Neutral Citation Number: [2023] EWCA Civ 376

Case No: CA-2021-000698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
Mr Justice Jay, Upper Tribunal Judge Pitt and Mrs Jill Battley
SC/169/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05 April 2023

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
LISA SMITH	**Respondent**

- -
- -

Cathryn McGahey KC and Natasha Barnes (instructed by **The Treasury Solicitor**) for the **Appellant**
Hugh Southey KC and Lara Smyth (instructed by **Birnberg Peirce & Partners Solicitors**) for the **Respondent**

Hearing date: 21 February 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is the Secretary of State's appeal against a decision of the Special Immigration Appeals Commission ('SIAC'). The Respondent ('R') appealed to SIAC against the Secretary of State's decision on 12 September 2019 ('the Decision') personally to direct that R be excluded from the United Kingdom. The notice of the Decision explained that 'it was assessed that you travelled to Syria and aligned with ISIL/Daesh. It is therefore assessed that your presence in the UK would present a genuine, present and a sufficiently serious threat to UK public security'.

2. The Secretary of State made the Decision under regulation 23(5) of the Immigration (European Economic Area) Regulations 2016, 2016 SI No 1052 ('the EEA Regulations'). The Secretary of State certified the Decision under regulation 38(2)(a) of the EEA Regulations. I summarise the EEA Regulations in paragraphs 17-21, below.

3. In a judgment given after a remote hearing on 3 July 2020, SIAC (Chamberlain J, sitting alone) made two decisions. First, he lifted a stay on R's appeal (the Secretary of State did not oppose that). SIAC had imposed that stay in order to give R the opportunity to apply to be registered as a British citizen. Second, he decided an issue about who could act as a Special Advocate in R's appeal. Chamberlain J also gave directions dated 10 July 2020 for the determination of ground 1 of R's notice of appeal as a preliminary issue. Mr Southey told the Court at the hearing of this appeal that R opposed the stay because she did not want to apply to be registered as a British citizen.

4. In paragraph 48 of his judgment, Chamberlain J explained that R had clarified that her argument was not that she was a British citizen, but that her father had been one, and she would have been one had her parents been married when she was born, and since there was no good reason for treating those whose parents were married any differently from those whose parents were not, 'she was entitled, by virtue of Article 14 read with Article 8 ECHR to be treated for the purposes of any decision to exclude her *as if* she were a British citizen' (original emphasis). In paragraphs 44-45, below, I say more about SIAC's approach to the preliminary issue.

5. After a hearing on 21 April 2020, SIAC allowed R's appeal (paragraph 52), by deciding that preliminary issue in her favour.

6. On this appeal, the Secretary of State was represented by Ms McGahey KC and Ms Barnes, and R by Mr Southey KC and Ms Smyth. I thank counsel for their written and oral submissions. Ms McGahey was not an author of the Secretary of State's skeleton argument.

7. Paragraph references are to SIAC's judgment, or, if I am referring to an authority, to that authority, unless I say otherwise.

8. For the reasons given in this judgment, I have reached six conclusions.

i. The question asked in the preliminary issue was liable to, and did, lead SIAC astray.
ii. SIAC should have asked whether the Secretary of State would have treated a British-Irish dual national who had acquired her British citizenship at birth, and who was assessed to have travelled to Syria and aligned with ISIL/Daesh in substantially the same way as R was treated.
iii. If SIAC had asked that question, the answer is that the Secretary of State would have done so.
iv. R was not therefore treated differently on the ground that her parents were not married at birth from the appropriate comparator.
v. If that is wrong any difference in treatment was justified.
vi. The Secretary of State's appeal should be allowed.

The facts

9. SIAC does not seem to have heard any evidence, and found few facts. R's evidence consisted of a brief, undated, witness statement (which, the parties confirmed at the hearing of this appeal, was served the day before the hearing). She relied on a report of two DNA tests, which showed that there was a very high probability that 'George Martin DOB 17 Aug 1954' was her father, a page from George Patrick Martin's Irish passport, his birth certificate, and parts of two seamen's documents, said to have been documents owned by her paternal grandfather and great grandfather.

10. It was said to be common ground that R was born in Ireland (paragraph 2). R's father, George Patrick Martin, was born in Belfast on 17 August 1954. According to his birth certificate, his parents were George Patrick Martin and Sarah Martin. 'Documents very recently disclosed by [R] reveal that [R'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 Patrick Martin born in Belfast on 5th May 1884. These records show that George Martin ([R's] grandfather) was British in 1967' (paragraph 6).

11. R's mother was said to have been born in the Republic of Ireland. She has never been a British citizen. R was born outside the United Kingdom on 17 February 1987. Her parents were not married. They have not married since (paragraph 7). According to SIAC, 'Little more is known about [R's father] beyond the fact that on 13th February 1982 he was issued with a passport by the Republic of Ireland stating that he was an Irish national. That would not of course preclude dual nationality' (paragraph 8).

12. SIAC drew an inference 'from the fact that [R's] grandfather was British, or at least had dual nationality, in 1967 …that her father was British at the time of his birth in 1954' (paragraph 11). In paragraph 12 it said that there was nothing to contradict R's evidence that her father had not renounced his British citizenship.

13. SIAC did not investigate what social or familial connections, if any, R might have with the United Kingdom. SIAC does not appear to have been invited to do so, perhaps because there was no relevant evidence. In paragraph 18 it said that R lived 'in a border town in the Republic of Ireland where there are historical and political sensitivities, she identifies as Irish, and would choose not to take an oath of allegiance

to the British Crown'. The source of those statements is paragraph 5 of the undated witness statement. She did not say that she would refuse to make a pledge of allegiance, nor, indeed, that she would refuse to swear an oath of allegiance.

The legislative framework

14. The effect of the relevant statutory provisions about citizenship is not in dispute, so I can summarise them briefly. If R's parents had been married when she was born, she would automatically have been a Citizen of the UK and Colonies by descent (see section 5 of the British Nationality Act 1948 ('the 1948 Act') read with section 32(2) of the 1948 Act). On the commencement of the British Nationality Act 1981 ('the BNA'), she would, by section 11, have become a British citizen on 1 January 1983.

15. Citizenship law was amended over time to mitigate the effects of provisions which are now seen as discriminatory, by enabling people who had not automatically acquired citizenship at birth to apply to be registered as a British citizen (section 41). R meets the general and other conditions in section 41. She is therefore entitled to be registered as a British citizen if she applies for registration. There is now no requirement that she be of good character. There is a difference, therefore, as the Secretary of State accepts, between R's position and that of a person whose parents were married when she was born. That person would have acquired British citizenship automatically at birth, whereas, if R wishes to become a British citizen (and she appears to be ambivalent about that), she must apply to be registered as a British citizen. If she were to apply to be registered, she would have to make an oath and pledge of allegiance (see section 42(3) and Schedule 5 to the BNA), unless the Secretary of State decided, by reason of exceptional circumstances, to exempt her from that requirement (see section 42(6)).

