry clearance as a partner granted under paragraph D-ECP.1.1; or

(b) limited leave to remain as a partner granted under paragraph D-LTRP.1.1; or

(c) a combination of leave under (a) and (b).

(1A) In respect of an application falling within subparagraph (1) above, the applicant must meet all the requirements of Section E-LTRP: Eligibility for leave to remain as a partner ([minor qualifications to this omitted]).

[…]

E-ILRP.1.6. The applicant must have demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with the requirements of Appendix KoLL of these Rules.

Section D-ILRP: Decision on application for indefinite leave to remain as a partner

D-ILRP.1.1. If the applicant meets all of the requirements for indefinite leave to remain as a partner the applicant will be granted indefinite leave to remain.

[…]

26. The key aspect for present purposes is the requirement for 5 years' continuous residence in the UK while enjoying leave to enter and/or limited leave to remain as the partner of someone who is settled here or has citizenship. A further appendix to the rules explains that certain periods spent outside the UK are disregarded for the purposes of calculating the period of continuous residence.

27. Returning to the 1981 Act, section 3(1) gives the Defendant a general discretion to register a minor as a British citizen if an application is made during their minority and they meet the statutory criteria for registration. The Defendant exercised that discretion in favour of the Claimant's two children based, I am told, on the same factual matrix as is relied upon by the Claimant.

28. There is no such general discretion in the case of adult applicants. However, section 4L, it seems, was introduced in order to provide for a more limited discretion to register adults who do not satisfy the criteria for registration or naturalisation set out in other sections of the 1981 Act. I was shown the explanatory notes for the Bill that eventually became the 2022 Act. Paragraphs 127-128 state:

"127 **Background**: The Secretary of State already has a power to register minors as British citizens by discretion under subsection 3(1) of the 1981 Act. No such power exists to grant citizenship by discretion to adults.

128 This clause allows for the grant of British citizenship and/or British overseas territories citizenship to a person who does not meet the existing naturalisation or registration requirements and is intended to benefit those who would have qualified for automatic acquisition of citizenship or who would have met the naturalisation or registration requirements, were it not because of, for example, unintended consequences caused by historical legislation or the result of the act or omission of a public body."

29. Section 4L of the 1981 Act follows a number of other sections that have been inserted over time and on which the Defendant places some reliance, so I shall set out their key aspects for present purposes:

4E The general conditions

For the purposes of sections 4F to 4I, a person ("P") meets the general conditions if—

(a) [...]

(b) at the time of P's birth, P's mother—

(i) was not married, or

(ii) was married to a person other than P's natural father;

(c) no person is treated as the father of P under section 28 of the Human Fertilisation and Embryology Act 1990[or under section 35 or 36 of the Human Fertilisation and Embryology Act 2008;

(ca) no person is treated as a parent of P under section 42 or 43 of the Human Fertilisation and Embryology Act 2008; and

(d) P has never been a British citizen.

4F Person unable to be registered under other provisions of this Act

(1) A person ("P") is entitled to be registered as a British citizen on an application made under this section if—

(a) P meets the general conditions; and

(b) P would be entitled to be registered as a British citizen under [*various specified provisions*] had P's mother been married to P's natural father at the time of P's birth.

[…]

4G Person unable to become citizen automatically after commencement

(1) A person ("P") is entitled to be registered as a British citizen on an application made under this section if—

(a) P meets the general conditions; and

(b) at any time in the period after commencement, P would have automatically become a British citizen at birth by the operation of any provision of this Act or the British Nationality (Falkland Islands) Act 1983, had P's mother been married to P's natural father at the time of P's birth.

[…]

4H Citizen of UK and colonies unable to become citizen at commencement

(1) A person ("P") is entitled to be registered as a British citizen on an application made under this section if—

(a) P meets the general conditions;

(b) P was a citizen of the United Kingdom and Colonies immediately before commencement; and

(c) P would have automatically become a British citizen at commencement, by the operation of any provision of this Act, had P's mother been married to P's natural father at the time of P's birth.

[…]

4I Other person unable to become citizen at commencement

(1) A person ("P") is entitled to be registered as a British citizen on an application made under this section if—

(a) P meets the general conditions;

(b) P is either—

(i) an eligible former British national, or

(ii) an eligible non-British national; and

(c) had P's mother been married to P's natural father at the time of P's birth, P—

(i) would have been a citizen of the United Kingdom and Colonies immediately before commencement, and

(ii) would have automatically become a British citizen at commencement by the operation of any provision of this Act.

