SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/169/2020
Hearing Date: 21st April 2021
Date of Judgment: 7th May 2021

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE PITT
MRS JILL BATTLEY

Between:

LISA SMITH

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Mr Hugh Southey QC and Ms Lara Smyth (instructed by Phoenix Law Solicitors) appeared on behalf of the Appellant

Mr Robin Tam QC and Ms Natasha Barnes (instructed by the Government Legal Department) appeared on behalf of the Secretary of State

Introduction

1. On 31st December 2019 the Respondent served on the Appellant Notice of her Decision to Make an Exclusion Order, dated 13th September 2019, on the grounds of public security. It is alleged that the Appellant travelled to Syria and is aligned with ISIL/Daesh. The merits of that proposition do not demand investigation at this stage.

2. The Appellant is described in the notice as "Lisa Smith 17 February 1982, Ireland". It is common ground that she was born there, and it is also common ground that if she were a British citizen the exclusion notice would be *ultra vires*. Subject to one important submission advanced by Mr Robin Tam QC on behalf of the Respondent, it is unnecessary for the Commission to address the provisions of regulation 23 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), in particular regulation 23(5), which is the source of the Respondent's exclusionary powers relating to EEA nationals. Regulation 2(1) defines "EEA national" as "a national of an EEA State who is not also a British citizen". Accordingly, Irish nationals or citizens can be excluded, but not those with dual nationality.

3. Ground 1 of the Amended Grounds of Appeal against the Exclusion Order is that:

> "The decision challenged is unlawful and/or *ultra vires* because the Appellant is a dual British and Irish citizen (or in the alternative, is entitled to be treated as one) by reason of article 14 of the ECHR read in conjunction with article 8."

4. As will soon be made clear, the effect of primary legislation is that the Appellant is *not* a British citizen: her real case is that she is entitled to be treated as one by reason of the Human Rights Convention and the Human Rights Act 1998 ("the HRA"). Had her parents been married at the time of her birth, British citizenship would have ensued automatically. The fact that they were not is a happenstance for which the Appellant is not responsible and generates the possibility (putting the matter at its lowest) of discrimination and a violation of article 14: see, in particular, *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, [2017] AC 365. It is therefore submitted that the Appellant should be treated as if her parents were married, with the inexorable consequence that she should be deemed a British citizen.

5. Accordingly, the preliminary issue that the Commission is required to determine should be recast in these terms: "whether the decision challenged is unlawful and/or *ultra vires* because the Appellant is entitled to be treated as a British citizen by reason of article 14 of the ECHR read in conjunction with article 8".

The Facts

6. The Appellant's father, George Patrick Martin, was born in Belfast on 17th August 1954. According to his birth certificate, his parents were George Patrick Martin and Sarah Martin. Documents very recently disclosed by the Appellant reveal that the Appellant's grandfather on her father's side was George Patrick Martin, born in Belfast on 5th January 1924. He was a merchant seaman, as was the man who was probably his father, George Martin born in Belfast on 5th May 1884. These records also show that George Martin (the Appellant's grandfather) was British in 1967.

Hereinafter we will be referring to the George Patrick Martin born in 1954 as the Appellant's father, to avoid any possible confusion.

7. The Appellant's mother was born in the Republic of Ireland and was not then, and is not now, a British citizen. At the time of the Appellant's birth on 17th February 1982 outside the UK (had it been in the UK the issue would not arise), the Appellant's parents were unmarried. They have not married since. Had they done so, the issue would also not arise.

8. Little more is known about the Appellant's father beyond the fact that on 13th June 2016 he was issued a passport by the Republic of Ireland stating that he was an Irish national. That would not of course preclude dual nationality.

9. The limited issues arising between the parties on the facts of this case will be addressed in the next section.

Legal Framework

10. By section 4 of the British Nationality Act 1948 (which was in force on 17th February 1982, because the British Nationality Act 1981 did not come into force until 1st January 1983):

> "**Citizenship by birth**
>
> Subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies ["CUKC"] by birth :
>
> Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth—
>
> (a) his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to His Majesty, and is not a citizen of the United Kingdom and Colonies; or
>
> (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy."