16. Section 12 of the BNA enables a person to renounce her British citizenship, in short, as long as the Secretary of State is satisfied that, if the person renounces that citizenship, she will not become stateless. Section 40(2) of the BNA gives the Secretary of State power to deprive a person of her British citizenship if the Secretary of State is satisfied that would be conducive to the public good, provided that the Secretary of State is also satisfied that deprivation will not make that person stateless (section 40(4)).

The EEA Regulations 2016

17. Regulation 11(1) of the EEA Regulations gives an EEA national a right of entry into the United Kingdom if she produces a valid passport or identity card issued by an EEA state. 'EEA national' is defined in regulation 2(1) as 'a national of an EEA State who is not also a British citizen…'.

18. Regulation 23(5) of the EEA Regulations gives the Secretary of State power, if she considers that the exclusion of the EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 27, to make an order prohibiting that person from entering the United Kingdom.

19. So far as is relevant, regulation 27(5) provides:

> *'(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to*

> *protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—*
>
> *(a) the decision must comply with the principle of proportionality;*
>
> *(b) the decision must be based exclusively on the personal conduct of the person concerned;*
>
> *(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;*
>
> *(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;*
>
> *(e) a person's previous criminal convictions do not in themselves justify the decision;*
>
> *(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person'.*

20. Regulation 36(1) gives the subject of an EEA decision a right to appeal against that decision under the EEA Regulations. By regulation 36(2), a person who claims to be an EEA national may not appeal under these Regulations without producing a valid national identity card or passport issued by an EEA State. I assume that R has produced such a document, but if she has, it is not in the bundles for this appeal. In this case, that right of appeal could only be exercised from outside the United Kingdom (regulation 37(1)(c)).

21. The effect of regulation 38 is that if, as here, the Secretary of State certifies, under regulation 38(2)(a), that a decision was made in the interests of national security, any appeal is to SIAC.

The decision of the Supreme Court in R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56; [2017] AC 365

22. SIAC said (paragraph 28) that 'the answer to this appeal is located in a close and accurate analysis' of the decision in *Johnson*. I will therefore summarise the reasoning in that decision before I summarise SIAC's decision on the preliminary issue.

23. The appellant was born in Jamaica in 1985 to a Jamaican mother and a British father. They were not married. He moved to the United Kingdom with his father when he was four. Under the law in force when he was born, he was a Jamaican citizen, but not a British citizen. He would have been British if his parents had been married when he was born, if they had married later, or if his mother, rather than his father, had been a British citizen. He would have been a British citizen if his father had registered him as a child, or if he had been registered over the age of 16, so long as he was of good character. He was convicted of serious offences between 2003 and 2008. He was convicted of manslaughter in 2008 and sentenced to nine years' imprisonment. The

Secretary of State was obliged by section 32 of the UK Borders Act 2007 ('the 2007 Act') to make a deportation order at the end of his sentence unless that would breach rights under the European Convention on Human Rights ('the ECHR').

24. He appealed to the First-tier Tribunal ('the F-tT'). The F-tT held that it would be proportionate to deport him, but remitted to the Secretary of State the question whether his deportation would be discriminatory, as he would not have been liable to deportation if his parents had been married. The Secretary of State reconsidered the case, confirmed the deportation order and certified his claim as clearly unfounded, so that he had no in-country right of appeal.

25. He applied for judicial review of the certificate. The Judge held that article 14 read with article 8 had been breached and quashed the certificate. The Judge did not read down the legislation as entitling the appellant to British citizenship, and did not make a declaration of incompatibility. This Court allowed the appeal of the Secretary of State, holding that the case had to be judged at the time of the appellant's birth. The Human Rights Act 1998 ('the HRA') was not in force then, so the discrimination was not incompatible with Convention rights.

26. He appealed to the Supreme Court. The Supreme Court allowed his appeal. Baroness Hale, with whom the other members of the Court agreed, gave the judgment. She said that the fundamental question was whether it was compatible with Convention rights to deny British citizenship to a child because his parents were not married when he was born. He was not responsible for their marital status, but it was 'he who suffer[ed] the consequences' (paragraph 1).

27. Many rights are associated with British citizenship. 'This case is about the right not to be deported…' (paragraph 2).

28. Section 2(1)(a) of the BNA provided that a person born outside the United Kingdom was a British citizen if his father or mother was a British citizen otherwise than by descent. 'Father' was defined, in section 50(9) of the BNA in such a way as to exclude a father who was not born to the child's mother. Section 47, in short, provided that if the child's parents married after his birth, he was 'legitimated' and was to be treated as if he had been born in wedlock. The legislation was amended on 1 July 2006, and only with prospective effect, so that children born after that date to unmarried parents were British citizens if they were able to prove their paternity.

29. Baroness Hale said that those provisions defined 'people who are automatically entitled to British citizenship whether they want it or not'. Other people could apply to be registered as British citizens. Baroness Hale described the relevant provisions in paragraph 13. The legislation was amended in 2014, so that people in the appellant's position could apply to be registered as British citizens, but that right was subject to a good character requirement.

30. In paragraphs 14-17, she described the way in which laws discriminating against the children of unmarried parents had been gradually removed. In paragraph 18 she said that a British citizen cannot be deported, but non-citizens could, if the Secretary of State deemed that their deportation was conducive to the public good. In paragraph 18 she summarised the relevant provisions of the 2007 Act, and in paragraph 19, the

appellate structure as it was in 2012. In paragraph 21 she described the history of the arguments. It had been suggested that any discrimination was a one-off act, or that the appellant's liability to deportation was not solely caused by any initial discrimination, as he could have registered as a British citizen, and was responsible for his serious crimes.

31. She pointed out that the subject of the proceedings was the certificate. It was argued that the Secretary of State was required by the provisions of primary legislation to make a deportation order because the appellant was not a British citizen. That meant that, even if the deportation order was incompatible with the appellant's Convention rights, the effect of section 6(2)(a) of the HRA was that the Secretary of State would not act unlawfully in making a deportation order.

32. That was a red herring. She pointed out that the 2007 Act made it clear that if a deportation order would breach Convention rights, the Secretary of State could not lawfully make a deportation order. To make a deportation order would not be 'in accordance with the law', even if it was not a breach of section 6 of the HRA (paragraph 22).

33. The issue was whether an appeal against the decision that section 23(5) of the 2007 Act applied to the appellant, 'on the basis that to deport the [appellant] now would be a breach of the UK's obligations under [the ECHR], is clearly unfounded'. That depended on whether (1) it was sufficiently within the ambit of article 8 to bring article 14 into play, (2) whether the discrimination had a one-off effect or had continuing consequences which could amount to a present violation of Convention rights, and (3) whether any discrimination could be justified (paragraph 23).

34. In paragraph 24, she described the case law of the European Court of Human Rights ('the ECtHR'). The EHCR does not guarantee a right to acquire a particular nationality. An arbitrary denial of citizenship might, nevertheless, give rise to an issue under article 8 because of its impact on a person's private life. It could also trigger the prohibition on discrimination in article 14. In paragraph 28, she held that the denial of automatic citizenship had current and direct effect on the appellant, as it meant that he was liable to deportation.