McCarthy, the 2016 Regulations and Lounes

30. The *McCarthy* case concerned a dual Irish/UK national who had lived in the UK all her life. She had applied for a residence permit relying on the regulations then in force that implemented the Free Movement Directive (the Immigration (European Economic Area) Regulations 2006; **the 2006 Regulations**). The CJEU held that, in this situation, where Ms McCarthy had never exercised her EU free movement rights and was not being deprived of

the effective enjoyment of those rights, neither the Freedom of Movement Directive nor Article 21 TFEU were engaged. The CJEU concluded at [57]:

> *" Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.*
>
> *Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States."*

31. The 2006 Regulations were amended in 2012 with the intention of reflecting the *McCarthy* decision so as to provide that: *""EEA national"* means a national of an EEA State who is not also a British citizen". The same definition was adopted in Regulation 2 of the original version of the 2016 Regulations, which replaced the 2006 Regulations.

32. The 2016 Regulations (now revoked following the end of the Brexit Implementation Period) provided a derivative right to reside for the parent of an EEA national who resides or has resided in the UK (subject to some immaterial further conditions). However, on a literal reading, the effect of the definition in Regulation 2 was to exclude that right where the EEA national in question had become a British citizen.

33. In *Lounes*, the CJEU had to consider the situation of a Spanish national, Ms Ormazabal, who had moved to the UK and naturalised as a British citizen in 2009 while maintaining her Spanish nationality. It was not her case, rather the case was brought by her husband, an Algerian national, whom she had married in 2014 and who had applied for a UK residence card in reliance on the 2006 Regulations and on the basis that he was a family member of an EEA national. The CJEU held that, once Ms Ormazabal had become a British citizen, her situation fell outside the scope of the Free Movement Directive (as did, necessarily, that of Mr Lounes, which was parasitical on her situation). However, the CJEU went on to say (in effect) that, analysed through the lens of Article 21 TFEU, her situation was different from that of Ms McCarthy, who had never exercised her EU freedom of movement rights.

A person in Ms Ormazabal's situation, the CJEU held, should not be treated less favourably than another EU citizen who has exercised their freedom of movement rights by moving to another Member State but who has not taken the extra step of acquiring the nationality of the state to which they have moved. "Less favourable treatment", the Court held, would include denying derivative rights of residence to a person's spouse which would have been granted if the person had not acquired a new nationality, because it would interfere, in a discriminatory manner, with their right to a family life. See [45]-[62].

34. In light of the *Lounes* decision (handed down on 14 November 2017) it was clear that the 2016 Regulations were incompatible with EU law and liable to be disapplied insofar as they purported to limit the derivative rights of family members of EEA nationals who had exercised free movement rights to situations in which the EEA national had not acquired British citizenship. Regulation 2 was amended to incorporate a *Lounes*-compatible definition of "EEA national". This amendment took effect on 24 July 2018 (notably some days after the Defendant had already decided to grant the Claimant's husband PR on 12 July 2018). Regulation 2 thereafter read:

> *"EEA national"* means—
>
> (a) a national of an EEA State who is not also a British citizen; or
>
> (b) a national of an EEA State who is also a British citizen and who prior to acquiring British citizenship exercised a right to reside as such a national, in accordance with regulation 14 or 15 […]

D. THE GROUNDS AND THE ISSUES FOR DETERMINATION

35. The Claimant's first ground alleges procedural irregularity. The allegation is that the August 2024 Decision contains an internal contradiction in that it purports to be both a reconsideration of the January 2024 Decision and a fresh decision following the withdrawal of the January 2024 Decision. The Claimant alleges that this contradiction is itself sufficient to amount to procedural irregularity. The Claimant further alleges that, if the August 2024 Decision was in reality a new decision, made following the withdrawal of the January 2024 Decision, then she has been unfairly deprived of the right to seek reconsideration of the August 2024 Decision (the Defendant's practice being to offer an opportunity to apply for reconsideration of any decision she makes). Ground 1 seems to be of limited significance and I shall deal with it last, as did the parties in their submissions.

