Neutral Citation Number: [2018] EWHC 1834 (Admin)

Case No: CO/3900/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2018

Before :

HELEN MOUNTFIELD QC
(Sitting as a Deputy High Court Judge)

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Between :

	THE QUEEN ON THE APPLICATION OF K, A CHILD, by her litigation friend MT	**Claimant**
	- and –	
	THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Mr Alex Burrett (instructed by **Law Lane Solicitors**) for the **Claimant**
Mr Robin Tam QC and Mr John-Paul Waite (instructed by **the Government Legal Department**) for the **Defendant**

Hearing date: 22nd March 2018

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Judgment Approved**HELEN MOUNTFIELD QC:**

Introduction

1. It is said to be a wise child who knows his own father. It might be thought, having read the facts of this case, that it is an even wiser child who knows who is deemed to be her father for the purposes of the British Nationality Act 1981 as amended ("the BNA 1981"). But, as the facts of this case also show, this can be an important question, in particular, for a child who seeks to establish their entitlement to British nationality through her father, by virtue of section 1 of that Act.

2. Section 1(1) of the BNA 1981 provided at the relevant time that a person born in the United Kingdom or a qualifying territory was automatically a British citizen at birth if, at the time of the birth, his father or mother was a British citizen or settled in the United Kingdom or in that territory.

3. However, it is only if the Secretary of State for the Home Department is satisfied that the

person deemed to be a child's father for the purposes of the 1981 Act is British that a child can claim British nationality through him. The issue in this case is whether, for the purposes of the BNA 1981, the Claimant, a four year old girl born in Britain, can be treated as the child of her (British) biological father, who is also the man named on her birth certificate as her father, or whether the legislation deems a different man, who is Pakistani, and to whom the Claimant's mother was married at the time of her birth, to be her father. The issue arose when Her Majesty's Passport Office ("HMPO") wrote to the Claimant on 12 June 2017 revoking her British passport on the basis that it had been issued on the mistaken basis that she was a British citizen. That is the decision under review in this case.

4. The Claimant submits that even though her non-British mother (who did not, at the time of her birth, have settled status in the UK) was married to another non-British national at the time of the Claimant's birth, she can and should be treated as being able to obtain British nationality through the British man who is her actual biological father. The Secretary of State submits that the only and obvious reading of the legislation is that a child in the Claimant's situation the non-British husband of her non-British mother is deemed, by operation of law, to be the Claimant's father. This turns on the correct construction of section 50(9A) of the 1981 Act which provided, at the relevant time:

"For the purposes of this Act, a child's father is –

(a) the husband, at the time of the child's birth, of the woman who gives birth to the child;" or

(b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or

(ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or

(c) where none of the paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to paternity."

5. The prescribed requirements as to proving paternity are set out in the British Nationality (Proof of Paternity) Regulations 2006. The regulations stated, at the relevant time, that proof of paternity could be provided by the person being named as the father of the child in a birth certificate issued within one year of the child's birth (which – in the case of a child born to a woman who is not married to the father, requires the mother's consent), or by other proof which satisfies the Secretary of State including, but not limited to, a DNA test or a court order.

6. In the present case, the Claimant's biological father is named on her birth certificate, and so – if there were no other person to whom subsections 50(9A)(a) or (b) applied – he would be deemed to be her father by virtue of section 50(9A)(c). However, because the Claimant's mother was married to someone else at the time of her birth, section 50(9A)(a) applies to deem her mother's husband at the time of her birth to be the Claimant's father, unless the words "where none of the paragraphs (a) to (ba) apply" can in some way be ignored, or read-down, or interpreted as a mere rebuttable presumption as to paternity, which can be displaced by evidence that there is another 'real' father.

7. Mr Burrett argues on behalf of the Claimant that the legislation can and should be read so that the provisions of section 50(9A)(a) which deem a mother's husband to be the father is treated as no more than a rebuttable presumption, which can be displaced by proof that someone else who satisfies the requirements of paternity is the father. He submits that any other reading breaches the Claimant's rights under Articles 8 and/or 14 of the European Convention on Human Rights ("the ECHR"), to be recognised as her true father's daughter, and to acquire his nationality. He submits that section 50(9A) of the BNA 1981 can be read down in the way he suggests, using section 3 of the Human Rights Act 1998 ("the HRA"), to avoid this result. Alternatively, he says that if I do not consider section 3 HRA can be used in this way, the Court should declare that section 50(9A) of the BNA 1981 is incompatible with the ECHR, using its powers under section 4 HRA.

8. The Defendant's case is that the Claimant's reading of the legislation is neither necessary nor possible.

9. As to why the Claimant's reading is unnecessary, the Defendant says that his reading of section 50(9A) of the 1981 Act does not breach Article 14 ECHR read with Article 8, because he does not accept that Article 14 is engaged at all, and if it is, the law as it stands is justified.

10. In any event, the Defendant submits, the words of section 50(9A)(a) cannot be read, as the Claimant proposes, as a rebuttable presumption without undermining the policy of the Act that for the purposes of conferring nationality by birth, the people who are a child's parents should be certain. His case is that, on a proper reading of the clear words of section 50(9A), subsection (c) only arises if subsection (a) does not apply, because the words "where none of the paragraphs (a) to (ba) apply" cannot be read other than as giving priority to the definition of paternity in section 50(9A)(a) and (b) over the fall-back definition in section 50(9A)(c). He also emphasises the importance, in a context where there may be more than one person with a social claim to fatherhood, of the law providing one clear route to identifying no more than one person who *is* the child's father for the purposes of passing on nationality. Thus, the Claimant's father must be deemed to be the Pakistani man to whom her mother was married at the time of her birth (29 May 2014), and accordingly, notwithstanding the existence of satisfactory proof that another man is her biological father, the Claimant is not entitled to British citizenship.