35. It was not in dispute that birth out of wedlock is a 'status' for the purposes of article 14. Nor could it be disputed that there was difference in treatment, on the grounds of such a status, between people who were in an analogous situation. If the appellant's parents had been married when he was born, he would automatically have become a British citizen, and 'would not be liable to deportation no matter how badly he had behaved' (paragraph 29). Such discrimination was on one of the 'suspect' grounds, and had to be justified by reference to 'very weighty reasons' (paragraph 30, and see paragraph 31).

36. In paragraph 32, she noted that there was dispute about precisely what had to be justified. If it was the initial denial of citizenship, the Secretary of State could argue that discrimination was not even recognised then. If it was the continued denial of citizenship in 2012, the Secretary of State argued that steps had been taken to put right the historic wrong and that it was reasonable for those to operate prospectively, and that it was reasonable for some people to acquire citizenship automatically and for

others to have to register, as citizenship might bring disadvantages, such as dual nationality problems. She identified two problems with that argument. First, citizenship was imposed automatically on some people at birth, whatever their wishes, and on others if their parents married later. The appellant's problems would be over 'if his mother could be found and his father persuaded to marry her' (paragraph 32).

37. If what had to be justified was the liability to deportation of non-citizens and the non-liability of citizens, that was easy. The right to live in one's country is the principal right of citizenship. It might also be easy to justify the liability of foreign criminals to deportation, as compared with other foreigners (paragraph 33).

38. What had to be justified, however, was the current liability to deportation of the appellant and of others like him, whose parents were not married when they were born, '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"' (paragraph 34). 'Exception 1' is a reference to section 33(2) of the 2007 Act. In paragraph 35, she said that the certificate had to be quashed, and his appeal allowed to go ahead. She added that 'for the reasons given earlier, it is certain to succeed'.

39. In paragraphs 36-39, she considered whether a declaration of incompatibility should be made. She said that 'Allowing the appeal is the consequence of the particular provisions relating to deportation which are relevant here'. There were bound to be other people in the appellant's position. There were many potential current consequences of that position, such as in relation to the right to vote. People in the appellant's position could not register as a British citizen unless they were of good character. The good character requirement did not apply to people who acquired citizenship automatically at birth. That distinction was based solely on birth and could not be justified (paragraph 36).

40. The appellant argued that the statutory instrument which brought the 2002 amendments into force was incompatible with Convention rights because it did not operate retrospectively by granting citizenship status automatically to all people who had been denied citizenship because their parents were not married at their birth, or later. The Secretary of State argued that it was contrary to principle for legislation to have retrospective effect, particularly if it automatically changed someone's status (paragraph 37).

41. Baroness Hale said that that argument should not be taken too far, for reasons which she then gave. She continued '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. That avoids the risk of inconvenient results and provides everyone with clarity and certainty'. It was not reasonable to impose the additional hurdle of a good character test, however, as that produced 'the discriminatory result that a person will be deprived of citizenship status because of an accident of birth which is no fault of his' (paragraph 38).

42. The provision which was incompatible was paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserted section 41A of the BNA (the requirement to be of good character) in relation to various categories of people who would automatically have become UK citizens had their parents been married when they were born. The Supreme Court made a declaration to that effect.

SIAC's judgment

43. SIAC described the Decision and the Notice in paragraph 1. It added that 'The merits of that proposition [ie of the Secretary of State's assessment] do not demand investigation at this stage'. SIAC also added that 'if she [that is, R] were a British citizen the exclusion notice would be *ultra vires*'. SIAC briefly considered regulation 23 of the EEA Regulations. Irish nationals could be excluded, but not those with dual nationality (paragraph 2).

44. Ground 1 of R's amended grounds of appeal was that the order made pursuant to the Decision was unlawful because R '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' (paragraph 3). SIAC said that the effect of primary legislation was that R was not a British citizen. Her 'real case' was that she was entitled to be treated as one because of the ECHR and the HRA. She would automatically have been a British citizen if her parents had been married when she was born. She was not responsible for the fact that they were not. That fact 'generates the possibility (putting the matter at its lowest) of discrimination and a violation of article 14'. SIAC referred to *Johnson*. It was 'therefore submitted that [R] should be treated as if her parents were married, with the inexorable consequence that she should be deemed a British citizen' (paragraph 4).

45. In paragraph 5 SIAC referred to the preliminary issue. That 'preliminary issue… should be 'recast…[as] "whether the decision challenged is unlawful and/or ultra vires because [R] is entitled to be treated as a British citizen by reason of article 14 of the ECHR read in conjunction with article 8"' (paragraph 5).

46. SIAC summarised the legal framework in paragraphs 10-18.

47. In paragraph 14 it said, 'The upshot is that [R] cannot say that she falls within what may be described as the automatic entitlement provisions of [the BNA]. However, there may be another route'. In paragraph 17, it observed that she was entitled to be registered as a British citizen and was not required to meet a good character requirement. No complaint was made about the requirement to pay a fee, but she would not choose to take an oath of allegiance as required by section 42(3). The Secretary of State has a discretion to disapply that requirement (paragraph 18).

48. SIAC summarised the submissions in paragraphs 19-27.

49. R submitted that the key question was whether the power to exclude under regulation 23 'could lawfully be exercised in [R's] case' when it could not have been had her parents been married. The requirement to take an oath was differential treatment and did not meet the high threshold for justification. The Decision was analogous to the decision to deport Mr Johnson. The ratio of *Johnson* (paragraph 34) 'did not demand

any consideration to be given to the possibility of acquiring citizenship by registration'. That meant that paragraphs 36-38 of the judgment in *Johnson* were 'supererogatory'. If, contrary to that submission, it was necessary to consider the possibility of registration, the requirement to take an oath could not be justified because R was entitled not to take an oath. The Decision was not mandated by primary legislation. The EEA Regulations are not primary legislation and the Secretary of State has a power, not a duty, to direct a person's exclusion from the United Kingdom.

50. The Secretary of State argued, first, that the continuing differential treatment was justified by the availability of registration. The Supreme Court had, in principle, endorsed the availability of registration as a justification; Mr Johnson's problem was that the good character requirement meant that he could not make such an application. The Secretary of State's 'overarching point' was that the Secretary of State 'would have won had there been no such requirement'. The Secretary of State accepted that if R successfully applied to be registered as a British citizen, she could no longer be the subject of an exclusion order. The requirement to register was a lawful way of correcting the injustice. There were advantages, and disadvantages, to citizenship. R's objection to taking an oath had emerged for the first time the day before the hearing.

51. The Secretary of State's second argument was that many great difficulties would be caused if R was entitled to be treated as a British citizen. Nationality was a package of rights and obligations and R could not pick and choose. The argument that R 'should be treated as' a British citizen undermined the clarity and certainty which were upheld in *Johnson*. One such difficulty was that R could not be deprived of her virtual British nationality under section 40 of the BNA.

52. The Secretary of State had a third argument, based on regulations 2 and 23(5) of the EEA Regulations. The definition of 'EEA national' meant that 'British citizen' could not include R. R was an 'EEA national', and that was all.

53. SIAC referred to *R (K) v Secretary of State for the Home Department* [201] EWHC 1834 (Admin); [2018] 1 WLR 6000 five times. Despite saying that it would consider *K* (paragraph 29), it did not obviously do so.