36. Grounds 2 and 3 allege, respectively, irrationality in the August 2024 Decision and irrationality in the January 2024 Decision. The Claimant explained that the case was put like this because of her uncertainty as to whether the January 2024 Decision had indeed been withdrawn, or whether its reasoning was somehow still in play. However, the focus at the hearing was on the August 2024 Decision. For the reasons I give when considering Ground 1/Issue 4 below, I consider that the August 2024 Decision was the correct target and its lawfulness must be judged by the reasoning it contains.

37. The complications do not end there because Grounds 2 and 3 allege irrationality (and only irrationality). I can understand why they were put in this way, because s4L(1) requires the Defendant to formulate an "opinion" about certain matters and that is classic statutory language indicating that the Court should defer to the decision maker's view and only interfere with it if it is irrational.

38. As the Claimant's case has developed however, it has become clear that her challenge is to much more than the question of whether the Defendant formed a rational opinion about her situation. There is a clear challenge as to the Defendant's interpretation of the words "*would have been able to become, a British citizen*". The Claimant also alleges that the Defendant has misconstrued other elements of s4L(1).

39. Questions about the correct interpretation of a statute are entirely matters for the Court: a public authority cannot defend their decision-making on the basis that they applied a reasonably arguable, but ultimately wrong, interpretation of a statute. If the public authority has applied the wrong interpretation then they have committed an error of law and the question then becomes whether the error is a material one, i.e. so significant that it vitiates the decision.

40. So, in this case, questions of irrationality only really arise in the true sense if I am first satisfied that the Defendant's decision did not involve any material error of law. If so, I would need to consider whether the Defendant's opinion, that the "but for" test in s.4L(1) is not made out, is a rational one, in the well-understood *Wednesbury* sense.

41. Although the compendious complaint of irrationality is therefore not an entirely accurate characterisation of the Claimant's case (as Mr Gajjar readily accepted), I do not consider

that there is any unfairness in conducting an analysis on the basis I have set out above. Both parties had pleaded their cases and prepared for the hearing on the basis that there were significant issues of statutory construction to be resolved before one could move to considering the rationality of the Defendant's decision making.

42. Accordingly, in my judgement, the issues that arise are best framed as follows:

(1) What is the correct meaning and effect of the words "*would have been able to become, a British citizen*" in section 4L(1)?

(2) If the Defendant misconstrued those words, does it vitiate the August 2024 Decision (**materiality**)?

(3) If there was no error of interpretation (or it was not sufficiently material to vitiate the Decision), did the Defendant nevertheless act irrationally - or otherwise act unlawfully - in rejecting the Claimant's contention that she would have been able to become a British citizen but for the existence/occurrence of a matter falling within s4L(1)(a)-(c)?(**the "but for" question**)

(4) Was there procedural impropriety and, if so, what is the likelihood that the outcome would have been substantially different if the correct procedure had been followed?

E. ISSUE 1: MEANING AND EFFECT OF "*WOULD HAVE BEEN ABLE TO BECOME…*"

The parties' cases on the meaning and effect of "would have been able to become"

43. The parties' cases are starkly contrasting. The Claimant contends that, to satisfy the *"would have been able to become"* requirement, an applicant needs simply to show that, at some point prior to their section 4L application, they would have been able to become a British citizen but for a reason falling within s4L(1)(a), (b) or (c). The Claimant contends that the requirement does not exclude applicants like her who may be in a position to become a British citizen in the future. The Defendant contends that, properly interpreted, the requirement is only satisfied where the opportunity to become a British citizen has been definitively lost. Each party accuses the other of illegitimately rewriting the statute. The Defendant says that the Claimant's construction involves reading the section as if it said

"would have been able to become, a British Citizen earlier". The Claimant says, the Defendant is impermissibly asking the Court to read the section as if it said *"would have had, but has lost, the ability to become a British Citizen"*.

44. Mr Gajjar's principal submissions in support of the Claimant's interpretation were these:

(1) First, as a matter of ordinary language, to say that something would have occurred in the past does not carry any implication that it cannot occur in the future. The Claimant's interpretation does not therefore involve any impermissible reading-in.

(2) Second, he says that the Claimant's interpretation does not produce any absurd results, whereas the Defendant's does: it would commit the Defendant to considering in every case whether there might be some door to citizenship that might open to the applicant in the future (such as a new marriage). That, he says, requires impossible speculation and (given the multitude of possible routes to citizenship that might arise in the future) would render section 4L ineffective.

