
**Hilary Term**
**[2018] UKSC 6**
*On appeal from: [2016] CSIH 24*

# JUDGMENT

# The Advocate General for Scotland (Appellant) *v* Romein (Respondent) (Scotland)

**before**

**Lady Hale, President**
**Lord Sumption**
**Lord Reed**
**Lord Hodge**
**Lady Black**

## JUDGMENT GIVEN ON

## 8 February 2018

**Heard on 6 December 2017**

*Appellant*
David Johnston QC
Julius Komorowski
(Instructed by Office of the Solicitor to the Advocate General of Scotland)

*Respondent*
Kenny McBrearty QC
Lesley Irvine
(Instructed by McGill & Co)

**LORD SUMPTION: (with whom Lady Hale, Lord Reed, Lord Hodge and Lady Black agree)**

1. For some four centuries, the United Kingdom and its component nations have been a major source of emigration. As a result, schemes for defining the right to British nationality have been complicated by the need to accommodate those born abroad but having significant connections with the United Kingdom by descent. Until 1983, the basic principle was that British nationality by descent was available to any person whose father was a citizen of the United Kingdom and Colonies. But if his father was himself a citizen by descent only, then unless the child was born in a British-controlled territory or the father was in Crown service at the time of the birth, it was normally a condition that the birth should be registered at a British consulate within a year. In no case could citizenship by descent be transmitted through the female line. Regulations governing the registration of births by British consuls restricted registration to those eligible for British citizenship.

2. The respondent, Shelley Elizabeth Romein, was born in the United States on 16 June 1978. Her father was a US citizen with no personal connection to the United Kingdom. Her mother had been born in South Africa and was a citizen of the United Kingdom and Colonies by descent because her father (Ms Romein's grandfather) had been born in the United Kingdom on 1 November 1905. Ms Romein's mother swore an affidavit in which she said that while pregnant with her she spent some time in South Africa and contacted the British consulate in Johannesburg to enquire about British citizenship for her unborn child. She was told, correctly, that the child would not be eligible because her only claim by descent was through her mother.

3. With effect from 1 January 1983, the restriction to descent in the male line was abrogated by legislation for those born after that date, and 20 years later in 2003 the legislation was retrospectively amended so as to allow those born before 1983 to acquire citizenship through the female line. However, when Ms Romein, who had been born under the old regime, sought to take advantage of the change in 2013, her application for citizenship was rejected on the ground that she was unable to satisfy the statutory condition of registration within a year. The reason why she was unable to do so was that although the law was now deemed at all material times to have allowed claims to citizenship by descent through the female line, the staff of British consulates, acting entirely properly under the law as it actually was, would have refused to register her birth because she was ineligible. A result so paradoxical clearly calls for scrutiny.

*Legislative history*

4. The exclusion of claims to British citizenship by descent through the female line is a curious survivor of redundant social and political priorities. At common law, English nationality was based on allegiance. It was acquired by birth within the King's realm or by marriage to an Englishman. Nationality by descent was wholly statutory and available under a statute of 1351 only where the child was born outside the realm to parents both of whom were English: see 25 Ed III, cap 1. It followed that an English woman who married an alien could not transmit her English nationality to her child born outside the realm. The Naturalization Act 1870 abolished the common law principle that allegiance was indelible, and provided for a woman to lose her British nationality upon marriage to an alien. From this it followed that no question could arise of transmission of British citizenship by descent through the female line alone.