54. In paragraph 32, SIAC noted, correctly, that the issue in *Johnson* was whether an appeal against the decision that section 32(7) of the 2007 Act applied to the appellant was clearly unfounded. Baroness Hale's remark in paragraph 30 that 'very weighty reasons' would be needed to justify the 'undoubted discrimination in this case' disposed of the Secretary of State's argument that the 'manifestly without reasonable foundation' test applied. That submission was 'based on a misreading of para 88 of *JD and A v UK* [2020] HLR 5. The test only applies to transitional measures: see paragraph 89' (paragraph 33).

55. What needed to be justified, according to Baroness Hale, was not the initial denial of citizenship in 1985, or the liability of non-citizens to be deported, SIAC said, referring to paragraphs 32 and 33, nor the continued denial of citizenship in 2012 (paragraph 32). SIAC then quoted paragraph 34. As Baroness Hale made clear in paragraphs 35 and 36, the appeal was allowed and the certificate was quashed. The appellant's appeal was certain to succeed in the F-tT. That was a consequence of the provisions

about deportation which applied in that case. There was no need for a declaration of incompatibility, as there was an unlawful certificate which could be quashed (paragraph 36).

56. In paragraph 37, SIAC noted the parties' rival contentions about the 'key paragraphs' of *Johnson*. SIAC quoted 32 and paragraphs 36-38, which it described as an 'excursus'. Baroness Hale had made two points in paragraph 32: (1) the continuing denial of citizenship in 2012 was not what needed to be justified; but (2), if it did need to be justified, it was at least in principle reasonable to have a citizenship law which operated prospectively (paragraph 40).

57. Baroness Hale's view in paragraph 32 (that the problem with R's argument was that the differentiating feature was the accident that some people's parents were married when they were born and other peoples' were not) needed to be explained. SIAC's view was that she meant that a difference of that kind could never be justified. Her reasoning about the good character requirement in paragraph 38 'would therefore apply to almost any hurdle which would not exist for those with married parents', although she did not have in mind the requirement to make a paid application with the necessary evidence. If she had thought that, the declaration of incompatibility would not have been limited to the good character requirement (paragraph 41).

58. In paragraph 34, Baroness Hale was not considering the differences which might apply to those who wanted to register as British citizens. She considered those in paragraphs 36-38. R was right to submit that paragraph 34 deals with 'the much narrower question of enforcement action'. That applied to the power to make an exclusion order as much as it applied to the power to make a deportation order. What had to be justified was the 'current' liability to such action. The liability would not exist if R's parents had been married when she was born. That difference could not be justified in *Johnson*, or in this case (paragraph 43).

59. It made no difference to the analysis that R could apply to be registered as a citizen. A person who acquired citizenship automatically at birth could not be subject of an exclusion order. 'This is not just an academic question because even a successful applicant for registration would face delays' (paragraph 44).

60. There was force in R'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 violation 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' (paragraph 45).

61. SIAC said that its conclusion did not involve 'the salami-slicing of citizenship'. R's case was not about rights and duties, but about '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 [R]'. 'British citizen' in regulation 2 of the EEA Regulations did not include those, like R, who 'say that they should be treated as such'. But section 6(2) of the HRA did not apply because the EEA Regulations are not primary legislation, and the Secretary of State

could have acted differently, by not making the Decision. The appeal was governed by section 6(1) of the HRA. SIAC would be acting incompatibly with a Convention right if it did not allow the appeal, 'even though there is no provision in the Regulations which is analogous to section 33(2) of the 2007 Act' (paragraph 46).

62. SIAC went on to say that, without more, R could not have a British passport, and could not vote in British elections. Paragraphs 36-38 of Baroness Hale's judgment were relevant. The Secretary of State was, in principle, entitled to insist on an application, and, subject to one issue, had supplied 'very weighty reasons' in support of that position (paragraph 27). That issue was whether R should be required to take an oath and pledge of allegiance. SIAC agreed with the Secretary of State that the requirement to make a pledge 'cannot be objectionable on any basis' (paragraph 49). SIAC did not resolve whether the requirement to take an oath was objectionable (paragraph 50).

63. In paragraph 51, SIAC said that paragraphs 47-50 dealt 'albeit not completely' with the Secretary of State's submission that to treat R as British would generate many serious problems. SIAC had accepted R's primary submission, which neutralised those difficulties. SIAC had not accepted R's alternative argument, which was that if R's primary argument was wrong, the registration process would, itself, be discriminatory. The point about those many serious problems was 'highly relevant and generally speaking we agree with it'. That issue 'may be addressed on another occasion when, where [the Secretary of State] will have a greater opportunity to think through the ramifications of the oath and section 42(6)'.

The grounds of appeal

64. SIAC refused the Secretary of State's application for permission to appeal on the ground that it had no realistic prospect of success. The Secretary of State applied for permission to appeal to this Court. I gave permission to appeal on the papers. I had, however, failed to see that R had raised a written objection to the jurisdiction of this Court. When that was drawn to my attention by the Civil Appeals Office, I ordered that the jurisdiction question should be decided after an oral hearing by three different judges of this Court. That question was in due course resolved in favour of the Secretary of State.

65. There are five grounds of appeal.
    i. SIAC erred in law in holding that the non-liability of a British citizen to an exclusion order is an 'immunity' that is different in nature from the rights flowing from British citizenship.
    ii. SIAC erred in law in holding that the distinction between a person like R, who is not a British citizen because her parents have never married, and is liable to exclusion, and a British citizen, could never be justified regardless of R's right to be registered as a British citizen.
    iii. SIAC erred in law in not holding that the distinction is justified because R can apply to be registered as a British citizen and would then not be liable to exclusion in a way which achieves the legitimate aims of a registration requirement.

iv. SIAC erred in law in failing to ask whether that distinction was 'manifestly without reasonable foundation' when deciding whether or not it was justified.

v. Alternatively, if the distinction cannot be justified, SIAC erred in law in not holding that the definition of 'EEA national' in the EEA Regulations was a provision made under primary legislation which cannot be read in any other way compatibly with article 14, and in making the Decision the Secretary of State was acting so as to give effect to that provision, so that, in accordance with section 6(2)(b) of the HRA, section 6(1) did not apply to the making of the Decision.

Submissions

66. In her skeleton argument, the Secretary of State accepted that birth outside wedlock is a status and that it is a suspect ground for a difference in treatment. The Secretary of State submitted, by reference to paragraphs 98, 99, 115 and 135 of *R (SC) v Work and Pensions Secretary* [2021] UKSC 26; [2022] AC 223 that it was difficult to describe a general rule which described how a difference in treatment could be justified. States had a wide margin of appreciation even when a difference in treatment is based on suspect grounds, when the state is correcting an 'historical inequality over a transitional period'. The ECtHR has applied the 'manifestly without reasonable foundation' test in cases which do concern suspect grounds and do not concern transitional measures.

67. The Secretary of State suggested that an important feature of *Johnson* was that the appellant was not able to apply for registration as a British citizen. That feature meant that, on the facts, the Secretary of State could not have relied on the availability of registration as a justification.