(3) Third, he submits that the purpose of section 4L is to relieve the applicant from the effects of some historic wrong (or some exceptional circumstances relating to the applicant) so that it must be interpreted in a way that allows the Defendant, so far as possible, to put the applicant back in the position they would have been in if that historic wrong had not occurred (or the exceptional circumstances had not arisen). He says that this is the approach that is required of the Defendant in other situations where there has been "historic" or "historical" injustice. He refers me to *Ahsan v SSHD* [2017] EWCA Civ 2009 at [120]-[121] and *Patel v SSHD* [2020] UKUT 003521 (IAC) (headnote).

45. Mr Tabori refers me to some well-known statements about statutory interpretation in *Reference by the Lord Advocate on Devolution Issues* [2022] UKSC 31 at [73] and *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at [40]-[43]. With those in mind:

(1) First, he submits that, as a matter of ordinary language, the words *"would have been able to become"* refer specifically and solely to an opportunity that existed in the past

and cannot apply to a person who is still, or will soon be, in a position to obtain citizenship;

(2) Second, as I have mentioned, he accuses the Claimant of reading in the word "earlier" when that cannot be justified under any applicable rules of construction;

(3) Third, he relies on the immediate context, namely s4L(2). He says that all these examples of "historic legislative unfairness" concern situations in which the applicant had lost an opportunity to be or become a British Citizen once and for all (because they concern gateways to citizenship that were only available at birth or during the applicant's childhood) and that this should inform the Court's interpretation of s4L(1).

(4) Fourth, he then refers to the somewhat wider context of sections 4F to 4I which, he says, expressly apply to a person "unable" to be registered as, or to become, a British citizen again, he says, by reason of immutable matters such as the fact that they were born out of wedlock. He says that this too favours a reading of s4L that excludes an applicant who is still able to become a citizen.

(5) Fifth, he says that the mischief s4L is aimed at is the situation of a person who has been definitively excluded from citizenship by reason of some historic wrong etc. He refers me to the explanatory notes which, he says, show that this is the situation Parliament intended to address. He submits that Parliament would not have used primary legislation simply to assist those whose acquisition of citizenship has merely been delayed.

(6) Lastly, he relies on the Defendant's own guidance to her decision makers on section 4L. He points to various places where the guidance indicates that the section applies to a person *"who missed out on an entitlement to register or an opportunity to naturalise"*. He also points to various worked examples in the guidance that indicate that citizenship under section 4L should not be granted when there is another route open to the applicant.

46. I asked each of the parties to explain their case on what is meant in s4L by being "*able to become*" a citizen, and what significance if any I should attach to the fact that Parliament has used this formula rather than saying straightforwardly *"would have become a British citizen"*. Both counsel agreed that the formula had been used to reflect the fact that

"becoming" a British citizen is generally not something that happens automatically but will require a person to make an application for registration/naturalisation, and then to be registered/naturalised (which may be a matter of entitlement, or may - as in s6(2) – be a matter of discretion). Mr Tabori's submission, in light of this, was that a person is "*able to become*" a citizen at the point that they are in a position to apply for registration/naturalisation, i.e. once they satisfy the criteria for registration/naturalisation under one of the other provisions of the 1981 Act, such as s6(2). Mr Gajjar appeared to suggest that "ability" to become a citizen may arise at some earlier point in the journey towards citizenship, given that the journey may involve other applications (e.g. for settlement) and things like security checks and good character determinations, the timing of which is out of the applicant's control.

The meaning and effect of "would have been able to become" – discussion and conclusions

47. As to the main dispute (whether, to satisfy the condition, a person who would have been able to become a citizen must have now definitively lost the opportunity to do so), I prefer the Claimant's submissions:

(1) First, I do not accept that, as a matter of ordinary language, "*would have become*" refers only to a situation that might have arisen in the past but cannot arise again in the future. It simply directs the decision maker to consider what the position in the past would have been. That is obvious and does not require any impermissible reading-in.

(2) Second, I agree with the Claimant that the Defendant's construction would commit decision makers to impossible speculation as to how an applicant's situation might change in the future and would render s4L useless for most applicants: there are likely to be relatively few situations in which it can be said that the door to citizenship is definitively shut and can never be re-opened even if a person's circumstances change. The fact that it is relatively easy to assess the Claimant's own future prospects of citizenship (she will likely be granted ILR in November 2025, having completed the 5-year "spouse route", putting her in a position to apply) should not obscure the great complications that would arise in many cases if the Defendant's analysis is correct.