5. The position was formalised by the British Nationality and Status of Aliens Act 1914, which was the first statute comprehensively regulating eligibility for British nationality. A valuable account of the historical background to this legislation will be found in M P Baldwin, "Subject to Empire: Married Women and the British Nationality and Status of Aliens Act", *Journal of British Studies*, xl (2001), 522. The Act arose from the Imperial Conference of 1911, in which the United Kingdom and the Dominions had agreed upon the principle of a common imperial nationality. A number of its provisions reflected concern among the Dominions that a common imperial nationality would undermine their attempts to restrict the right of entry by "undesirables". The common nationality was therefore restricted with a view to meeting these concerns. The 1914 Act repealed the statute of 1351. Section 10 reproduced the effect of the Naturalization Act 1870 by providing that the British wife of an alien would become an alien on her marriage. Consistently with these provisions, section 1(1) of the 1914 Act as originally enacted defined a British subject as (a) any person born within His Majesty's dominions and allegiance, and (b) any person born elsewhere whose father was a British subject. This provision was amended by the British Nationality and Status of Aliens Acts of 1918 and 1922. In its final form, the Act made (b) dependent on the father satisfying any one of five conditions, the most significant of which was condition (v), which was that the birth of a child born outside His Majesty's dominions must be registered at a British consulate within a year or in special circumstances and with the consent of the Secretary of State within two years. Section 1 of the British Nationality and Status of Aliens Act 1943, repealed condition (v) and replaced it with a provision to substantially the same effect but authorising the Secretary of State to permit registration at any time. The Report of the Joint Select Committee on the Nationality of Married Women (24 July 1923) recorded the main reasons advanced by the Foreign Office in support of these measures: the dominant role of the husband in shaping the cultural affiliation of the family, the problems under British diplomatic practice of affording consular protection to British citizens with dual nationality, the

need to maintain commonalty with the Dominions and the desirability of deterring certain mixed marriages which were "in the women's case nearly always most undesirable."

6. The Act of 1914 was superseded with effect from 1 January 1949 by the British Nationality Act 1948, which was the statute in force at the time of Ms Romein's birth. The occasion for the new Act was the Commonwealth Conference of 1947 on nationality and citizenship, which agreed that each of the Dominions should in future legislate for its own citizenship instead of sharing in a common British citizenship. This made it possible for the new Act to abrogate the rule that British women who married aliens lost their nationality. But it did not alter the basic principles on which citizenship by descent was available. Section 5 provided:

> "5.(1) Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of the birth:
>
> > Provided that if the father of such a person is a citizen of the United Kingdom and Colonies by descent only, that person shall not be a citizen of the United Kingdom and Colonies by virtue of this section unless -
> >
> > > (a) that person is born or his father was born in a protectorate, protected state, mandated territory or trust territory or any place in a foreign country where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty then has or had jurisdiction over British subjects; or
> > >
> > > (b) that person's birth having occurred in a place in a foreign country other than a place such as is mentioned in the last foregoing paragraph, the birth is registered at a United Kingdom consulate within one year of its occurrence, or, with the permission of the Secretary of State, later; or

> (c) that person's father is, at the time of the birth, in Crown service under His Majesty's government in the United Kingdom; or
>
> (d) that person is born in any country mentioned in subsection (3) of section one of this Act in which a citizenship law has then taken effect and does not become a citizen thereof on birth.
>
> (2) If the Secretary of State so directs, a birth shall be deemed for the purposes of this section to have been registered with his permission notwithstanding that his permission was not obtained before the registration."

7. Nothing was done to remedy the inability of women to transmit British nationality by descent until 1979. Under section 7(1) of the Act of 1948 the Secretary of State had a discretion to cause a minor child of a British citizen to be registered as a British subject on the application of his or her parent or guardian. On 7 February 1979, Mr Merlyn Rees, the then Home Secretary, made a written statement in the House of Commons that he would in future exercise this discretion in favour any minor child of a woman who was herself born in the United Kingdom. He added that in due course legislation would be introduced to address more generally the transmission of citizenship in the female line: Hansard HC vol 962, cols 203-204W. Since Ms Romein's mother had not been born in the United Kingdom, this change of policy made no difference to her situation. Neither did the promised legislation, when it was eventually enacted. The British Nationality Act 1981, which came into force on 1 January 1983, removed the limitation to descent through the male line for the future. It also abolished acquisition of nationality by children of British nationals by descent by the registration of their births at a consulate. For a five year transitional period nationality could still be acquired in similar circumstances by registration with the Secretary of State (but still restricted, as before 1983, to descent through the male line). In April 1986, the United Kingdom ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. Article 9.2 of the Convention required state parties to grant equal rights to men and women with respect to the nationality of their children. However, the United Kingdom's ratification was subject to a reservation that it would continue to apply the five year transitional provision in the Act of 1981.