11. It follows that the Appellant's father was a CUKC on 17th August 1954 unless the proviso was applicable. For obvious reasons, the Respondent does not rely on paragraph (b), but at one stage at least submitted that there is an insufficiency of evidence bearing on paragraph (a). However, the inference to be drawn from the fact that the Appellant's grandfather was British, or at least had dual nationality, in 1967 is that her father was British at the time of his birth in 1954. In our judgment, there is absolutely nothing to suggest that the proviso could apply and this point falls away.

12. The second factual issue is whether the Appellant's father might have renounced his British citizenship before the Appellant's birth in 1982. We must say that the Respondent's submission that this might be so was somewhat ambitious. It is true that the Appellant's evidence about this is terse, and that the Appellant's father has filed no witness statement, but renunciation of British citizenship is rare and there is nothing to contradict the Appellant's evidence that it has not occurred. Although we accept that it would be difficult for the Respondent to check the paper records of

renunciations over a number of decades, and that the name "George Martin" is scarcely uncommon, the Appellant cannot be expected to prove a negative and what she has said in these proceedings should in our view be accepted.

13. So, the Appellant would have been a CUKC by descent at the time of her birth had the Appellant's father been her father for the purposes of section 5(1) of the 1948 Act, and she would have become a British citizen on 1st January 1983 by virtue of section 11 of the British Nationality Act 1981. However, the effect of section 32(5) of the 1948 Act, which defined "father", is that illegitimate children are not covered. It follows that the Appellant is unable to rely on the provisions of section 5 of the 1948 Act. Section 11 of the 1981 Act must also be a closed book to her because she was not a CUKC at the date of commencement.

14. The upshot is that the Appellant cannot say that she falls within what may be described as the automatic entitlement provisions of the British Nationality Acts. However, there may be another route.

15. By section 4I of the British Nationality Act 1981:

> "**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.
>
> …
>
> (3) P is an "eligible non-British national" if—
>
> (a) P was never a British subject or citizen of the United Kingdom and Colonies; and
>
> (b) had P's mother been married to P's natural father at the time of P's birth, P would have automatically become a British subject or citizen of the United Kingdom and Colonies—
>
> (i) at birth, or
>
> (ii) by virtue of paragraph 3 of Schedule 3 to the British Nationality Act 1948 (child of male British subject to become citizen of the United Kingdom and Colonies if the father becomes such a citizen)."

16. The "general conditions" mentioned under section 4I(1)(a) are set out in section 4E, as follows:

> "**The general conditions**
>
> For the purposes of sections 4F to 4I, a person ("P") meets the general conditions if—
>
> (a) P was born before 1 July 2006;
>
> (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; and
>
> (d) P has never been a British citizen."

17. Thus, the Appellant is entitled to be registered as a British citizen and is not required to fulfil the condition as to good character set forth in section 41A(1)(a). More specifically, the good character requirement does not apply to applications made *inter alia* under section 4I. However, aside from the payment of a fee, as to which no complaint is made, section 42(3) of the 1981 Act requires a person acquiring British citizenship by registration to take the oath and pledge of allegiance specified in Schedule 5 at a citizenship ceremony. These are in the following prescribed terms:

> **OATH**
> "I,*[name]*, swear by Almighty God that, on becoming a British citizen, I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law."
>
> **PLEDGE**
> "I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen."

18. The Appellant lives in a border town in the Republic of Ireland where there are historical and political sensitivities, she identifies as Irish, and would not choose to take an oath of allegiance to the British Crown. But the Respondent has power under section 42(6) to disapply this requirement in her discretion to meet the special circumstances of a case.

The Appellant's Case

19. Mr Hugh Southey QC emphasised that the key question here for the purposes of article 14 of the Convention was whether the power to exclude under regulation 23 could be lawfully exercised in the Appellant's case where it could not have been had her parents been married. It is important context, he submitted, that the Appellant is an Irish national who identifies as Irish and whose right to do so flows both generally and under the Good Friday Agreement of 1998. To the extent that the issue of justification is relevant, and it was Mr Southey's primary submission that it does not arise because his client should succeed at an anterior stage, the requirement to take an oath of allegiance to the Crown (inapplicable to those who do not have to register

because, for example, their parents were married) amounts to differential treatment which does not meet the high threshold dictated by the authorities.