(3) Third, assuming that Mr Tabori is right to submit that the examples of "historical legislative unfairness" given in s4L(2) would all have operated to deprive the applicant definitively of any opportunity to be or become a citizen, I do not accept that this informs the construction of "would have been able to become". They are expressly only examples, and they are only examples of one of the three categories of situation that an applicant can rely upon (see s4L1(a), (b) & (c)). I found Mr Tabori's *ejusdem generis* argument to the contrary to be tortuous and unconvincing.

(4) Fourth, the fact that some of the preceding sections are titled "*person unable to become*" etc does not assist the Defendant. On the contrary, it rather begs the question - if the Defendant's construction is correct – why s4L is not also titled "*Person unable to become a citizen due to special circumstances*".

(5) Fifth, I do not read the Explanatory Notes as supporting or undermining either parties' case.

(6) Sixth, the Defendant's own guidance for her decision makers is not a proper aid to construction as to what s4L actually means. (I would add that, in any event. many of the worked examples I was shown appeared to be directed to whether the decision maker should exercise the discretion under s4L in a case where the applicant has an opportunity to qualify via another route, not the question of whether the applicant is within s4L in the first place).

48. As to the question of what it means to be "able to become a British citizen", I would agree with the Defendant that it refers to the point at which a person satisfies the criteria for registration or naturalisation under some other provision of the 1981 Act. If Parliament had simply stated "*would have become a British citizen*" then, in a case where the Defendant is considering a notional route to citizenship under which registration was discretionary, it would require her to second guess how the notional decision maker on the former occasion would have exercised that discretion. That is obviously undesirable and unnecessary, since the Defendant has a discretion under s4L in any event. I do not see any warrant for treating "ability to become" a citizen as arising at any earlier point in the journey towards citizenship.

49. Accordingly, a person "*would have been able to become, a British citizen*" for the purposes of section 4L if, at some point before they made their s4L application, they would have satisfied the criteria for registration but for a reason falling within s4L(1)(a), (b) or (c).

50. It follows that the Defendant misdirected herself in the 6 August 2024 Decision. Her self-direction that "*section 4L is about being prevented from applying but not from applying earlier"* is wrong and is inconsistent with the meaning I have found the section to bear.

F. ISSUE 2: MATERIALITY

51. Mr Tabori submits that a finding that the Defendant had misdirected herself on *"would have been able"* does not require me to allow the claim and quash her decision. I accept that submission. Having relied upon her misdirection to hold that the Claimant falls outside the scope of s4L altogether, the 6 August 2024 Decision nevertheless goes on to consider and reject the Claimant's own case on "but for" causation, as formulated in her reconsideration request. I read that second part of the Decision as being made without prejudice to the Defendant's first reason for rejecting the Claimant's application and proceeding on the assumed basis that the Claimant's construction is correct and that her ability to apply again in the future is no obstacle to registration via s4L. The two aspects of the Decision are severable, in my view, and I am confident that the erroneous construction of "would have been able" did not infect the reasoning on the "but for" question. See generally the cases listed in *Fordham, Judicial Review Handbook* (7th edn) at 48.1.16.

G. ISSUE 3: THE "BUT FOR" QUESTION

The parties cases on the "but for" question

52. The Claimant principally relies upon the time it took for her husband to obtain PR. She attributes this to the state of the 2016 Regulations prior to their amendment which she characterises as "historical legislative unfairness"; alternatively to the Defendant's unlawful refusal to grant her husband PR when she first considered his application in September 2017, which she characterises as an act or omission of the Defendant within s4L(1)(b). And further still, she says that the prior state of the law and/or the initial refusal of PR to her husband amount to exceptional circumstances relating to her, for the purposes

of s4L(1)(c). She argues that the Defendant has already conceded this, and rightly so, because the "relating to" test, correctly construed, is satisfied.