11. If the Defendant's submission is right, the Claimant in this case does not have a right to British nationality under section 1 of the BNA 1981 as the child of a British national as of right, because she is deemed not to be the child of the man who is her biological father and named on her birth certificate. She may apply to the Secretary of State to grant her British nationality as a matter of discretion, under the terms of section 3 of the 1981 Act, but – as Mr Tam QC (who ably represented the Secretary of State in this case) accepts – that is a wide discretion. Other matters, such as the character or contacts of parent or child, might feed into that exercise of discretion. So the existence of the right to be considered for a discretionary grant of citizenship under s3 of the 1981 Act is not a complete answer to the absence of a right to citizenship upon proof that one's actual father is a British national which arises in this case.

12. This case has been treated as a lead case on an issue, which I am told has arisen in a number of other cases, some of which have been settled individually and others of which have been stayed behind this case.

The facts

13. The facts can be shortly stated. The Claimant in this case, K, was born in Lambeth on 29 May 2014. The birth was registered on 20 June 2014, showing her father as SK and her mother as MT. It is not in dispute that SK is indeed K's biological father. SK and MT lived together when K was born, as they continue to do.

14. SK is a British citizen and has lived in Britain at all material times. K's mother and litigation friend, MT, is a Pakistani national, who entered the UK as a visitor on 24 April 2013. At the time of K's birth, MT did not have settled status in the United Kingdom, and so K could not claim British nationality through her.

15. Although MT was and is in a committed relationship with SK, at the time of K's birth, she remained married to RS, to whom she had been married in Pakistan. RS is also a Pakistani national, so K cannot claim British nationality through him. MT left RS because she said he had been violent towards her.

16. In due course, K's parents made an application on her behalf for a British passport, accompanied by K's birth certificate and evidence that her father, SK, is British. She was granted a British passport valid from 9 October 2014 to 9 October 2019.

17. There matters stood until, on 5 July 2016, K's mother, MK, made an application for leave to remain, based on her family relationship with SK and K. The application stated that she had entered the UK with a son from her first marriage on 24 April 2013 and made an asylum application based on her fear of her then husband, RS. The application also relied on the fact that she had a British child.

18. On 12 June 2017, however, the Defendant wrote to the Claimant, via her mother, to inform her that her British passport had been revoked. The letter said that this was because HMPO had been informed by UK Visas and Immigration (both agencies of the Home Office) that there had been "a change of circumstances". The change of circumstances was that the enquiries in relation to MT's application for leave to remain had revealed that at the time of K's birth, she was married to RS, a fact of which HMPO was apparently previously unaware. Based on the Defendant's interpretation of the law, as outlined in paragraph 10 above, HMPO considered that K was deemed to be RS's child by virtue of section 50(9A)(a), for the purposes of establishing K's nationality, and not MT's child, as recorded on her birth certificate. So HMPO considered that K's British passport had been issued in error, in the mistaken belief that she was a British national, which, they considered, she was not.

19. K's lawyer wrote a letter under the pre-action protocol for judicial review challenging the removal of K's passport. In a response, HMPO wrote a letter dated 25 July 2017 which confirmed the decision to revoke.

20. Proceedings were then commenced to challenge that decision. Permission to apply for judicial review was granted on the papers by Jonathan Swift QC sitting as a Deputy High Court Judge on 26 October 2017.

21. On 19 December 2017, the Defendant wrote to the Court to say that there were a number of similar cases which raised the same or similar points of law. The Defendant invited the Court to stay these cases and to treat this case as the lead case. On 26 January 2018, the Court ordered that the other cases be stayed behind this one.

The legal framework

The law as to acquisition of British Nationality by birth

22. A child can acquire British nationality at birth if one of their parents is a British national (s1(1) of the BNA 1981). However, the law has changed over time in relation to who can be recognised as a child's parent.

23. The long-standing position at common law was that a father of a child born outside wedlock was not recognised in law as the child's father. The legal position, as expressed by Lord Denning in *Re M (an infant)* [1955] 2 QB 479, in the language of its day, was that:

> "the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, the child of nobody except its mother".

24. This situation was gradually changed by statute. The passage of the Legitimacy Act 1926 enabled children to be treated as legitimate by the subsequent marriage of their parents, provided that neither parent had been married to someone else at the time of their conception. The Legitimacy Act 1959 enabled children to be treated as legitimate as a result of their parents' subsequent marriage even when their parents had not been free to marry at the time of their birth.

25. By virtue of the Family Law Reform Act 1969, people born outside marriage were allowed to inherit their parents' property if either of their parents died intestate. Science as well as social attitudes were moving on. For the first time, the courts could order blood tests in cases of disputed paternity.

26. However, there was no general provision removing discrimination on grounds of legitimacy until the Family Law Reform Act 1987 was passed. The 1987 Act was a response to a report from the Law Commission which reported on ways of removing legal provisions which discriminated against children who had been born out of wedlock. In other words, the desire not to penalise a child for this accident of birth was by then sufficiently politically uncontroversial to be a proper matter for a Law Commission recommendation.

27. The majority of the Law Commission's proposals were accepted. Section 1 of the Family Law Reform Act 1987 provides that:

> "In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other".

28. However, by virtue of section 34(5) of the Family Law Reform Act 1987, this general rule of social policy did not apply to British nationality law, on the basis that this was a matter of UK-wide law, extending beyond the law of England and Wales, whereas the Family Law Reform Act 1987 was limited only to those jurisdictions.

29. Accordingly, the position which preceded the passage of section 50(9A) BNA 1981

was that although a person could acquire British nationality by descent from a parent was himself or herself a British citizen, a father who was not married to a child's mother at the time of her birth did not count as a parent at common law and so could not pass on his British nationality to his natural child.

30. This was the holding of the Court of Appeal in the case of *R v Secretary of State for the Home Department ex parte Crew* [1982] Imm AR 94, following the authority of Lord Denning (by which it was bound) in the 1955 decision of *M*. The Court of Appeal held that for the purposes of section 2 of the Immigration Act 1972, the father of an illegitimate child did not count as a child's parent for the purposes of conferring nationality by descent.

31. This position carried over into section 50(9) of the BNA 1981 as originally enacted. This section originally provided:

> "For the purposes of this Act –
> (a) the relationship of mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her; but
> (b) subject to section 47, the relationship of father and child shall be taken to exist only between a man and <u>any legitimate child</u> born to him;
> and the expressions 'mother', 'father', 'parent', 'child' and 'descended' shall be construed accordingly.