68. The Secretary of State submitted that paragraphs 36-38 of *Johnson* show that SIAC was wrong to hold, in paragraph 41, that a difference in treatment based on whether an appellant's parents were married could never be justified. The correct interpretation of Baroness Hale's judgment is that the difference in treatment could potentially be justified even though that would require very weighty reasons. The difference in treatment could not be justified because the appellant could not avoid liability to deportation by applying to be registered as a British citizen. The reasoning at paragraph 38 suggests that had he been able to apply to be registered, the difference in treatment could have been justified.

69. The Secretary of State described several difficulties of principle which SIAC's approach entails. I mention six.

i. Nationality is a legal bond and is a single and indivisible package of rights and duties. A supposed immunity to exclusion cannot be separated from that package.

ii. SIAC erred in deciding that even though differential treatment is now justified if a person wishes to apply for a British passport or to vote, it is not justified as regards liability to deportation or exclusion because of the delay involved in registration.

iii. SIAC erred in equating exclusion and deportation. The Secretary of State should not be able to deport pending application for registration.

Exclusion is not enforcement action. There is no positive action to remove a person, and that person can stay where she is pending a decision on an application for registration.

iv. SIAC did not deal with the practical consequences of its analysis.
    a. It was unclear how R could prove her indefeasible right to enter the United Kingdom.
    b. It did not explain why R should be in a better position than a dual British-Irish national. The Secretary of State cannot terminate R's 'immunity from exclusion', but would, in these circumstances, deprive a dual national of her British citizenship.
v. If R has an indefinite immunity from exclusion, there is a gap in the Secretary of State's ability to protect the United Kingdom from people who are outside the United Kingdom and are a threat to national security.
vi. The Secretary of State could deprive and exclude the comparator, but not R.

70. SIAC's decision that R has an automatic immunity from exclusion, an interference with which could never be justified, implies that in enacting the registration provisions, Parliament had not gone far enough, and could only do so by putting R into a better position than the comparator. As SIAC should have rejected R's case on the preliminary issue, the appeal to this Court should be allowed and R's appeal to SIAC should be remitted.

71. The Secretary of State had a second argument, in case her primary argument failed (see paragraph 65.v, above).

72. In her oral submissions, Ms McGahey advanced a fall-back argument and a second fall-back argument. The second such argument put the significant themes of the skeleton argument into the analytical framework required in an article 14 claim on these facts. She contended that the correct comparison for the purposes of article 14 is between R's case and the case of a dual-British Irish national who lives in the Republic of Ireland and who acquired her British nationality at birth, and who is assessed to pose the same risk to national security as R. That hypothetical comparator is in a position which is, for relevant purposes, similar, or analogous, to that of R.

73. Ms McGahey accepted that the Secretary of State could not have made an exclusion order under 2016 Regulations against the comparator. She nevertheless submitted that the Secretary of State would have deprived the comparator of her British nationality. She also accepted that the exclusion and deprivation powers are different, but nevertheless submitted that they are relevantly similar.

74. As Ms McGahey pointed out, in order to make the exclusion order, the Secretary of State had to be satisfied that R was a 'present threat' and that the exclusion order was proportionate. In those two respects, the criteria in regulation 27(5) of the 2016 Regulations are both more specific, and stricter, than the test for deprivation in section 40(2) of the BNA. Ms McGahey accepted that to deprive a British/Irish dual national of her British nationality might be a sensitive matter, given the long historic links between the United Kingdom and the Republic of Ireland. She submitted,

nevertheless, that if the Secretary of State considered, in the light of her assessment of the risk posed by R, that the more specific and stringent tests of the 2016 Regulations were met, it is highly likely that she would have deprived the comparator of her British nationality, if her assessment of the comparator's risk was the same.

75. Mr Southey submitted that the proper comparator is a British national who acquired British citizenship by descent, at birth, because her parents were married. Regulation 23(5) does not just apply in national security cases, but across the board. All that was needed was that R had been denied 'the benefit of the positive measure in question' (see paragraph 55 of *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804). In that case this Court declared that statutory provisions which did not confer a right to bereavement damages on cohabiting partners were incompatible with article 14 read with article 8. However this case was analysed, the difference in treatment was based solely on whether or not a person's parents were married when the person was born. What had to be justified was the difference in treatment and not just the treatment. The core of SIAC's reasoning was paragraph 43, the focus of which, consistently with *Johnson*, was whether R's current liability to exclusion could be justified. SIAC had rightly held that it could not be (see paragraph 58, above).

76. In his oral submissions he accepted that, when she made the Decision, the Secretary of State knew nothing about R's personal history. It must follow that the Secretary of State did not know that R would argue that, because of her personal history, she was a person who should be treated as a British citizen. He argued that the Secretary of State could deal with any such difficulties by withdrawing the Decision making a new decision which explicitly stated that had a person like R been a dual national, she would have deprived that person of her British citizenship. The Secretary of State could make regulations to clarify the position in such cases. Not everyone who has returned from Syria has been deprived of their nationality. He accepted that the relevant statistics do not differentiate between dual and nationals and others.

77. It was not enough to show that the Secretary of State had a legal power to deprive a dual national; it was necessary to show that the Secretary of State would have exercised that power. The Secretary of State could have put in evidence, even though the appeal was being dealt with by reference to the preliminary issue. It would have been open to the Secretary of State to argue that there was no difference in treatment.

78. He rightly pointed out that there was no complaint in the grounds of appeal that SIAC had asked the wrong question.

79. *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 shows that deprivation is a 'draconian' power and can only be exercised when it is proportionate to do so. Mr Southey particularly relied on paragraphs 97-98 and 108. The 'sensitivities' arising from the history between the United Kingdom and the Republic of Ireland were also significant. If SIAC's decision was correct, the Secretary of State could always withdraw the current decision and make a fresh decision. This Court would not know, without evidence, whether or not the Secretary of State would in fact have deprived R of her British citizenship, had R been a British citizen.

Discussion

80. The question whether or not there is a breach of article 14 involves four stages, as Lord Reed explained in paragraphs 36 and 37 of Regina *(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223. He referred to the language of article 14 and to paragraph 61 of the decision of the Grand Chamber *in Carson v United Kingdom* (2010) 51 EHRR 13.
    i. Does the claim fall within the ambit of a Convention right?
    ii. Is there a difference in treatment based on an identifiable characteristic (or 'status')?
    iii. Are people who are in analogous, or relevantly similar, situations treated differently?
    iv. Does the difference in treatment have an objective and reasonable justification?
        1. Does it pursue a legitimate aim?
        2. Is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

81. Lord Reed added that the contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

82. The preliminary issue which SIAC considered was liable to, and, in my judgment, did, set SIAC off on the wrong track. There is nothing in Baroness Hale's judgment in *Johnson* which suggests that the effect of article 14 read with article 8 is to entitle a person to be treated as if she has a legal status which she does not have. A more fundamental problem with the preliminary issue is that it ignores those four stages, and substitutes for them a question which is not an accurate proxy for all, or, indeed, for any of them. I sympathise with Mr Southey's point that the Secretary of State does not appear to have complained about the framing of the issue at the time. But I do not accept that, even if both parties agreed to set SIAC off on the wrong track, this Court should also follow that track.