53. The Claimant contends that, if the 2016 Regulations had correctly reflected the law as it was later declared to be in *Lounes,* or if the Defendant had not initially refused her husband's PR application in breach of TFEU Art 21, he would have obtained PR much earlier, and she in turn would have been able to switch to the "spouse route" much earlier, such that she would have been able to become a British citizen well before the date she made her s4L application. The Claimant contends that, in reaching the opposite conclusion, the Defendant (a) misconstrued the "but for" test in s4L, wrongly directing herself that it required "direct" causation, and (b) reached a *Wednesbury* unreasonable conclusion, given the Claimant's own explanation of what she would have done, had the "spouse route" opened up to her earlier.

54. The Claimant also places some reliance on the Defendant's unlawful initial refusal of her husband's Tier 1 visa application. Her case – though it was not pressed forcefully at the hearing – was that this too was an act or omission of the Defendant within s4L(1)(b), but for which she could have returned to the UK earlier as the partner of a Tier 1 visa holder, again with the result that she would have been able to become a British citizen well before she made her s4L application in 2023.

55. The Defendant disputes that the state of the 2016 Regulations prior to amendment amounted to "historical legislative unfairness". She argues that her initial decision to refuse the Claimant's husband PR was lawful at the time because it preceded the *Lounes* judgment and that, in any event, the decision to refuse his application was not a qualifying act/omission of a public authority because it involved the application of a court decision (the *McCarthy* judgment) and so falls into the "court or tribunal" exemption in s4L(3). She argues that neither the prior state of the law nor the initial refusal of PR to her husband are sufficiently related to the Claimant to fall within s4L(1)(c). The Defendant says that the 6 August 2024 Decision did not involve any misdirection about the "but for" test and that her conclusion that the test was not satisfied was one that was reasonably open to her for the reasons given in the Decision, namely that, even on the assumption that the Claimant's husband would have obtained PR earlier than he did, the supposed route by which the Claimant could have got herself into a position to make an application for citizenship under

s6(2) of the 1981 Act involves so many hypothetical scenarios that it cannot be said that this is what "would" have occurred. The Defendant places particular reliance on what actually happened once the Claimant's husband obtained PR, opening up the "spouse route" for the Claimant, namely that the Claimant did not in fact apply for a visa that would put her on to that route for another 2 years.

The "but for" question – discussion and conclusions

56. It is convenient to start with the Defendant's decision in September 2017 to refuse the Claimant's husband's PR application. That decision was wrong because it was incompatible with Article 21 TFEU. The Defendant should have read-down or disapplied Regulation 2 of the 2016 Regulations (as it then stood) in order to achieve compatibility. That is indeed what the Defendant later did, in July 2018, when she granted the Claimant's husband PR *before* the 2016 Regulations had been amended. The September 2017 decision, being incompatible with EU law, was liable to be quashed. See, by analogy, *R (Hafeez) v SSHD* [2020] 1 WLR 1877 at [130]-[134] (Foster J) concerning another aspect of the 2016 Regulations that was incompatible with EU law. In *Lounes* the CJEU did not change the law; it declared what the law had always been. I entirely accept that this was not appreciated by either those who drafted the 2016 Regulations or the Defendant's decision maker who made the September 2017 decision, but that does not change the analysis.

57. In my judgement therefore, the Defendant's unlawful decision in September 2017 to refuse the PR application is an act or omission falling within s4L(1)(b) and is a candidate for consideration as the "but for" cause of the Claimant's inability to become a British citizen prior to the date of her s4L application.

58. I reject the Defendant's submission that her decision to refuse the PR application was not an act or omission of a "public authority" by reason of the proviso in s4L(3) excluding from that definition a "court or tribunal". The Defendant is not a court or tribunal. The fact that she made a decision that referred to the judgment of a court or tribunal (the CJEU decision in *McCarthy*) does not make her one. The purpose of the proviso in s4L(3) is to avoid the constitutionally improper situation in which the Defendant might (effectively) treat as wrongly decided a court decision that resulted in an applicant being unable to obtain citizenship. The Defendant cannot do that: a wrongly decided court decision can only be reversed by way of appeal to a higher court (or by an act of parliament). But that

constitutional prohibition is not engaged where an administrative decision maker makes a decision that refers to and purports to apply a court judgment.