32. Section 47 of the BNA 1981 made provision for children to be treated as the child of their biological father upon the father's marriage to the child's mother.

33. However, from 1987, the Defendant also operated an extra-statutory policy whereby a child who was not legitimate would nonetheless be registered as a British citizen if:
a. The applicant was a child living in the United Kingdom; and
b. His father was a British citizen; and
c. The Secretary of State was satisfied as to paternity; and
d. If the child was aged 16 or over, he was of good character.
Although it is not stated in the policy, this was presumably also only the case if the child's mother was not married to someone else, because of the form of section 50(9) of the BNA 1981 which was then in force, and which would have construed a child born within marriage as a child of that marriage.

34. In 2002, legislation was passed to put the 1987 p policy onto a statutory footing. The White Paper which preceded the passage of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") 'Safe Borders, Safe Haven: Integration with Diversity in Modern Britain' (CM 5387) stated that the draft Bill would contain provisions

> "removing the present statutory distinctions between legitimate and illegitimate children where there is the required proof of paternity".

35. The law also needed to be amended to clarify the position in relation to babies born as a result of In Vitro Fertilisation ("IVF") and other forms of assisted conception licensed under the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") which had come into force in 1991.

36. From 1 July 2006, sections 50(9) and (9A) of the BNA 1981 as amended provided:
> "(9) For the purposes of this Act, a child's mother is the woman who gives birth

to the child.

(9A) For the purposes of this Act a child's father is –

(a) the husband, at the time of the child's birth, of the woman who gives birth to the child; or

(b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 (father), that person, or

(c) where neither paragraph (a) nor paragraph (b) applies, any person who satisfies required requirements as to paternity" .

37. Section 50(9A) was further amended in 2009 to take account of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act"), which added section 50(9A)(ba), (and to add a reference to section (ba) in subsection (c)), so that by the time of K's birth, the section was in the form set out in paragraph 2 of this judgment.

38. The persons who can claim British nationality at birth as of right under the terms of section 1(1)(a) of the BNA 1981, on an ordinary reading of this Act are therefore:

a. the child of the woman who gave birth to them; and

b. the child of the husband of the woman who gave birth to them; or

c. the child of a deemed father or female co-parent of the child under the legislation dealing with IVF (as to which see paragraphs 42-52 below); or

d. if there is no father (or female co-parent) under that legislation, a person who satisfies prescribed requirements as to proof of paternity.

39. The provisions through which a person can prove paternity are set out in the British Nationality (Proof of Paternity) Regulations 2006, as outlined in paragraph 5 above.

40. A person who has not acquired British nationality as of right by birth may apply to acquire it at a later date, by virtue of section 3 of the BNA 1981 which provides so far as is material:

> "(1) If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State *may if he thinks fit, cause him to be registered as such a citizen* (emphasis added) …
>
> (2) A person born outside the United Kingdom and the qualifying territories shall be entitled, on an application for his registration as a British citizen made while he is a minor, to be registered as such a citizen if the requirements specified in subsection (3) … are fulfilled in the case of either that person's father or mother ("the parent in question").
>
> (3) The requirements referred to in subsection (2) are –
>
> (a) that the parent in question was a British citizen by descent at the time of the birth; and
>
> (b) that the father or mother of the parent in question –
>
> (i) was a British citizen otherwise than by descent at the time of the birth of the parent in question … and
>
> (c) that, as regards some period of three years ending with a date not later than the date of the birth –
>
> (i) the parent in question was in the United Kingdom or a qualifying territory at the beginning of that period; and
>
> (ii) the number of days on which the parent in question was absent from the United Kingdom and the qualifying territories in that period does not exceed 270."

41. It is important in this context to note that it was common ground before me that children who have a natural father who cannot be not recognised as their father by virtue of the provisions of section 50(9A) have no right to British citizenship, even upon providing satisfactory proof of paternity.

42. Those not entitled to citizenship as of right may, however, invite the Secretary of State exercise a discretion under section 3(1) of the BNA 1981 to consider whether (or not) to exercise his discretion so as to confer British nationality upon them. The Secretary of State need only register him or her as a British citizen 'if he sees fit', subject to ordinary principles of administrative law.

43. Mr Tam QC accepted that the Defendant's power under section 3(1) of the BNA 1981 did not impose a duty to confer citizenship upon proof of paternity. The Secretary of State's discretion under that section is an open-ended one which may take into account any matter which the Secretary of State rationally considers relevant. The Secretary of State could refuse to grant a child citizenship, for example, because of the child's, or indeed the parent's bad character. By contrast, a child entitled to citizenship through a father under section 50(9A) of the BNA 1981 has a right to citizenship, irrespective of their own, or their father's character or actions.

'Deemed' parenthood in cases of assisted conception

44. One can see that in cases of assisted conception, there may be strong social policy reasons for treating a person other than the 'biological' father as the father of a child born as a result. There are many other complexities, including of surrogacy arrangements.

45. The complexity of these issues has generated an equally complex statutory structure, and Mr Tam QC elaborated on this in the course of developing his submission that, in all contexts, it is an aim of legal policy, that a child shall only ever have two parents, and that at least one of those shall be the woman to whom the child was born. This, he submitted, was the policy of the BNA 1981 and also the policy of the 1990 and 2008 Acts concerning assisted conception.

46. The 1990 Act (which applies to children born by assisted conception between 1 August 1991 and before the commencement of the 2008 Act, on 6 April 2009), and the 2008 Act (which came into force on 6 April 2009) specify in some detail who shall be treated as the mother and father of a child in the cases of assisted reproduction. It is not necessary to go into the detail of these provisions for the purposes of this judgment. For these purposes, I need only note that the policy of this legislation seems to be to avoid the possibility of complexity caused by the possibility that in a case of assisted conception, the person providing a donor egg may not be the woman who carried the child, and in the case of either, the donor of the sperm or egg may be entirely socially unrelated to the child. The legislation is drafted in such a way that there can only ever be two 'deemed' parents as a result of assisted conception, and at birth, one of these should always be the woman who carried the child. (A same-sex male couple can become co-parents of a child in law, but only by adoption after birth).

