

## Case notes

# *R (on the Application of Johnson)* *(Appellant) v Secretary of State for the* *Home Department (Respondent)* [2016] UKSC 56

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### Background and facts

The appellant in the instant case, Eric Erron Johnson, is a citizen of Jamaica, where he was born in 1985 to an unmarried British father and Jamaican mother. At the time, British law operated to prevent transmission of citizenship by unmarried British fathers to their children. Eric was brought to the UK by his father in 1989, where he has been lawfully resident ever since. As a result of his criminal record, which included a prison sentence in 2008 for manslaughter, Eric became automatically liable for deportation as a foreign criminal in accordance with the UK Borders Act 2007. Section 32 of the Act provides that the Secretary of State must deport foreign criminals who have been sentenced to a period of imprisonment of at least 12 months. A deportation order was duly issued in August 2011.

### UK citizenship law

Like other cases concerning lawfully resident, long-term immigrants whose criminal activities trigger an expulsion process in the host state,<sup>1</sup> Johnson's case highlights the consequences that can flow from immigrants' failure to apply for citizenship of the host state once they qualify to do so. After arriving in the UK in 1989, Johnson became eligible to be registered as a British citizen, but neither he nor his father made any such application. Acquisition of citizenship by registration is similar to naturalisation, but while applicants for naturalisation must satisfy a number of criteria and may be refused at the discretion of the Secretary of State,<sup>2</sup> registration is generally an entitlement for which applicants are not required to pass tests demonstrating integration.<sup>3</sup> A further distinction between these two routes to British citizenship is that, while registration is often open only to children,<sup>4</sup> naturalisation is available only to persons over the age of 18.<sup>5</sup>

Johnson's non-citizen status was, however, more complicated than a simple failure to activate his entitlement to be registered as a British citizen while a minor. There was also clearly an issue of discrimination at play in the distinction drawn in British nationality law

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1 See, for example, *Üner v The Netherlands* [GC] App No 46410/99 (ECtHR, 18 October 2006).

2 BNA 1981, s 6 and Sch 1.

3 See, for example, BNA 1981, ss 3–5. Since 4 December 2006, however, the Secretary of State must be satisfied that applicants for registration over the age of 10 are of good character. See BNA 1981, s 41A.

4 See, for example, BNA 1981, ss 1(3), 1(3A) and 3.

5 BNA 1981, s 6.

between children born to married and unmarried British fathers, whereby the former acquired their fathers' citizenship while the latter did not. In the absence of such a distinction, Johnson would have acquired British citizenship at birth, precluding any possibility of future deportation.

The objectionable nature of the distinction in question was addressed by the amendment of the British Nationality Act 1981 (BNA 1981) to provide for transmission by British men of their citizenship to their children regardless of marital status. This applies, however, only to children born on or after 1 July 2006.<sup>6</sup> An attempt was made to deal with the situation of those born to unmarried fathers prior to 1 July 2006 by the Immigration Act 2014 which amended the BNA 1981 to allow such persons to apply to be registered as British citizens.<sup>7</sup> This option was not available to Johnson, however, as para 70 of Schedule 9 of the Immigration Act 2014 requires such applicants for registration, if over 10 years of age, to satisfy a good character requirement.<sup>8</sup> Johnson's criminal record thus constituted an insurmountable obstacle to registration.

### Article 8 of the European Convention on Human Rights

Article 8 of the European Convention on Human Rights (ECHR)<sup>9</sup> provides that everyone has the right to respect for private and family life. Invocation of this right has grounded successful appeals against deportation orders in the past, with the European Court of Human Rights (ECtHR) satisfied that deportation would violate the Article 8 rights in question.<sup>10</sup> In Johnson's appeal against deportation, the First-tier Tribunal found that, although he had a family and private life in the UK, his deportation was a legitimate and proportionate interference with that life and so did not violate Article 8. The tribunal did, however, remit to the Secretary of State the question whether deportation would be unlawfully discriminatory, given that Johnson would not have been liable to deportation had his parents been married to one another. The Secretary of State concluded in November 2012 that her deportation decision was not unlawfully discriminatory and also certified that the appellant's claim was clearly unfounded. The consequence of this latter point was that it deprived Johnson of an in-country right of appeal against the decision to deport him.

### The issue of unlawful discrimination and Articles 8 and 14 ECHR before the High Court and the Court of Appeal

Article 14 of the ECHR provides that Convention rights shall be enjoyed by everyone without discrimination on any ground such as birth or other status. Article 14, however, has no independent existence and its application is triggered only if one of the other Convention rights is first engaged. In July 2014, *Dingemans J* held in the High Court that

6 BNA 1981, s 50(9A), inserted by s 9 of the Nationality, Immigration and Asylum Act 2002 which was brought into force by SI 1498/2006.

7 Specifically, s 65 of the Immigration Act 2014 inserted into BNA 1981 ss 4F, 4G, 4H, 4I and 4J, which concern various categories of people who would have automatically acquired British citizenship had their parents been married to one another at their birth.

8 Specifically, para 70 of Sch 9 to the Immigration Act 2014 inserted into s 41A, BNA 1981 (concerning the requirement to be of good character), a reference to ss 4F, 4G, 4H and 4I.

9 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 5) 213 UNTS 222, entered into force 3 September 1953.