59. "But for" causation is a very well understood legal concept. For event A to be the "but for" cause of event B it is not necessary that event A should be the immediate, proximate or "direct" cause of event B, or even the unique cause of event B. All that is required is that event B would not have occurred if event A had not occurred. It is very common to encounter situations in which event A is the "but for" cause of event B even though there may be a number of further events in the chain or causation that links A to B, or a number of other contributory causes. That said, a degree of confidence is required before one can properly identify an event as the "but for" cause of a later event or situation. It is an exercise in prediction, not speculation. As the language of section 4L properly reflects, the question is what "would" have occurred if the putative causal event had not taken place, not what "might" have occurred. Where there is a long causal chain between the putative "but for" causal event and the eventual outcome, it may well be harder to say, with sufficient certainty, that event B would not have occurred, "but for" event A. That is particularly so when the hypothetical events one has to consider in the chain consist of the voluntary actions of human beings rather than purely physical events. See generally *Clerk & Lindsell on Torts* 24th edn, 2-09, 2-13 to 2-20, and 2-25 to 2-26 and the cases discussed there.

60. The language used in the 25 January 2024 Decision suggests that, at that stage, the Defendant may well have been misdirecting herself about the "but for" test: it said, for example, that "*the act or omission must have* <u>*directly*</u> *resulted in you missing out on being, or being able to become, a British citizen"* whereas "direct" connection is not the test. That language is not replicated in the 6 August 2024 Decision, however. What is said there is that *"The wording of the legislation is clear that there should be a causal effect between the act or omission of a public body and the person not being able to become a British citizen"*, and later, *"The Secretary of State does not accept that there is a* <u>*clear*</u> *link …"*. That language is consistent with the but for test, properly understood. It reflects the need for a degree of certainty about what would have happened as opposed to mere speculation about what might have happened. There was therefore no misdirection as to the law.

61. The Defendant's task was to ask whether it was sufficiently clear that, if she had granted the Claimant's husband PR in 2017 as she ought to have done, the Claimant would have

been in a position to apply for naturalisation before she made her s4L application in 2023. That is the question she asked herself, and she answered it in the negative because, in her view, when one plots out the various steps that would have to be taken between the Claimant's husband acquiring PR and the Claimant herself satisfying the criteria for naturalisation, one cannot say with sufficient certainty that the Claimant would have reached that point prior to the date of her s4L application. Since a person in the Claimant's situation may only naturalise under s6(2) once they have ILR, it was necessary for the Defendant to ask whether the Claimant would have obtained ILR in time. That in turn required the Defendant to ask whether and when the Claimant would have started out on the 5-year "spouse route" to settlement and, while there is no real scope for doubt that, once she had completed the "spouse route" she would have swiftly been granted ILR, there is room for reasonable disagreement as to whether/when she would have started out on that route (and thus whether/when she would have completed it).

62. The August 2024 Decision specifically mentioned the fact that, even though the possibility of pursuing the "spouse route" opened up to the Claimant in July 2018, when her husband was granted PR, she did not in fact place herself on that route until 17 May 2020, nearly 2 years later. Neither the Claimant's original representations nor her reconsideration request explained the timing (indeed the reconsideration request alleged that it was untrue that she had only applied under Appendix FM in 2020: not a position maintained by the Claimant now). The Defendant was entitled to look at what actually happened when the opportunity to get on to the "spouse route" arose in order to form a view of what would have occurred if that opportunity had arisen earlier. In my judgement, she was entitled to find, having regard to the unexplained delay, that it was insufficiently clear that the Claimant would have placed herself on the spouse route and completed her 5-year journey by 2023.

63. Another decision maker might well have placed much less weight on the unexplained delay that occurred once the "spouse route" opened up for the Claimant: there was, after all, a considerable body of evidence before the Defendant tending to show that the Claimant and her husband were keen to get settled and acquire citizenship as soon as possible. However, I am rehviewing the decision for rationality, not correctness. In my judgement, the Defendant's conclusion that the but-for test was not satisfied was a rational one.