47. Thus, section 27 of the 1990 Act and section 33(1) of the 2008 Act both prescribe that in cases in which it applies, the child's 'mother' is the woman who is carrying or who carried the child as a result of the placing in her of an embryo or of sperm and

eggs, and no other woman. (In other words, for the avoidance of doubt, an egg donor is deemed not to be the mother.)

48. Sections 28(2) and (3) of the 1990 Act prescribe two situations in which a man may be the father of a child born by assisted reproduction during the period in which those provisions are in force. Section 28(2) (which only operated before same-sex marriages were introduced by law) provides that if the 'mother' was at the relevant time a party to a marriage to a man, he is prescribed to be the father. In a case to which section 28(2) does not appl, but the embryo or sperm were placed in the woman in the course of treatment services provided for her and a man together by a person licensed to provide assisted reproduction services under the Act, then that man is treated as the father, unless one of the exceptions apply, or one of the provisions in relation to dead fathers under section 28(5A) apply, and no other person is to be treated as the father of the child (by virtue of section 28(4) of the 1990 Act). In other words, this Act (which post-dates the BNA 1981) provides that a person designated as a father by sections 28(2) or (3) is the only person who is to be treated as the father. This gives a clear steer that even a man who can prove his paternity (in terms of being the provider of the sperm for the child, and a DNA test) cannot be treated as the father in such a case. This steer is made still clearer by section 29 of the 1990 Act which provides that where by virtue of section 27 or 28 of the Act a person is to be treated (or not to be treated) as the mother or father of a child, that person is to be treated as the mother or father of the child "*for all purposes*".

49. The 2008 Act contains provisions dealing with assisted conception for births conducted with the help of a licensed provider of assisted reproduction services after 6 April 2009. The provisions in relation to who is prescribed as a child's mother in s33(1) of the 2008 Act are identical to the provisions in section 27(1) of the 1990 Act.

50. Section 34(1) applies the provisions of sections 35-47 of the 2008 Act to the determination of the question of who is to be treated as "the" other parent of the child. In other words, the 2008 Act again assumes there can be only one other parent in addition to the child's mother.

51. Section 35 of the 2008 Act is similar to section 28(2) of the 1990 Act, in relation to prescribing that the man to whom a 'mother' as defined in section 33(1) was married at the time of the birth is prescribed to be the father of a child. Section 42 extends a similar provision concerning a "mother" who was at the relevant time a party to a civil partnership or marriage with another woman, who may be prescribed as the child's other parent. In other words, under the 2008 Act, at birth a child always has one mother, who is the woman who bore her; may also have a female or male co-parent; may never have more than one male parent; and may not have more than two parents by birth.

52. Sections 36 or 43 of the 2008 Act operates in a similar way to section 28(3) of the 1990 Act to prescribe a 'father' or 'parent' (being the person for whose benefit licensed assisted reproduction services were jointly provided), but only in a case to which neither sections 35 or 42 operate.

53. Sections 38(1) and 45(1) of the 2008 Act make provisions which are the equivalent of section 28(4) of the 1990 Act, in providing that the persons specified in the legislation are the only persons to be treated as the child's parents at birth.

54. Section 48 of the 2008 Act provides, like section 29 of the 1990 Act which preceded it, that the persons designated as mother, father or parent of a child under this legislation is to be treated in law as the mother, father or parent (as the case may be) "for all purposes". These purposes must include the purposes of identifying who is treated as a parent by virtue of section 50(9A) of the BNA 1981. Section 48 of the 2008 Act provides a clear steer that the priority given to those persons deemed to be parents under the terms of a licensed assisted reproduction agreement in sections 50(9A) (b) and (ba) of the BNA 1981, over the person who may otherwise prove his paternity under section 50 (9A)(c), is a considered and deliberate policy choice.

55. The submission which was made by the Defendant (and not challenged by the Claimant) was that in cases of reproduction under the 1990 or 2008 Acts, a child born as a result of licensed assisted reproduction can have only one 'mother' and (if at all) no more than one other parent.

The relevant provisions of the Human Rights Act 1998 ("the HRA")

56. Section 1 (1)(a) and Schedule 1 to the HRA give effect to specified rights and fundamental freedoms in the European Convention on Human Rights ("ECHR"), which include Articles 8 and 14.

57. Article 8 provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

58. Article 14 provides:
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

59. Section 3 of the HRA provides that so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights, whenever that legislation was enacted.

60. Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right unless (section 6(2)(a)) as a result of one or more provisions of primary legislation, the authority could not have acted differently.

61. Where a court cannot read primary legislation compatibly with Convention rights, but is satisfied that the legislation in question is incompatible with the Convention, it has a power under section 4(2) to make a declaration of that incompatibility, provided (as here) the Crown has notice of the possibility of the making of such a declaration. It is then a matter for the relevant minister or Her Majesty in Council to decide whether to exercise the power under section 10 of the HRA to take remedial action.

Discussion

The submissions of the parties

62. It was submitted on behalf of the Claimant that section 50(9A) of the BNA 1981 should be read and given effect so that it is compatible with Article 8, taken in conjunction with Article 14, of the European Convention on Human Rights. The Claimant submitted that this meant treating the definition of a father in section 50(9A) as a rebuttable presumption only, which could be displaced by proof that another man was in fact the child's father. It was submitted that this was a possible reading of the legislation under section 3 HRA.

63. The Defendant accepted that conferral of citizenship was within the ambit of Article 8 ECHR (on the basis of the decision to that effect of the Supreme Court in in *R (on the application of Johnson) v. Secretary of State for the Home Department* [2016] UKSC 56, [2017] AC 365 at [27]).