83. I agree with Mr Southey's submission that Baroness Hale was considering two distinct issues in her judgment in *Johnson*. In paragraphs 32-35 she decided that the executive decision in that case which interfered with Mr Johnson's article 8 rights was unlawful because it involved a breach of his article 14 rights, and that what had to be justified was Mr Johnson's 'current' liability to be deported. In paragraphs 36-39, she explained why a declaration of incompatibility in relation to the statutory requirement of good character was appropriate, again, because it resulted in unlawful discrimination (ie was a breach of article 14). In those paragraphs she was considering a different issue, that is, whether the regime for correcting the historic breach of article 14 itself involved a breach of article 14.

84. She accepted in paragraph 30 that very weighty reasons would be required to justify discrimination on a suspect ground. She said in paragraph 34 that no justification had been suggested for what she identified as the discrimination in that case. That might not be surprising, because she analysed the case in a different way from both the parties. Further, if she had thought that discrimination on the grounds of the marital status of a person's parents could never be justified, there is a contradiction between that conclusion and her approach in paragraph 38. It may be that she thought the

discrimination could not be justified in Mr Johnson's case, because of the good character requirement, but if she did, that consideration is not expressed in her reasoning.

85. But these points only take Mr Southey's argument so far. They do not support the next step in the argument, which is that R can enjoy part of the rights which attach to citizenship (described as 'an immunity from enforcement') while not actually being a citizen.

86. A comparison is inherent in stages ii. and iii. of the analysis required by article 14 (see paragraph 80, above). It is necessary to see how the claimant is treated differently from a person who is in a relevantly similar situation. The framing of the preliminary issue substituted one inapt question for all four stages of the analysis, but the implication of SIAC's reasoning is that it considered that, as regards the making of the exclusion order, the relevant comparison was between R and a person who acquired British citizenship automatically at birth and did not have another nationality. I do not consider that that is the correct comparison. I accept Ms McGahey's second fall-back submission about the appropriate comparator (see paragraph 72, above).

87. On the face of it, R and the comparator could not be treated in exactly the same way, because R is not a British citizen and the comparator is. Formally, R complains that she was treated in a way in which the comparator could not have been treated. I nevertheless consider that the treatment which the comparator would have received is in substance equivalent to the exclusion order, if an allowance is made for the fact that R is not, but the comparator is, a British citizen.

88. I also accept the rest of Ms McGahey's second fall-back submission. R and the comparator are in a situation which is, in the relevant respects, similar, or analogous. The reason for the apparent difference in the ways in which R and the comparator are treated is that R's parents were not married when she was born, whereas the parents of the comparator were married when she was born, with the result that R is not, but the comparator is, a British citizen. However, the difference in treatment is more apparent than real. The treatment is formally different, because of the difference in their status. But in substance, the treatment would be the same. In each case, the Secretary of State used, or would use, the available tool which best neutralises the risk which each poses to national security, by ensuring that she cannot enter the United Kingdom. In R's case, that is an exclusion order; and in the case of the comparator, it would be deprivation of the second citizenship. I therefore consider that, on close analysis, there is, in substance, no difference in treatment.

89. If, however, I am wrong about that, I consider that any such difference in treatment is justified. The justification is not that R could have avoided the difference in treatment by applying for registration as a British citizen. The justification is that the difference in the citizenship status of R and the comparator necessitates the different treatment, if different treatment it be, because R has no second citizenship of which she could be deprived, whereas the comparator, who could not be excluded from the United Kingdom because she is a British citizen, could be deprived of that citizenship.

90. The difference in treatment has an objective and reasonable justification. First, it pursues a legitimate aim. The legitimate aim is the protection of national security. Second, there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, because if a person poses the risk to national security which is posed by a person who has travelled to Syria and aligned with ISIL, there is no less intrusive means of managing the risk satisfactorily than keeping the person outside the United Kingdom. There are many decisions of SIAC which have upheld deprivation on that ground: for example, *R3 v Secretary of State for the Home Department* (Cheema-Grubb J, Upper Tribunal Judge O'Connor and Mr Roger Golland) SC/150/2018. I consider that that justification is supported by very weighty reasons.

91. I do not consider that *Johnson* bound SIAC, or binds this Court, to reach a different conclusion. Like all article 14 cases, this case depends on a careful analysis of the facts (in so far as they are known), and decisions about which facts are relevant at each stage of the article 14 analysis. *Johnson* is not an appropriate factual, or legal, template for the purposes of that exercise, not least because paragraph 29 of Baroness Hale's judgment in *Johnson* (see paragraph 35, above) does not bind this Court to make a particular decision on the linked questions of who is the appropriate comparator and whether there is, in substance, a difference in treatment between that comparator and R. The comparator in *Johnson* was a person who acquired British nationality at birth because his parents were married. The considerations raised by Ms McGahey's fall-back submission simply did not arise.

92. Wisely, Ms McGahey did not, in her oral submissions, press the argument I refer to in paragraph 65.v, above. If I understand the argument, I consider that it is based on a misreading of section 6. It assumes that there is a comma between 'primary legislation' and 'which cannot'. There is no such comma. There is no provision of primary legislation which obliged the Secretary of State to do anything in the EEA Regulations which was contrary to any person's Convention rights. I would therefore reject that argument (see further the submissions in paragraphs 38-40 of Mr Southey's skeleton argument, which I accept).

Conclusion

93. For those reasons, I would allow the Secretary of State's appeal. The Respondent's Notice was, in effect, a challenge to SIAC's failure to find that the requirement that R take an oath was further discrimination which could not be justified and was therefore contrary to article 14. This is a hypothetical point. The Secretary of State's attitude to the oath has not been put to the test, since she has not been asked to consider a request in an application for her to exercise the discretion conferred by section 42(6) of the BNA. In any event, the reasons why I would dismiss this appeal do not depend on the availability of registration as the justification for any relevant difference of treatment. That means that it is unnecessary to decide the issues raised by R's Respondent's Notice. Those reasons also mean that I do not need to express any view about *Andrejeva v Latvia* (2020) 51 EHRR 28 (at paragraph 91) and *Munoz Diaz v Spain* (2010) 50 EHRR (at paragraph 70), to which this Court drew the parties' attention before the hearing. They are only relevant to a justification argument based on the availability of registration.

94. I should also make clear that the Court heard no submissions about two matters which were not in issue on this appeal. They are the relevance or otherwise of the Common Travel Area to the issues and the potentially linked question of jurisdiction for the purposes of article 1 of the ECHR. This decision should not be taken as implying anything about those issues.

95. After the Court reserved its judgment, in response to a request from the Court at the hearing, the parties produced, on 29 March 2023, an agreed note on two questions.

    i. What rights did Irish nationals have to enter the United Kingdom before Brexit and what rights do they now have to enter the United Kingdom?
    ii. What powers did the Secretary of State have to exclude an Irish national before Brexit and what relevant powers does the Secretary of State have now?