20. Fleshing out those submissions, Mr Southey rightly focused on two authorities: *Johnson* (Supreme Court) and *R (K) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin), [2018] 1 WLR 6000 (Helen Mountfield QC sitting as a DHCJ). We will analyse these decisions later, but Mr Southey advanced two essential arguments. The first was that the exclusion decision in the instant case should be regarded as analogous to the deportation decision in *Johnson*, and that the ratio of the Supreme Court's decision (at para 34 of the judgment of Baroness Hale DPSC) did not demand any consideration to be given to the possibility of acquiring citizenship by registration. Accordingly, so the submission ran, paras 36-38 of Baroness Hale's judgment which address that question are supererogatory. Alternatively, Mr Southey's submission was that, if consideration could be given to the possibility of registration (and, unlike Mr Johnson, his client would not have to satisfy the good character criterion), there remained differential treatment which could not be justified because the Appellant was entitled to refuse to take the oath. The second submission (which was directed to the alternative argument) was that the test for article 14 purposes was not more favourable treatment but different treatment, and Mr Southey drew attention to certain passages in *K* to that effect.

21. Finally, Mr Southey addressed the Respondent's argument under section 6 of the HRA that the exclusion decision was mandated by primary legislation. The short answer, he contended, was that the 2016 Regulations are not primary legislation and that the power under regulation 23 is exactly that: discretionary.

The Respondent's Case

22. Mr Tam's case had two essential strands. The first was that the continuing differential treatment in the Appellant's case was justified by the route of citizenship registration accorded by the provisions of the British Nationality Act 1981 which she could deploy if she chose, thereby removing the discrimination in her case. Mr Tam's submission was that the Supreme Court in *Johnson* endorsed registration as justification *in principle*: the problem for Mr Johnson was that the good character requirement meant that it could not be deployed by him. This problem does not exist for this Appellant. Mr Tam's overarching point is that the Respondent would have won *Johnson* had there been there no such requirement.

23. Mr Tam accepted, indeed averred, that a successful application for registration, and the completion of all relevant formalities, would mean that the Appellant could no longer be excluded.

24. Developing his first strand, Mr Tam submitted that the requirement to register was justifiable as an entirely proportionate means of redressing an historical injustice. The test for this Commission was "manifestly without reasonable foundation". In this regard, there were disadvantages in acquiring British citizenship which a putative registrant would need to weigh in the balance: the merits were not all one way. These included: potential loss of one's existing nationality; taxation burdens; disqualification from certain public offices.

25. Mr Tam observed that the Appellant's objections to the oath of allegiance constituted a new point not prefigured in her evidence until the day before the hearing. He suggested that the ceremony might take place in private.

26. The second strand of the Respondent's case was that the proposition that the Appellant should be treated as if she were a British citizen would "give rise to a multiplicity of serious and insuperable difficulties". As a matter of principle, nationality is a package of mutual rights and obligations, including an obligation of loyalty and allegiance, and the Appellant cannot adjure to that part she chooses (sc. immunity from exclusion) at the same time as abjuring from the rest. The taking of an oath is very much incidental because the obligations of loyalty would exist in any event. As a matter of practice, the "is to be treated as" argument undermines the aims of clarity and certainty that were upheld in *Johnson* and *K*. For example, why – asks Mr Tam rhetorically – should the Appellant be entitled to enter the UK without a passport when section 3(9) of the Immigration Act 1971 requires one, even for those automatically entitled to citizenship? The same practical difficulties apply to issues such as the right to consular assistance overseas or the manner in which foreign States might wish to treat British citizens as distinct from those who are not. Mr Tam had a list of similar points, including the contention that the deprivation power under section 40 of the British Nationality Act 1981 could not sensibly apply to someone who claimed to be entitled to be treated as a British citizen as opposed to an individual who was formally such.

27. Mr Tam raised a separate submission on the language of regulations 2 and 23(5) of the 2016 Regulations. Given, he submitted, the definition of "EEA national", he contended that the term "British citizen" could not be read as encompassing the Appellant. She was an EEA national *tout court*.