64. However, it was said that in the present case:

a. That there was no discrimination on grounds of 'birth', as alleged by the Claimant, and so Article 14 was not engaged. This was not discrimination on grounds of 'birth' in the sense of a distinction between legitimate and 'illegitimate' children (since a child born out of wedlock could acquire citizenship through his or her father under section 50(9A)(c) of the BNA 1981 unless another person was deemed a father by virtue of section 50(9A) subsections (a)-(ba)). Rather, the law's treatment of a child as the deemed child of his or her mother's husband at the time of their birth was, if anything, a distinction based on whether the child's mother was free to marry at that time of the child's birth, the Defendant did not submit that this was a basis upon which the distinction between a child such as the Claimant and the child of a marriage was based. The Defendant also submitted that if this was the proper analysis of the distinction between the Claimant and other children with whom she compared herself, this was not discrimination on grounds of 'birth'.

b. That in any event even if Article 14 was engaged, in many circumstances automatic conferral of citizenship through one's natural father may not be a benefit.

c. That if there is discrimination, it is proportionate and justified by the legitimate aim of ensuring that there is clarity as to who is a child's father, through whom the child can gain citizenship, and that the legislature was entitled to take the policy choice that it was best for clarity and consistency if a child born within wedlock was conclusively presumed to be a child of that marriage. In those circumstances, the right to apply for the exercise of a broad discretion as to the grant of citizenship under section 3(1) of the BNA 1981 was a sensible and proportionate way of dealing with the complex issues which arose. This was an area of social policy which attracted a broad discretionary area of judgment.

d. Finally, it was submitted that even if, contrary to these submissions, there was discrimination contrary to Article 14 ECHR, it was not possible to 'read down' the legislation in the way the Claimant suggested without thwarting the clear and unambiguous language of section 50(9A). The only appropriate remedy would be the exercise of the Court's discretion to make a declaration of incompatibility

under section 4 HRA.

Discrimination on grounds of status

65. It being common ground that the acquisition of nationality through a parent is within the ambit of Article 8, the right to 'equal enjoyment' of other ECHR rights, which is conferred by Article 14 ECHR, is engaged. Article 14 requires signatories to the ECHR to 'secure' equal enjoyment of other underlying Convention rights without discrimination on grounds (among others) of 'birth … or other status'. Although it is not in dispute that birth outside wedlock is a "status" for the purpose of Article 14 (which was established in *Marckx v Belgium* (1979) 2 EHRR 330), the Defendant did not accept that Article 14 was engaged. This was because (he submitted) there was no discrimination as between children depending on whether their mother was married or unmarried, and he did not accept that being treated differently as the child of a woman who was married to a man other than one's biological father at the time of one's birth amounted to discrimination on grounds of 'birth'.

66. I do not accept that submission. It is highly probable that, when Article 14 was drafted, the principal meaning of discrimination on grounds 'birth' was discrimination between those born inside and outside marriage. But the Convention is a living instrument, and I see no reason of principle why, for the purposes of a provision intended to secure equal enjoyment of other Convention rights, and to require justification for unequal enjoyment, the characteristic of 'birth' should not be wide enough to include other unchosen circumstances of one's birth (such as whether or not one is a child of IVF; being born to a mother not free to marry someone else). Treating a person differently, in the enjoyment of other Convention rights, by virtue of such a characteristic appears obviously to be a matter which calls for justification.

67. In any event, it is not necessary for me to determine whether the distinctions in this case were discrimination on grounds of 'birth' for the disposal of this case, because even if it were not, it is clear that being born to a mother married to someone other than one's biological father is an 'other status' for the purposes of Article 14. It is well established in the caselaw that courts take a broad approach to recognising *'other status'* under Article 14, as a reflection of each person's fundamental equality in dignity and rights. In *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, the Supreme Court held that being a child who stayed in hospital for more than a certain number of weeks was a status, which therefore required justification for removal of certain social security benefits on that basis. Lord Wilson held at [22] that a purposive approach to Article 14 led to a reluctance to conclude that an applicant has no relevant status so as to prematurely terminate the inquiry into whether there is unjustified discrimination. Moreover, a child has no choice over whether or to whom his or her parent was married at the time of his or her birth. Although some statuses may be chosen, the absence of choice is a significant factor in assessing if there is regarded as a 'core' status in relation to which the right to equal enjoyment of other Convention rights will be particularly strongly protected: see eg *AL(Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1432 at [26]. A 'core' status usually encompasses '*personal characteristics which the complainant did not choose and either cannot or should not be expected to change'*.

68. In *AL,* Lady Hale also commented on the absence of a need to identify a precise comparator under Article 14, describing this as an '*arid*' exercise [28]. At [24]-[25], she held that in all but an *'obvious', 'plain*' or '*clear'* case, the question of whether

cases are in a '*similar situation*' is in practice properly addressed as part of considering the question of justification, with which it overlaps.

Is there any prima facie discrimination in any event?

69. The Defendant's next objection to the Claimant's case is that there was no discrimination. It was, Mr Tam submitted a mistake to presume that automatic conferral of the citizenship of a biological parent on a child is a benefit. There are some circumstances – Mr Tam gave a list of examples in a post-hearing note dated 13th July 2018 – where this may not be the case. It may (for example) impose problems of dual nationality, which can create problems in relation to some other nationalities. A mother may not to have the child of a rape, or a brief affair, deemed to be the child's father, rather than, as at present, the father being deemed to be the mother's husband. In cases of IVF, the law has expressly decided that the person who enters a licence agreement with the mother, and not the sperm donor, will be deemed to be a father, even though a DNA test could establish his paternity as a matter of biological fact (in recognition of the intentions of the parties to such an agreement). The various circumstances in which it may or may not be beneficial to an individual child to be treated as the child of a person other than their biological father were, Mr Tam submitted, sufficient justification for the structure of the legislation which confers a power rather than a duty on the Secretary of State to recognise a child's biological father as their father for the purposes of the BNA 1981, if an application is made for this to be the case, accompanied by proof of paternity which satisfies the 2006 Regulations.

70. There are two answers to this point, however. The first is a practical one. The Claimant does not suggest that a child *must* be treated as the child of his or her biological father in all circumstances, but only if an application is made – while the child is a minor, on their behalf (by a person with parental responsibility for them); or, after the child has achieved majority, by the person wishing to acquire nationality for themselves. It would only be if the applicant wished the child of a British national biological father to acquire his nationality that the child would be able to do so. There is no suggestion, for example, that a rapist should be entitled to require the child of a rape to be recognised as his child, against the will of the child or the persons with parental responsibility for the child.