96. The note clearly explains the legal framework on both questions, before, and after Brexit. I do not consider that it is necessary to summarise the note, as neither of these questions was explored in front of SIAC. The only potentially relevant aspect of the material in the note is that the Secretary of State's policy about the deportation of Irish nationals is significantly more restrictive than the approach she takes to the deportation of other foreign national prisoners.

97. SIAC was not told about the deportation policy. The policy's restrictive approach to deportation does not affect my views on this appeal. First, the policy applies to deportation, not to exclusion. There is no policy for exclusion, according to the agreed note. Second, if, which is not obvious, that restrictive approach should be read across to exclusion, this case would be in, and not outside, that approach. The policy refers to terrorism and to national security.

Lewis LJ

98. I agree that the appeal should be allowed for the reasons given by Elisabeth Laing LJ. As I take a different view from Underhill LJ as to the basis on which the appeal should be allowed, I set out my reasons for doing so shortly. First, the factual position is that the respondent, Ms Smith, is an Irish national. The appellant, the Secretary of State, exercised the power conferred by regulation 23(5) of the EEA Regulations to make an order excluding the respondent from the United Kingdom as she had been assessed as presenting a genuine, present and sufficiently serious threat to the United Kingdom as she had travelled to Syria and aligned herself with ISIL/Daesh. That assessment is not the subject of the current appeal.

99. Secondly, the relevant question on this appeal is whether the Secretary of State acted unlawfully in exercising the power to exclude the respondent because to do so would involve discrimination contrary to Article 14, read with Article 8, of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"): see section 6 of the Human Rights Act 1998. The discrimination is said to arise from

the fact that the respondent's father was a British national but, as her parents were not married at the time of her birth, she did not acquire British citizenship automatically at birth. If her parents had been married, she would have had British nationality as well as Irish nationality. Persons who are British nationals could not be excluded under regulation 23(5) of the EEA Regulations (as the power to exclude only applies to an EEA national who is defined by regulation 2 as a national of an EEA State who is not also a British citizen). Thus, it is said, there was unlawful discrimination as, if the respondent's parents had been married, the respondent would have acquired British nationality and would not have been liable for deportation under regulation 23(5) of the EEA Regulations.

100. The proper analysis for determining whether there has been a breach of Article 14 of the Convention read with Article 8 is to consider the four issues set out at paragraph 80 of Elisabeth Laing LJ's judgment as they apply to the facts in this case. In that regard, it is accepted that the subject-matter of the appeal involves the enjoyment of a Convention right and that Article 14 is applicable, and the treatment in question is based on a status, that is birth out of wedlock. The critical questions are whether there has been a difference in treatment and, if so, whether that difference in treatment is justified. The proper focus for considering whether there has been a difference in treatment is to compare the treatment of the respondent with the treatment that would be accorded to a dual British-Irish national who lives in the Irish Republic and who is assessed as posing a risk to national security by reason of her association with ISIL/Daesh in Syria. It is not sufficient, and is apt to mislead, to formulate the issue as SIAC did, namely whether the respondent ought to be treated as a British citizen. That omits key matters from the assessment of whether there has been a difference of treatment and is apt to mislead for the reasons given by Elisabeth Laing LJ at paragraph 82 of her judgment. In particular, the respondent was an Irish national and, if her parents had been married, she would also have acquired British nationality and been a dual British-Irish national. Thus, the real issue is to compare the treatment of the respondent, as an Irish national living in the Republic and assessed as a security risk with the treatment that would be accorded to dual British-Irish nationals in similar circumstances.

101. I agree with Elisabeth Laing LJ that the treatment accorded to the respondent would in substance be the same as that accorded to a dual British-Irish national who was assessed as presenting the same security risk to the United Kingdom. In each case, the Secretary of State would take the necessary legal steps to address the risk that each presented by ensuring that they could not enter the United Kingdom. The steps that would need to be taken would differ to reflect the different legal status of the respondent (who, in fact, is only an Irish national) as compared with a dual British-Irish national. In the case of the respondent, it would only be necessary legally to exercise the power to exclude her from the United Kingdom. In the case of a dual British-Irish national, it would be necessary for the Secretary of State first to deprive the dual national of British citizenship under section 40 of the 1981 Act and then to exercise the power to exclude that person from the United Kingdom under regulation 23 of the EEA Regulations. But it is not appropriate to compare the treatment of the respondent with a person who was only a British national. The respondent is an Irish national whose complaint is that she would also have acquired British citizenship at birth if her parents had been married. The proper comparison, therefore, is with a person who is a dual British-Irish national. I agree with Elisabeth Laing LJ that there

is no difference in treatment for the reasons given in paragraph 88 of her judgment. Even if that were wrong, I would agree that any difference in treatment would be justified for the reasons given at paragraphs 89 to 91 of her judgment.

102. I consider that that is the proper analysis of the issue that arises on this appeal. I am not persuaded that the appeal should be dealt with on a different basis by reason of the matters identified by Underhill LJ in his judgment. First, I accept that the true issue only became clear in the course of argument in this Court. However, now that the issue has been properly analysed, and given that the way in which the issue was dealt with below was apt to mislead, it does seem to me that the correct and certainly preferable course is to address the issue that does actually arise in this case so far as it is possible to do so.

103. Secondly, I accept that it might have been preferable for there to have been evidence (if such evidence were available) as to how dual British-Irish nationals assessed as a security risk because of their associations with ISIL/Daesh would have been treated. However, in the circumstances of this case, I am satisfied that the proper inference is that the Secretary of State would have taken the appropriate legal measures to treat a dual British-Irish national in the same way. The criteria for exercising the power of exclusion under regulation 23 and 27 of the EEA Regulation are stricter than the criteria for deprivation of citizenship under section 40(2) of the 1981 Act as recognised in paragraph 74 of Elisabeth Laing LJ's judgment. If the Secretary of State had grounds to exclude a person from the United Kingdom, she would also have had power to deprive a person of British citizenship. Given that the purpose of the Secretary of State would in the case of the respondent and the hypothetical comparator in each case be to prevent a person assessed as being a security risk because of associations with ISIL/Daesh in Syria entering the United Kingdom, the natural inference is that the Secretary of State would have exercised those powers.

104. Nor does the reference to potential sensitivity arising out of the relationship between the United Kingdom and the Republic of Ireland suggest any different result. It is clear that the Secretary of State is prepared to exclude an Irish national, with the right to travel to the United Kingdom, from this country. She has done so in the case of the respondent. I do not consider that it is realistic to suggest that any sensitivities would cause the Secretary of State not to deprive a person of British citizenship because he or she also had Irish nationality if he or she had been assessed as a risk to national security because of associations with ISIL/Daesh. If I had had any doubt about this matter, and if the issue were critical to the outcome of the appeal the appropriate course of action would be to allow the appeal and remit the matter for consideration by SIAC. I do not consider that there is any realistic doubt. The natural inference is that the Secretary of State would have taken the available legal steps to prevent a dual British-Irish national assessed as a security risk because of associations with ISIL/Daesh from entering the United Kingdom just as she has taken the available legal steps to prevent the respondent, assessed as a security risk for those reasons, from entering the United Kingdom.