10 See, for example, *AA v UK* App No 8000/08 (ECtHR, 20 September 2011) and *A W Khan v UK* App No 47486/06 (ECtHR, 12 January 2010). However, in most Article 8 cases concerning deportation of criminally convicted immigrants the ECtHR finds that deportation is a proportionate measure and therefore compatible with Article 8.

the discrimination against Johnson, whereby he was denied British citizenship at birth because his parents were unmarried, was not justified at the time of his birth and continued to be unjustified. This therefore amounted to a continuing violation of Article 8 in conjunction with Article 14.<sup>11</sup>

The Court of Appeal in January 2016, however, endorsed the argument of the Secretary of State, which focused on the fact that the Human Rights Act 1998, giving protection to ECHR rights in domestic law, entered into force in October 2000 'long after Mr Johnson's birth'.<sup>12</sup> Arden LJ, with whom Laws and Lindblom LJ agreed, found against Johnson on the basis that the Human Rights Act 1998 does not apply retrospectively<sup>13</sup> and found no continuing breach of Johnson's human rights as the 'violation occurred once and for all on Mr Johnson's birth. He never became a British national and so the violation began and ended upon his birth'.<sup>14</sup>

Arden LJ was unconvinced that the ruling of the ECtHR in *Genovese v Malta*<sup>15</sup> in 2011 required conferral of British citizenship on Johnson. In that case, the ECtHR had found a violation of Article 14 in conjunction with Article 8 where a Maltese father's citizenship had not been transmitted to his son as the child had been born out of wedlock. Again, the key issue leading the Court of Appeal to find that this ECtHR judgment had no implications for Johnson was that of timing. The ruling in *Genovese* was delivered in 2011 and it was 'therefore not possible to hold that by 1985 the discriminatory denial of nationality to an illegitimate child at birth violated the Convention'.<sup>16</sup>

### The Supreme Court judgment

Following the reasoning adopted by the ECtHR in *Genovese*, Lady Hale in the Supreme Court found that, as denial of citizenship has such an important effect upon a person's social identity, the case came sufficiently within the ambit of Article 8 to trigger the application of the prohibition of discrimination in Article 14.<sup>17</sup> She also dismissed the Court of Appeal's characterisation of the initial act of discrimination as a 'one-off' event, finding instead that denial of automatic citizenship 'has a current and direct effect upon the appellant who is currently liable to action by the state, in the shape of deportation, as a result'.<sup>18</sup>

Lady Hale referred to the well-established ECtHR principle that birth outside wedlock is a 'status' for the purpose of Article 14 and that very weighty reasons are required to justify discrimination between persons born to married parents and those born to unmarried parents.<sup>19</sup> No justification, however, had been suggested for the distinction at the root of the instant case which rendered Johnson liable to deportation.<sup>20</sup> In a logical conclusion to her reasoning, Lady Hale quashed the Secretary of State's November 2012 certificate that the appellant's claim of unlawful discrimination had been clearly

11 *R (Eric Erron Johnson) v Secretary of State for the Home Department* [2014] EWHC 2386 (Admin).

12 *R (Johnson) v Secretary of State for the Home Department* [2016] EWCA Civ 22 [1].

13 *Ibid* [32].

14 *Ibid* [47].

15 *Genovese v Malta* App No 53124/09 (ECtHR, 11 October 2011).

16 *Johnson* (n 12) [23].

17 *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56 [24]–[27].

18 *Ibid* [28].

19 *Ibid* [30]–[31].

20 *Ibid* [34].

unfounded and noted that the appeal against the decision to deport was ‘certain to succeed’.<sup>21</sup>

While this alone would have secured protection of Johnson’s ECHR rights, Lady Hale was mindful that there would be others, like Johnson, ‘who are denied the automatic right to citizenship by reason of the fact that their British father was not married to their non-British mother at the time of their birth’.<sup>22</sup> She therefore issued a declaration of incompatibility against para 70 of Schedule 9 of the Immigration Act 2014 which had inserted into the BNA 1981 the requirement that persons in a situation analogous to Johnson’s must, if over 10 years of age, satisfy a good character requirement in order to register as a British citizen.

### Conclusion

The *Johnson* case raises important issues concerning law’s potential to remedy historical injustices and the state’s powers to deport lawfully resident, long-term immigrants who commit serious crimes. The significance of the Supreme Court judgment lies largely in the restriction it places, on human rights grounds, on the state’s powers to allocate and withhold citizenship. In that regard, Lady Hale’s judgment reflects an increasing willingness on the part of courts over recent decades to scrutinise the process and procedure surrounding approval and rejection of citizenship applications.<sup>23</sup>

The Supreme Court judgment must be welcomed by anyone concerned with immigrants’ rights and the discriminatory treatment historically endured by persons born out of wedlock. Given that the privileges of citizenship include the right to vote and protection against expulsion, the Supreme Court’s finding that Johnson and others like him suffered unjustified discrimination is of great consequence. Lady Hale should, however, have gone further. By issuing a declaration of incompatibility against para 70 of Schedule 9 of the Immigration Act 2014, she simply removed the need for individuals like Johnson to satisfy a good character test in order to register as a British citizen. This leaves unaltered the initial act of discrimination whereby those born to unmarried British fathers and foreign mothers prior to 1 July 2006 did not gain British citizenship.

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21 Ibid [35].

22 Ibid [36].

23 For the UK context, see *R v Secretary of State for the Home Department, ex p Fayed* [1996] EWCA Civ 946, [1998] 1 WLR 763. For the Irish context, see *Mallak v Minister for Justice Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297. At the supranational level see *Genovese* (n 15).