71. The second is a point of legal principle. While, under the Equality Act 2010, the domestic concept of discrimination implies that there must be a detriment, the issue under Article 14 ECHR is only whether there has been a failure to 'secure' equal treatment of people in otherwise analogous circumstances, either by failing to treat like cases alike or by failing to treat different cases differently. Only a difference in treatment needs to be established to engage Article 14, not 'less favourable' treatment. This was confirmed by the Supreme Court in *Steinfeld v Keidan v Secretary of State for International Development* [2018] UKSC 32 [2018] 3 LR 415 at [18]-[19] (which was decided on 27 June 2018, after this case was argued – but confirming existing legal principles).

72. Since *Steinfeld* was decided after I heard oral argument in this case, I gave the parties an opportunity to make written submissions to me on this issue. Mr Tam QC for the Secretary of State accepted that decision of the Court of Appeal in *Steinfeld* on this issue (upheld, albeit – as there was no cross-appeal on this point – *obiter*) was binding on me. Mr Tam relied on the fact that there might be some countervailing benefits in a child not having British nationality conferred in circumstances where it

was proved that a biological father was a man other than a woman's husband, as an aspect of the question of justification for making conferral of nationality in such circumstances a matter of discretion rather than of right.

73. However, the consequence of accepting that a mere difference in treatment on grounds of status can amount to discrimination calling for justification means that Article 14 is engaged in this case. There is a contrast between the treatment, in law, of a child whose mother is not married to anyone at the time of its birth, who is deemed to be the child of the biological father under section 50(9A)(c) of the BNA 1981 (provided the fact of paternity is proved), and a child whose mother is married at the time of its birth, who is deemed to be the child of the husband, even if it is subsequently proved that the child is not his child. That is the law, whatever the beneficial or harmful effects (in terms of dual nationality, social upset etc which may arise). The law does not therefore 'secure' equal enjoyment of the right to acquire one's natural father's citizenship to children whose mothers are married and unmarried at the time of their birth, and since this is a matter within the ambit of Article 8 ECHR, there is therefore a breach of Article 14 unless the Secretary of State provides proportionate justification for this failure to secure equal enjoyment (It cannot be said that there is a reason for this distinction which is so obvious as not even to call for justification).

74. In any event, in the present case, there is a clear detriment to K in not being able to acquire her birth father's nationality as of right. It deprives her of a link to her father and his country, and it imposes specific practical difficulties upon her. Unless and until the Secretary of State exercises a discretion in her favour under section 3(1) of the BNA 1981, if she travels abroad – presumably on a Pakistani passport - she will be subject to immigration control on her return home.

Justification

75. The issue in this case is therefore whether the Defendant has adduced proportionate justification for the form of the legislation which (he says) prevents a biological child of a father (other than a child born through IVF, in relation to whom specific statutory deeming provisions are in play) to acquire that father's nationality as of right on proof of paternity, and leaves the issue of whether or not a child can acquire that nationality to an exercise of discretion under section 3(1) of the BNA 1981.

76. I say 'other than a child born through IVF', because the carefully considered scheme of the 1990 and 2008 Acts makes it clear that the legislature has confronted the problem of the difference between biological and social constructions of parenthood in cases of assisted conception head-on, and decided that where a licensed provider of assisted reproduction services is involved, the person who provided biological material (whether sperm or egg) is not, as a result of this, to be treated as the parent. A legislative choice has been made as to who should be deemed to be the parent, in these specific circumstances, and there is no challenge in the present case to the priority which is given by sections 50(9A) (b) and (ba) to the mother, father or parent (as defined by the 1990 or 2008 Acts) and section 50(9A)(c). The challenge in this case is only to the priority which is apparently given by the language of section 50(9A) to the husband of a birth mother over a man who is in a social sense (ie being named on the birth certificate) and/or a biological sense, unassisted by IVF, the father of the child.

77. I approach this question of whether the Defendant has adduced sufficient justification for this policy choice using the structured approach to justification now

well-established by a line of Supreme Court cases (recently summarised in *Steinfeld* at [41] per Lord Kerr), namely:

(a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right;
(b) are the measures which have been designed to meet it rationally connected to it;
(c) are they no more than are necessary to accomplish it; and
(d) do they strike a fair balance between the rights of the individual and the interests of the community?

78. I am prepared to accept that it is a legitimate goal of social policy to decide that, for the purposes of deciding who are 'birth parents' from whom a child can automatically acquire nationality by birth, that there must be legal clarity as to who these parents may be, and that each child should be restricted to two parents, one of whom is the birth mother. The social realities of who later forms the social role of a parent can be amended by adoption or court order.

79. I also accept that it is also a legitimate aim of social policy that there should be reasonable legal certainty and clarity as to whom the law treats as parents.

80. The provisions of section 50(9) and 50(9A) are rationally linked to those goals. However, in my judgment, they are not the least restrictive means of achieving them, given that they have the effect of preventing some children (but not all) from the benefit of being able to acquire their biological father's nationality, simply on the basis of what is - so far as they are concerned – an unchosen characteristic, namely, having been born to a mother who was, at the time of their birth, married to a man other than their biological father. Children whose mothers were married to their biological fathers at the time of their birth, or who were not married at all, do not suffer this problem.

81. I accept that in most cases it is reasonable to presume that a child born within a marriage is a child of that marriage, without further proof of that fact. I also accept that, if a child is born to a father who is not married to the mother, it is legitimate for the Defendant to require proof of paternity before displacing the presumption that the mother's husband at the time of the birth is the child's father, either (under the Proof of Paternity Regulations 2006) by proving that, with the mother's consent, the father has been named on the birth certificate or by provision of proof, which may include DNA evidence or a court order, which is sufficient to satisfy the Secretary of State of the fact of paternity. I also accept that this requires some process of application if someone wishes to displace the presumption that a mother's husband is a child's father.