64. Turning briefly to the other ways in which the Claimant puts her case:

(1) The question of "historical legislative unfairness" does not arise. I have found that, despite the wording of the 2016 Regulations, it was open to the Defendant to disapply them or read them down (indeed she was bound to do so) when considering the Claimant's husband's PR application. Therefore, whether or not the Regulations were "unfair" within the meaning of s4L(1)(a) (a matter on which I express no view), they could not have been a candidate for the "but for" cause of the Claimant's inability to become a British citizen. The only candidate for that was the Defendant's decision refusing PR to the Claimant's husband;

(2) I do not need to consider whether the Defendant had conceded that there were "exceptional circumstances relating to" the Claimant or, if not, whether the Defendant applied an unduly narrow interpretation of "relating to". It makes no difference because, even if the state of the 2016 Regulations and/or the delay in granting her husband PR amount to "exceptional circumstances relating to" the Claimant, the Defendant was still entitled to rely on the Claimant's unexplained delay after July 2018 in order to conclude that her contention, that she would have been in a position to apply for registration in 2023, was too speculative;

(3) The August 2024 Decision did not expressly address the Claimant's alternative case, that the Defendant's failure to grant her husband a Tier 1 visa in 2016, was causative of her inability to become a British citizen. In my judgement, this was not irrational. The case was mentioned in the original representations but not developed in any clear way. The representations did not plot out in any detail how (on the Claimant's case) things would have developed in practice had the Claimant's husband been granted a Tier 1 visa in 2016. All the emphasis was on the delayed grant of PR on EU law grounds. The Reconsideration Request did not rely on this case at all: it was founded solely on the state of the 2016 Regulations pre-amendment and/or the wrongful delay in granting the Claimant's husband PR. I was not given full information about how, at the time, dependants of Tier 1 migrants might have used that status to progress towards citizenship, so I prefer to say nothing more about it. The simple point is that the Defendant did not need to address it in order to make a rational decision rejecting as speculative the Claimant's case, as articulated in the Reconsideration Request, that she "would have been able to become" a British citizen.

H. ISSUE 4: PROCEDURAL IRREGULARITY

The parties' submissions on procedural irregularity

65. The Claimant contends that the statement in the August 2024 Decision that the January 2024 Decision is "withdrawn" is irreconcilable with the statement later in the August 2024 Decision that the writer has "reviewed" the January 2024 Decision, that they are satisfied that "the correct decision was taken to refuse" and that "there are no grounds to reopen your client's application". This internal contradiction is said to amount to procedural irregularity in its own right and also to give rise to procedural unfairness in the sense that, if this really was a new decision following withdrawal of the earlier decision, then the Claimant ought to have been given the chance to request reconsideration of the August 2024 Decision. (There is also a complaint that the Claimant ought to have been refunded a fee she paid when seeking reconsideration of the January 2024 Decision but nothing turns on that: this is not a claim for financial loss). The Claimant refers me to *R (Akinola) v Upper Tribunal* [2022] 1 WLR 1585 at [65]-[69] for the potentially important distinction between a "withdrawal" and a "reconsideration".

66. The Defendant's position is that there is no contradiction between the two parts of the August 2024 Decision highlighted by the Claimant. Mr Tabori puts it as follows in his skeleton: *"Following a review such as undertaken in the 6 August 2024 decision, where detailed consideration of the original application is carried out, leading to a fresh decision ensures administrative coherence, by ensuring there is only one effective decision, rather than a combination of original and supplementary"*.

Procedural irregularity – discussion and conclusions

67. I prefer the Defendant's submissions here. Although the way the August 2024 Decision is expressed is not entirely happy, it is tolerably clear that the analysis is as put forward in the Defendant's skeleton: the Defendant has looked again at the January 2024 Decision in light of the Claimant's Reconsideration Request; she has decided to maintain her refusal of citizenship but has replaced the January 2024 decision with a new decision to the same effect, containing a compendious statement of the reasons on which she now relies. It was clear to the Claimant that the operative decision from 6 August 2024 was the second decision, in place of the first. The Claimant does not identify why such an approach was procedurally irregular. It is unlike the position in *Akinola*, where it was argued that a

decision had distinct and important legal consequences depending on whether it was a "withdrawal" or a "reconsideration".

68. I do not accept that, because the August 2024 Decision was a fresh decision, the Defendant was obliged to offer the Claimant a further chance to request reconsideration. I was not shown any guidance which was said to create a legitimate expectation of this. If any of the new content in the August 2024 was erroneous for reasons not previously advanced by the Claimant, she was able to challenge it through Pre-Action Protocol correspondence, effectively obliging the Defendant to reconsider (in the non-technical sense) in any event.

I. CONCLUSION

69. For these reasons, the claim for judicial review fails. The Defendant's August 2024 Decision involved an error of law but not a material one. The Decision was not irrational and there was no procedural irregularity.