Discussion

28. The Commission is appreciative of the high quality of Counsels' submissions in this case.

29. In our judgment, the answer to this appeal is located in a close and accurate analysis of the Supreme Court's judgment in *Johnson*. The case of *K* adds very little but we consider it below, for completeness.

30. The facts of *Johnson* were that he came to this country at the age of four and would have been a British citizen had his parents been married. He had a serious criminal record and the Respondent was required to deport him as a foreign criminal under section 32(5) of the UK Borders Act 2007. But pursuant to section 33(2), the duty to deport did not apply *inter alia* where removal would breach a person's Convention rights ("Exception 1"). Mr Johnson's argument on appeal was that deportation was unlawfully discriminatory (sc. article 14 read in conjunction with article 8, as in the instant case), but the Respondent set removal directions, immediately challenged by way of judicial review. The Respondent then issued a certificate that Mr Johnson's human rights claim was "clearly unfounded" (meaning that he could not pursue an in-country appeal), and the judicial review proceedings were expanded to challenge it. At first instance, the certificate was quashed, but the Respondent's appeal was

allowed by the Court of Appeal, primarily on the basis that at the time of Mr Johnson's birth in 1985 there had been no unlawful discrimination.

31. The Supreme Court allowed Mr Johnson's appeal. Baroness Hale (with whose judgment her colleagues concurred, without giving separate reasons) observed that there were many benefits to being a British citizen, and that the present case was about just one of those: the right not to be deported as a "foreign criminal" (para 2). At the material time, there was a specific requirement for registrants that they be of good character, and but for that Mr Johnson would have qualified. For obvious reasons he could not satisfy that requirement.

32. The issue before the Supreme Court was "whether an appeal against the decision that section 32(5) of the 2007 Act applies to the claimant, on the basis that to deport the claimant now would be a breach of the UK's obligations under the Human Rights Convention, is clearly unfounded" (para 23).

33. Baroness Hale then addressed a number of issues which Mr Tam did not seek to resurrect before us, and she observed that in order to justify the undoubted discrimination in this case would require "very weighty reasons" (para 30). We interpolate at this stage that this disposes of Mr Tam's submission that the "manifestly without reasonable foundation" test applies: that entails a mis-reading of para 88 of the judgment of the ECtHR in *JD and A v UK* [2020] HLR 5. That test only applies to transitional measures: see para 89.

34. Baroness Hale stated that it was important to be precise about what needed to be justified. It was not the initial denial of citizenship in 1985, or the liability of non-citizens to be deported (paras 32 and 33). Further, it was not the continued denial of citizenship in 2012 (see para 32, although we will come back to this).

35. Instead:

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

36. So, as Baroness Hale made clear in paras 35 and 36, the appeal was allowed on the basis that the Respondent's certificate was quashed. The matter would be remitted to the tribunal where Mr Johnson's appeal would be certain to succeed. This was "the consequence of the particular provisions relating to deportation which are relevant here". It is also to be noted that on this narrow basis there was no need for a declaration of incompatibility, *pace* Mr Southey's submission to the Supreme Court. There was executive action – the clearly unfounded certificate – which could be corrected by judicial review.

37. These key paragraphs in *Johnson* were subjected to critical analysis by the parties. Mr Southey's essential contention was that the clause "and no justification has been suggested for it" in para 34 had nothing to do with the theoretical possibility of acquiring British citizenship by registration: there could be no such justification even if registration had been available to Mr Johnson. Mr Tam's riposte was that the clause reflected the factual reality of Mr Johnson's case and nothing more. He could not seek registration, but a man of good character could have done and justification would have existed in such a case. Mr Tam bolstered that submission with reference to passages in paras 32 and 38 of Baroness Hale's judgment to which we will now turn.