82. But requiring there to be an application process through which facts must be proved, in order to acquire rights which flow from those facts, is a different matter from replacing a right to acquire citizenship through a parent with a mere right to the exercise of a discretion as to whether or not the state will confer such citizenship, bearing in mind whatever the Secretary of State may rationally consider to be wider relevant considerations.

83. A child whose mother was not married to another man at the time of her birth would have the right, upon provision of satisfactory proof of paternity to have her natural father recognised as such of right. I do not understand why a child whose mother applies, on her behalf, on the basis of the same proof of paternity, should not have the same right to have that man recognised as her father, simply because of the fact

that her mother was married to someone else at the relevant time: a matter over which the child has no control, and which may be irrelevant to her life. The child whose mother was married to a man other than her biological father at the time of her birth has no right to her father's nationality; she is instead dependent upon the Secretary of State's discretion to decide whether to confer it upon her.

84. The circumstances in which a person may wish to displace the presumption that a mother's husband is a child's father are various. This issue has arisen in the European Court of Human Rights, in cases where husbands (named on birth certificates) have later discovered that they are not their wives' children's fathers, and wish to have the formal record of their paternity changed or removed.

85. There are many circumstances in which the situation which the law initially deems to be the case may need to be changed to reflect reality. There is a case like the present. There are also cases where a man is named on a child's birth certificate and subsequently discovers that the child is not his and wishes to have his name, and presumed parental responsibility, removed. I requested, and received, helpful post-hearing notes from both counsel on cases which have emerged from the European Court of Human Rights concerning situations where a person has been designated in official proceedings to be the father of a child, in circumstances where this does not reflect the reality of the situation, and in which national law did not provide for a procedure for this presumption to be displaced. In particular, the case of *Mizzi v Malta* [2006] 1 FCR 256 – which concerned an application by a woman's husband to have himself removed from official registers as being the father of a child who was not, in fact, his biological child - was said by both parties to support their case. The Claimant said this case showed that, to comply with Article 8 ECHR, the requirement that a legal presumption or designation should be capable of being displaced by proof. This, she argued, supported her submission that the provisions as to who is deemed to be a father by section 50(9A)(a) of the BNA 1981 should be capable of being displaced, as of right, by proof that another man is actually the child's father. The Defendant said that there was no direct read-across between the facts of *Mizzi* and the facts of this case; but that in any event, this and other cases showed that all that Article 8 ECHR required was a procedure by which a legal presumption of this kind could be set aside in an appropriate case, and the provisions of section 3(1) of the BNA 1981 provided such a procedure.

86. Given that I accept that ensuring that there are only two parents from whom one can obtain nationality at any one time is a reasonable aim of social policy, and that the legislature was entitled to create provisions to create certainty as to who these people are, I accept that it is reasonable and proportionate for legislation to prescribe who is deemed to be a child's father, and for this to be a statutory provision capable of a certain answer. In other words, I do not consider it a disproportionate or discriminatory interference with Article 8 or 14 rights to require the person with parental responsibility for a child who wishes to establish that a person other than the wife's husband is the father, and should be treated as such in law, to make an application to displace the presumption in section 50(9A)(a) of the BNA 1981.

87. In my judgment, however, the current procedure in section 3 of the BNA 1981 is insufficient to fill this gap, because it does not permit a child who can prove that the presumed fact of paternity in section 50(9A)(a) of the Act is false to displace it as of right: it confers only a right to ask the Secretary of State to exercise a discretion to grant such nationality. In my judgment, in this respect, the current law does not achieve a fair balance between the interests of the child wishing to acquire his or her father's nationality and the Defendant's identified social policy goals.

88. A child whose mother is not married to someone else at the time of their birth, and who is not a child of an IVF arrangement governed by sections 50(9A) (b) or (ba) of the BNA 1981, may acquire their British father's nationality through that father as of right; whatever the child's character, or the father's character or associations may be, and however committed – or otherwise – the relationship which resulted in the child's conception. Nothing other than proof of the fact of paternity is relevant.

89. By contrast, a child whose mother is married to someone else at the time of their birth may only apply to the Defendant to exercise a *discretion* to confer British nationality on them, which discretion can take into account any other considerations the Secretary of State rationally considers to be relevant. If the Secretary of State considers either biological father or child, or indeed associates of such persons, to be of bad character, she could – on application under section 3(1) of the 1981 Act – refuse to grant the child British citizenship, even if satisfactory proof of paternity has been provided.

90. Mr Tam outlined some circumstances in which this might be a good thing. For example, if the child of a married mother was conceived as the result of a rape, and it caused real distress or difficulty for the biological father to be treated as the father in terms of the law, it might make good sense for the Secretary of State to have a discretion to refuse to confer the natural father's nationality on the child of the rape.

91. That may be so. But Mr Tam's example of rape illustrated the lack of justification for a difference between the treatment of a child born to a married mother and a child born to an unmarried mother. There is a strong case for saying that the law should enable a man who has fathered a child as a result of a rape to be deprived of the right to be treated as the child's parent, if that is in the child's best interests. But there is no reason why the law on this issue should differ depending on whether or not the child's mother was married at the time. On the Defendant's reading of the BNA 1981, a child who is born of a rape within marriage remains deemed to be the child of the mother's husband by virtue of section 50(9A)(a) of the 1981 Act, for the purposes of acquiring his nationality, irrespective of the fact that rape is obviously a very serious crime, and irrespective of whether this is in the child's best interests. The same is arguably true if the child is born as a result of a rape within an established relationship, and the child's mother is unmarried, by virtue of section 50(9A)(c). In the case of a child conceived as a result of a rape, the father's character is only relevant to whether the child can acquire his nationality if the mother happened to be married to someone other than the biological father at the time of the child's birth. Only in those circumstances is it the Secretary of State (not the child's mother or a family court) who can decide if this is a reason for refusing, in exercise of a discretion, to grant the child his citizenship.

92. While I am persuaded that a child who wishes, or whose responsible parent wishes, to acquire a father's nationality on proof of his paternity must necessarily make an application to the Defendant and satisfactory proof of the fact of paternity, I am not persuaded that it is also proportionate for such a child to have to make a case for the exercise of a wider discretion in their favour. An application for an exercise of discretion, and consideration of wider social factors by the Defendant in considering how to exercise that discretion is necessarily a more complex, and costly, process than the mere process of considering whether satisfactory proof has been provided of the fact of paternity.

