8 February 2018

PRESS SUMMARY

The Advocate General for Scotland (Appellant) v Romein (Respondent) (Scotland)
[2018] UKSC 6
On appeal from [2016] CSIH 24

JUSTICES: Lady Hale (President), Lord Sumption, Lord Reed, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

Under section 5(1) of the British Nationality Act 1948 the general rule was that British citizenship was available to a person by descent if his or her father was a citizen of "the United Kingdom and Colonies" at the time of the person's birth. But, if the person's father was himself a citizen by descent only, then unless either the person was born in a British-controlled territory or the father was in Crown service at the time of the birth, it was normally a condition under section 5(1)(b) that the person's birth should be registered at a British consulate within a year. Citizenship by descent could not be transmitted through the female line. Regulations permitted a British consul to register a birth only if the child was eligible for British citizenship.

The Respondent, Shelley Elizabeth Romein, was born in the USA in 1978. The 1948 Act was in force at that time. Ms Romein's father was a US citizen with no personal connection to the UK. Her mother had been born in South Africa and was a citizen of the United Kingdom and Colonies by descent, because her father (Ms Romein's grandfather) had been born in the UK. Ms Romein's mother swore an affidavit in which she said that, while pregnant with her and in South Africa, she contacted the British consulate in Johannesburg to enquire about British citizenship for her unborn child. She was correctly told that the child was ineligible because her only claim by descent was through her mother.

The British Nationality Act 1981 removed the restriction to descent through the male line for those born after 1 January 1983 (subject to a five-year transitional period). The 1981 Act was amended retrospectively in 2003 and 2009. Section 4C of the amended 1981 Act, as it stood when Ms Romein applied for citizenship and as it now stands, requires applications for citizenship to be dealt with on the assumption that the law had always provided for citizenship by descent from the mother on the same terms as it provided for citizenship by descent from the father. However, in 2013 when Ms Romein sought to take advantage of the change, her application for citizenship was rejected because she was unable to satisfy the condition of registration within a year. The reason why she was unable to do so was that although the law was now deemed at all material times to have allowed claims to citizenship by descent through the female line, at the time of Ms Romein's birth in 1978 the staff of British consulate, acting entirely properly under the law as it actually was, would have refused to register her birth because she was ineligible for citizenship.

Ms Romein applied for judicial review of the decision refusing her citizenship application. The Lord Ordinary dismissed that application for judicial review. Ms Romein appealed to the Inner House of the Court of Session which allowed her appeal, quashed the refusal of her citizenship application, and remitted her citizenship application for reconsideration.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, although for reasons other than those given by the Inner House. Lord Sumption gives the judgment, with which Lady Hale, Lord Reed, Lord Hodge and Lady Black agree.

REASONS FOR THE JUDGMENT

The refusal of Ms Romein's citizenship application, notwithstanding the assumption in section 4C, on the ground that the consular staff would have properly refused to register her birth is a paradoxical result, calling for scrutiny **[3]**. There are logically only three possible solutions to this conundrum **[9]**.

The first approach is that Section 4C requires one to assume not only that the law had always provided for citizenship by descent through the female line, but that consular officials at the time in fact acted on that basis. This is Ms Romein's case, which the Inner House substantially adopted **[9(1)]**. This involves formidable difficulties. First, the counterfactual assumption that the consular officials would have registered the birth is inconsistent with section 4C(3D), according to which "it is not to be assumed" that the registration requirement was met. The Court cannot accept the view of the Inner House that section 4C(3D) serves only to cast on the applicant the burden of proving his her of claim without the assistance of any presumption of fact. Subsection (3D) does not say that. Moreover, the applicant would bear the burden of proving his or her claim anyway. Second, there is a conceptual problem about making the operation of section 4C dependent on an enquiry conducted years later into the question of whether a parent would have wished or intended or attempted to take advantage of a then non-existent right. Third, if the counterfactual assumption includes an assumption about the steps which the parents would have taken with a view to obtaining British citizenship for their children, then it would be open to an applicant to seek citizenship by descent on the basis that the mother would have moved to a British-controlled territory for the birth, or that a parent would have entered or continued in Crown service in time for the birth. It seems extremely unlikely that Parliament expected the operation of section 4C to depend on that practically unanswerable question. Subsection (3D) appears to have been added precisely to rule out such unrealistic enquiries **[10]**.

The second approach is that section 4C requires one to assume only that the law had always provided for citizenship by descent, but not to make any assumption that the facts were other than they actually were. This is the Advocate General's case, which the Lord Ordinary substantially adopted. This accords with the literal words of section 4C, but its result is that citizenship by descent through the female line would be available under section 5(1)(b) of the 1948 Act only where persons were registered by mistake or in defiance of the regulations. It is difficult to see why Parliament should have intended to help only them. The Court cannot accept the suggestion that the intention behind section 4C was to allow claims to citizenship by descent from a woman only in cases where citizenship followed automatically from certain specified circumstances and was not dependent on a person taking steps, such as registering a birth. Section 4C as drafted would be an extraordinary way of doing that. Parliament is highly unlikely to have had any such intention. It would have significantly undermined the purpose of section 5(1)(b) of the 1948 Act for no discernible reason **[9(2)-11]**.

The solution is to treat the registration condition in section 5(1)(b) as inapplicable in applications for citizenship by descent from the mother. This is the only way to give effect to section 4C(3), given that section 4C(3D) precludes any counterfactual assumption that the birth was registered **[9(3)-12]**.

There are two objections to this solution. The Court accepts neither. The first is that it is said to lead to unacceptable discrimination between those born before and after the 1948 Act came into force. The Court prefers not to decide this point. It does not affect Ms Romein's case. It is enough to point out that, if there is any difference between the treatment of those two categories of people, it arises from the wording of the 1981 Act (as amended) **[13-14]**. The second objection is that this solution leads to a different form of gender discrimination, because claimants through the female line would be free of the registration condition whereas claimants through the male line under the previous law were not. This is not anomalous either: there is no current discrimination between applicants. There was historic discrimination between their parents. Section 4C simply corrects the remaining consequences **[13, 15]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html