38. At para 32, Baroness Hale said this:

> "If it [what needs to be justified] is the continued denial of citizenship in 2012, the Secretary of State can argue that steps have now been taken to put right the historic injustice, but that it is justifiable for these steps only to operate prospectively: it is reasonable to have a citizenship law which assigns citizenship to certain people automatically at birth and grants it later only on application. Citizenship should not be imposed upon people unless they have asked for it: it may bring disadvantages if they are also citizens of a state which does not recognise dual nationality. The problem with that argument is that citizenship is imposed automatically at birth upon certain people, whether they want it or not and whether or not it gives rise to dual nationality problems. Furthermore it is also imposed automatically if a person is legitimated by the subsequent marriage of his parents. The appellant's problems would be over if his mother could be found and his father persuaded to marry her."

39. At paras 36-38, Baroness Hale proceeded to consider on a more general basis the cases of those who were denied the automatic right to citizenship because their parents were unmarried. She made it clear that this excursus was not strictly necessary for the determination of Mr Johnson's case. However:

> " 36. … There are all sorts of current consequences which might flow from that situation. An example is the right to vote, which is an aspect of citizenship and also a Convention right under article 3 of the First Protocol. People born before 1 July 2006 are denied that right unless they are first registered as citizens. In order to do this they must pass the "good character" test in section 41A of the 1981 Act. Had their parents been married to one another at or at any time after their birth they would not have to do this. While of course all babies arrive in the world with a good character the same cannot be said of those legitimated by the subsequent marriage of their parents. The distinction is based solely on birth status and for the reasons given earlier cannot be justified.
>
> 37. Mr Hugh Southey QC, for the appellant, argued that it followed that the Nationality, Immigration and Asylum Act 2002 (Commencement No 11) Order 2006, SI 2006/1498, bringing into force the 2002 amendments to section 50(9) of the 1981 Act was incompatible with the Convention rights. It should have operated retrospectively so as to grant automatic citizenship to all

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

40. These paragraphs must be read all of a piece with para 32. At this earlier paragraph, Baroness Hale was making two points. The first was that what had to be justified was not the continued denial of citizenship in 2012 (see also para 34). The second was that *if* that was what had to be justified, it was *at least in principle* reasonable to have a citizenship law which operated on a prospective basis, distinguishing between those who acquired citizenship automatically and those who had to apply for it.

41. An exegetical issue does arise in connection with Baroness Hale's view as expressed in para 32 that the Respondent's argument was problematic in circumstances where the differentiating feature inhered in the adventitious circumstance that some people's parents were married and others were not. On one reading of her judgment (ultimately in our view the correct reading), a differentiating feature of this nature would always be incapable of justification. At para 38 Baroness Hale repeated her opinion that there is nothing wrong *in principle* with a system which requires an application for registration by those who did not acquire citizenship automatically at birth, but the problem with the good character requirement was the inherent one that it did not apply to those whose parents happened to be married. Her reasoning would therefore apply to almost any hurdle or barrier which would not exist for those with married parents. Clearly, Baroness Hale did not have in mind the act of completing an application form, submitting proof of identity and of relevant ancestors, and paying a reasonable fee. Had that been her view, the declaration of incompatibility that the Supreme Court made would not have been limited to the good character requirement.

42. The removal of the good character requirement, which is what happened by a Remedial Order made under section 9 of the HRA following the *Johnson* case, would abrogate the differentiating feature which was the immediate obstacle for those who

wished to apply for citizenship in order to obtain a British passport or vote, but it would have no impact on those whom the Respondent wished to deport. The use of terminology such as hurdle or barrier appears inapposite in a situation where the individual is acting defensively. Such a person is not seeking to invoke certain rights (e.g. to vote); she is, however, very keen to invoke an immunity against enforcement action taken against her by the State.

43. In our judgment, para 34 of Baroness Hale's judgment is not dealing with differentiating features which may be applicable to those seeking to apply to be registered as British citizens and acquire the rights and duties that flow. That is the topic of paras 36-38. Mr Southey is right in submitting that para 34 is addressing the much narrower question of enforcement action, which applies as much to the exclusionary power under regulation 23(5) as it does to the power to deport under section 32(5). What needs to be justified in such a case is the "current liability" (we would emphasise the epithet "current", as well as the similar adjective in the terminology of "*present* distinction") of the individual to be the subject of such action. Such a liability would not exist if the Appellant's parents had been married at the time of her birth. That is the differentiating feature which could not logically be justified in *Johnson*, and cannot be justified here.