Conclusion on discrimination issue

93. In my judgment, this distinction between two different classes of children discriminates between them on grounds of status, because it fails to secure them equal enjoyment of their right to acquire their biological father's nationality, irrespective of whether their mother was married to a man other than their biological father at the relevant time. This distinction is not rationally explained or proportionately justified in the case of a biological child who was not born through licensed assisted conception under the 1990 or 2008 Acts. (This is different from the situation where a child is born in the context of a licensed IVF arrangement, where the legislature has taken a carefully calibrated choice as to who – in social terms – will be considered to be the child's father, taking into account that this may not be the donor of the sperm: that is not this case and I do not have to determine this issue to form a conclusion in this case.)

94. Accordingly, I find that the scheme of section 50(9A) of the BNA 1981 as the Defendant currently reads and applies it breaches the Claimant's right under Article 14 ECHR read with Article 8, to enjoy equal access to the ability to acquire her biological father's nationality which she would enjoy if her mother had not been married to a man other than her biological father at the time of her birth.

Remedy

95. However, that is not the end of the matter. If the Defendant is right to say that his reading of section 50(9A) of the BNA 1981 is the only possible one, then HMPO was right to apply it in order to determine whether or not the Claimant was a British citizen by birth, and right to conclude she was not. In the absence of an application for discretionary grant of citizenship under section 3(1) of the BNA 1981, she was therefore not a British national.

96. Despite the arguments advanced by the Claimant, I consider that the Defendant's reading of section 50(9A) of the BNA 1981 is not only the natural reading, but also the only possible one.

97. I do not accept that I can use the provisions of section 3 HRA to 'read down' the provisions of section 50(9A) of the BNA 1981 so as to make it compatible with Article 14 ECHR read with Article 8.

98. The statutory language of section 50(9A)(c) creates a completely clear order of priority: a biological father can only be treated as a father under the operation of that provision "where none of the paragraphs (a) to (ba) applies". It is not possible to ignore those words without doing violence to the structure of the Act and the intention of the legislature. That would be to 'cross the boundary between interpretation and amendment' (see *Re S (A Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 at [40]).

99. Moreover, as I have explained above, my provisional view – though I did not hear full argument on this issue, and do not need to determine this for the purposes of resolving this appeal – is that different considerations would apply if a child sought to set aside a presumption of paternity under sections 50(9A)(b) to (ba) of the BNA 1981. That means that I cannot 'read down' section 3(1) of the BNA 1981 so as to render the Secretary of State's discretion to permit a child to acquire his or her child's nationality upon proof of paternity a duty, because the words "where none of the paragraphs … applies" must apply equally to all the paragraphs to which they

refer. In other words, if the provisions of section 50(9A)(a) of the 1981 Act are treated only as a rebuttable presumption, so too must the provision of sections 50 (9A) (b) and (ba); and this is plainly contrary to the provisions of sections 29 of the 1990 Act and 38(1) and 45(1) of the 2008 Act.

100. My conclusion that section 50(9A) is incapable of being read compatibly with Articles 8 and 14 ECHR by virtue of section 3 HRA 1998 means that Her Majesty's Passport Office was precluded by the language of section 50(9A) from treating K as her natural father's daughter. It follows that the decision that she should not have a British passport because she was not, as defined by the BNA 1981, entitled to be treated as a British citizen by birth, did not breach section 6(1) of the HRA 1998, by virtue of the provisions of section 6(2).

101. In those circumstances, I propose to exercise my discretion under section 4(2) HRA 1998 to make a declaration that the provision which prevents a child, other than a child born under a licensed IVF arrangement mentioned in sections 50(9A)(b) or (ba) of the BNA 1981, as being recognised as the child of his or her actual biological father for the purposes of acquiring his nationality, if the child's mother was married to someone other than the biological father at the time of the child's birth, is incompatible with Article 14 ECHR read with Article 8.

102. I will consider any submissions which counsel wish to make on the form of such order, and any consequential matters.

Addendum - Totally without merit

103. In the Acknowledgment of Service, the Defendant invited the Court to refuse permission to apply for judicial review and to certify this case as being 'totally without merit'. Permission was thereafter granted on the papers by Jonathan Swift QC sitting as a deputy High Court judge: in other words, he considered the case crossed the arguability threshold. Later, in correspondence with the Claimant's solicitor and the court, the Defendant indicated that there were a number of other cases which raised these or similar issues of law, and invited the Court to stay the other cases behind this one. In other words, this case was not only arguable, but of some wider public importance.

104. The 'totally without merit' provisions were introduced to save court time in respect of cases which were obviously hopeless or abusive. They were intended, in such cases, to remove the right, after permission to apply for judicial review has been refused on the papers, to make a renewed oral application for permission (without first seeking the court's permission to renew). Far too often, however, Acknowledgements of Service are received on behalf of this Defendant which invite the judge considering permission to dismiss the claim as being 'totally without merit' when that is clearly not the case.

105. In a case where the Secretary of State does not consider an argument obviously hopeless or abusive - even if she does not consider that it crosses the arguability threshold - what should be pleaded is that the Defendant does not accept the Claimant's case is arguable. Where a case is obviously arguable, albeit the Defendant thinks it is wrong, what should be pleaded is that the Defendant accepts that the point is arguable, though the Defendant does not think it is right.

106. On any view, the legal submissions made in this case are arguable and important, as

is illustrated by the fact that (I was told) other cases on this issue have been settled on an individual basis, and it has been treated as a lead case for a number of other cases raising the same issue.

107. It devalues the concept of a case being 'totally without merit' if it is pleaded as a matter of course. Indeed, it may be an abuse of process to assert this in circumstances where it is apparent that a point is arguable. I would simply observe that the Secretary of State should not as a matter of routine pleading invite judges to certify cases as being totally without merit. If a Defendant wishes to plead that a case is totally without merit, as opposed to wrong, she should be prepared to say why that is the case.