105. I also doubt that the appeal could be dismissed on the basis that the availability of registration as a British citizen amounts to justification of the difference in treatment that, on analysis, is said to arise in this case. In *Johnson* the Supreme Court had to consider whether it was unlawful discrimination contrary to Article 14 of the

Convention to deport a person who was not a British national (because his British father and non-British mother were not married at the time of his birth or subsequently). Baroness Hale, with whom the other members of the Supreme Court agreed, identified that what needed to be justified was the current liability of the individual to be deported because his parents were not married at the time when he was born or any subsequent time. That was a distinction which was based solely on birth outside wedlock and no justification had been suggested for it. Consequently, the Supreme Court quashed a certificate that the claim was manifestly unfounded with the result that the person concerned could appeal against the decision. Baroness Hale observed at paragraph 35 that the appeal itself would be "certain to succeed" for the reasons given earlier as deportation would involve unlawful discrimination contrary to Article 14 of the Convention. Baroness Hale also went on to deal with the question of whether denial of an automatic right to citizenship was unlawful in other contexts (such as the right to vote). She concluded that, where a person had not been able to acquire citizenship automatically at birth, it was reasonable (and was therefore justified) to accept that that person should be required to apply for registration. In one respect, the requirement that an applicant had to establish that he was of good character, was not justifiable and to that extent it was appropriate to grant a declaration that the provision inserting the requirement to be of good character was incompatible with Convention rights.

106. In the light of the decision in *Johnson*, I doubt that the availability of registration as a British citizen is capable of amounting to justification for the difference of treatment said to arise in this case. That difference of treatment is said to be the fact that the respondent is liable to be excluded from the United Kingdom. Deportation and exclusion are similar in nature for present purposes. Deportation involves the removal of a person from the United Kingdom and it is a criminal offence to enter the United Kingdom in breach of a deportation order (see section 3(5) and 24(1)(a) of the Immigration Act 1971). Exclusion involves the making of an order prohibiting a person from entering the United Kingdom (see regulation 23(1) and (5) of the EEA Regulations). Given that the Supreme Court considered that liability to deportation could not be justified simply because the person's parents were not married when the person was born, or at any time thereafter, it seems to me to be likely that exclusion could not be justified simply on that basis. The fact that the person concerned could acquire British citizenship by registration would not amount to justification of the differential treatment involved in excluding people from the United Kingdom. The availability of a system of registration may be a justification for a difference in treatment resulting in the fact that children of unmarried parents would not automatically acquire citizenship, and the rights that flow from it, as recognised by Baroness Hale in paragraph 38 of her judgment. But that would not be a justification for deportation (or, by analogy, exclusion). For those reasons, I would not be minded to decide this appeal on the basis set out in Underhill LJ's judgment.

107. In short, therefore, I would allow this appeal for the reasons given by Elisabeth Laing LJ.

Underhill LJ

108. I agree that this appeal should be allowed, but I have reached that conclusion by a different route than Elisabeth Laing and Lewis LJJ. They would decide the appeal

essentially on the basis that Ms Smith is as a matter of substance not being treated differently from her comparator – that is (as I would agree) a British-Irish dual national living in Ireland who is assessed as posing an equivalent security risk – because, although if she had British nationality she could not have been excluded under the 2016 Regulations, the same result could and would have been reached by depriving her of that nationality under the 1981 Act and thereupon also excluding her. I see the force of the point, but I am uneasy about deciding the appeal on that basis because it was first advanced by Ms McGahey in the course of oral argument, at the suggestion of the bench, and there are aspects which were not fully explored. In particular, it does not seem to me necessarily to follow from the fact that Ms Smith's hypothetical comparator could have been deprived of her nationality and excluded that she would have been. There is no evidence about what the Secretary of State's attitude would be in such a case, which would, as Mr Southey pointed out, involve real sensitivities because of the special relationship between this country and Ireland.

109. That being so, I prefer to approach the appeal on the basis that Ms Smith has established that she was differently treated from her comparator as a result of the fact that her parents were not married and that in consequence she does not enjoy British nationality. However I believe that the appeal should nevertheless should be allowed on the basis that any such difference in treatment is justifiable. In the circumstances I need only state my reasons shortly.

110. The essential point in my view is that, as the Secretary of State expressly acknowledges, Ms Smith has an absolute and indefeasible right to be registered as a British citizen on application (see para. 15 of Elisabeth Laing LJ's judgment), and the proceedings in SIAC were indeed stayed in order to give her the opportunity to make such an application (see para. 3). If she took that step she would be in an identical position to her comparator. I accept of course that the requirement to do so is itself a difference of treatment originating in past discrimination. But the requirement is not onerous: the essential obligations are to pay a fee (which we were told would in her case be £80), to which Ms Smith has made no objection, and (normally) to attend a citizenship ceremony where she would have to take the citizenship oath and pledge (see section 42 (1) of the 1981 Act). In *Johnson* Lady Hale said in terms that the application of a registration requirement in circumstances where a person had been discriminatorily denied British citizenship at birth was not unreasonable in principle in the interests of "clarity and certainty" (see para. 38 of her judgment, quoted at para. 41 above), and I respectfully agree.

111. Accordingly Ms Smith could readily overcome the disadvantage resulting from her parents being unmarried, but she has chosen not to do so. In those circumstances it does not seem to me disproportionate to treat her in accordance with her chosen status as a foreign national. Indeed to do otherwise would, as the Secretary of State submits, mean that she has the benefit of one particular incident of British citizenship – non-excludability – without being willing to assume the full package of rights and obligations of a citizen. At para. 42 of its judgment SIAC distinguishes between "defensively" invoking an immunity from exclusion and actively invoking other rights, but I find that unconvincing. What Ms Smith is in fact doing is not purely defensive: she is asserting a right freely to enter and stay in the United Kingdom on the basis that she should have become a British citizen at birth. It would be

extraordinary if she were entitled to that right without being willing to acquire the status from which it derives.

112. I should acknowledge that Ms Smith, in a witness statement lodged on the eve of the hearing in SIAC, said that she identified as Irish and had "never previously opted" to swear an oath of allegiance to the British Crown on account of the historical and political sensitivities (although she does not go so far as to say that she would never do so). I fully understand those sensitivities. (In fact, as SIAC pointed out, the Secretary of State has a discretion under section 42 (6) of the 1981 Act to disapply the requirement in subsection (1); but since Ms Smith has never applied it has not been tested whether that discretion would be exercised in her favour, and I will proceed on the assumption that it would not.) But Ms Smith cannot have it both ways. If she wishes to be treated as a British citizen she must accept the obligations that go with that status, including allegiance to the Crown, which is owed by those who are British from birth just as much as by those who acquire nationality subsequently.

113. I do not believe that this analysis is inconsistent with the decision of the Supreme Court in *Johnson*. In that case there was no possibility of the claimant applying for British citizenship, because the legislation at that time incorporated a good character requirement which he could not satisfy; and no justification of the kind which I believe exists in this case could be, or was, asserted. The general observations in Lady Hale's judgment relied on by Mr Southey cannot be applied to the fundamentally different situation in this case. For the same reason her approach that the discrimination in that case could only be justified on the basis of "very weighty reasons" cannot be read over to the present case – or, if it can, the availability of British citizenship on application would constitute such a reason.