44. In our judgment, it makes no difference to the analysis that the Appellant could apply to be registered, assuming that the steps she would have to take do not fail the justification test for other reasons. The point is that a person who is automatically a British citizen at birth would not find herself exposed to such a liability, because no exclusion notice could validly be served on her. This is not just an academic question, because even a successful applicant for registration would face delays. Until such an application was processed, a person subject to an exclusion order would be unable to cross the border (and visit family members for example) even if no passport is required.

45. Further, there is force in Mr Southey's submission that if a potential answer to the discrimination addressed in para 34 of *Johnson* were the making of a registration application, the Supreme Court would have made it clear that the reasoning of paras 36-38, and the making of a declaration of incompatibility to address the human rights violations in the hypothetical cases there under scrutiny, should be extended to the type of case directly under consideration, as addressed in the ratio of Baroness Hale's judgment.

46. This conclusion does not entail the salami-slicing of the package of rights and obligations which flow from being a British citizen. The present case is not concerned with rights and duties, but with immunities. Just as Mr Johnson would have had an unanswerable case before the relevant tribunal that the deportation notice violated his Convention rights, the same applies to this Appellant before us. Although we agree with Mr Tam that "British citizen" in regulation 2 does not cover those who say that they should be treated as such, the position here is that section 6(2) of the HRA is not applicable because these Regulations are not primary legislation and the Respondent could have acted differently by not exercising her regulation 23(5) power. The case is governed by section 6(1), which compels the Commission not to act in a way which is

incompatible with a Convention right. We would be acting incompatibly if we did not allow the appeal, even if there is no provision in the Regulations which is analogous to section 33(2) of the 2007 Act. The reason for that express statutory exception is that section 32(5) is in mandatory terms, and without it section 6(1) of the HRA would apply.

47. For the avoidance of doubt, the Appellant should not be heard to say that, without more, she wants a British passport or to vote in UK elections. Paras 36-38 of Baroness Hale's judgment would be applicable to such an assertion. In principle, the Respondent is entitled to say to her that she needs to make an application. In our view, subject to one issue the Respondent has supplied very weighty reasons in support of that position, as implicitly recognised by Baroness Hale in para 38. It is also expressly recognised, albeit in a slightly different context, in paras 77-86 of *K*.

48. The only real question is whether the requirement that the Appellant take an oath and pledge of allegiance cannot be justified because she has a form of conscientious objection to them, and (it is argued) one vouchsafed by international treaty. Mr Southey points out that this is not a new point inasmuch as it had been flagged in the pleadings, but until the day before the hearing there was no evidence to support it.

49. The fact that many would have no difficulty with this requirement is not the answer to the potential discrimination: the same would apply to a good character requirement. But examining the issue more closely, we agree with Mr Tam that requiring someone to take the pledge cannot be objectionable on any basis. The pledge does no more than articulate obligations that would subsist in any event (see, for example, *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591), and is not inconsistent with the rights of those who wish to identify as Irish.

50. On the other hand, we can see that there may well be a difficulty with the oath which raises different issues. That difficulty could, of course, be circumvented by the Respondent deciding that there exist special circumstances for the purposes of section 42(6) of the British Nationality Act 1981, and that it would be sufficient in cases such as this for the pledge to be given in private. We have decided that it is unnecessary to invite the Respondent to set out her position on this sub-section. We are allowing the appeal for other reasons.

51. Paras 47-50 above address, albeit not completely, Mr Tam's submission that to treat the Appellant as British would generate a multiplicity of serious and insuperable difficulties. Given that we have upheld Mr Southey's primary submission, two matters flow. The first is that the multiplicity point does not in fact arise because the correctness of Mr Southey's primary submission neutralises it. The second is that we are declining to uphold Mr Southey's alternative submission that, should he be wrong about his primary argument, the registration process would in itself be discriminatory. In this particular context the multiplicity point is highly relevant, and generally speaking we agree with it. However, that issue may be addressed on another occasion, where the Respondent will have a greater opportunity to think through the ramifications of the oath and section 42(6).

Disposal

52. This appeal must be allowed.