8. Those born before the commencement of the 1981 Act continued to benefit from the Rees policy until the end of 2000, when the last person born while the 1948 Act was in force ceased to be a minor. There was then a hiatus of some two years until 30 April 2003, when section 13 of the Nationality, Immigration and Asylum

Act 2002 came into force. This retrospectively amended the Act of 1981 by inserting a new section 4C. Section 4C was subsequently replaced by a revised section 4C to similar but not identical effect, which was introduced into the 1981 Act by section 45(3) of the Borders, Citizenship and Immigration Act 2009. In this form it was in force at the time of Ms Romein's application, and indeed still is. It provides as follows:

> "**4C Acquisition by registration: certain persons born before 1983**
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> (1) A person is entitled to be registered as a British citizen if -
>
> (a) he applies for registration under this section, and
>
> (b) he satisfies each of the following conditions.
>
> (2) The first condition is that the applicant was born before 1 January 1983.
>
> (3) The second condition is that the applicant would at some time before 1 January 1983 have become a citizen of the United Kingdom and Colonies-
>
> (a) under section 5 of, or paragraph 3 of Schedule 3 to, the 1948 Act if assumption A had applied,
>
> (b) under section 12(3), (4) or (5) of that Act if assumption B had applied and as a result of its application the applicant would have been a British subject immediately before 1 January 1949, or
>
> (c) under section 12(2) of that Act if one or both of the following had applied -
>
> (i) assumption A had applied;

(ii) assumption B had applied and as a result of its application the applicant would have been a British subject immediately before 1 January 1949.

(3A) Assumption A is that -

(a) section 5 or 12(2) of, or paragraph 3 of Schedule 3 to, the 1948 Act (as the case may be) provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father, and

(b) references in that provision to a father were references to the applicant's mother.

(3B) Assumption B is that -

(a) a provision of the law at some time before 1 January 1949 which provided for a nationality status to be acquired by descent from a father provided in the same terms for its acquisition by descent from a mother, and

(b) references in that provision to a father were references to the applicant's mother.

(3C) For the purposes of subsection (3B), a nationality status is acquired by a person ('P') by descent where its acquisition -

(a) depends, amongst other things, on the nationality status of one or both of P's parents, and

(b) does not depend upon an application being made for P's registration as a person who has the status in question.

> (3D) For the purposes of subsection (3), it is not to be assumed that any registration or other requirements of the provisions mentioned in that subsection or in subsection (3B) were met.
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> (4) The third condition is that immediately before 1st January 1983 the applicant would have had the right of abode in the United Kingdom by virtue of section 2 of the Immigration Act 1971 (c 77) had he become a citizen of the United Kingdom and Colonies as described in subsection (3) above.
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> (5) For the purposes of the interpretation of section 5 of the 1948 Act in its application in the case of assumption A to a case of descent from a mother, the reference in the proviso to subsection (1) of that section to 'a citizen of the United Kingdom and Colonies by descent only' includes a reference to a female person who became a citizen of the United Kingdom and Colonies by virtue of -
>
> (a) section 12(2), (4) or (6) only of the 1948 Act,
>
> (b) section 13(2) of that Act,
>
> (c) paragraph 3 of Schedule 3 to that Act, or
>
> (d) section 1(1)(a) or (c) of the British Nationality (No 2) Act 1964."

In other words, applications for citizenship by descent through the female line are now to be dealt with on the assumption that the law had always provided for citizenship by descent from the mother on the same terms as it provided for citizenship by descent from the father.

*Application to Ms Romein's case*

9. The paradox of the Secretary of State's decision in the present case is that although section 4C(3)(a) of the 1981 Act (as amended) and the associated Assumption A require her to assume that section 5 of the 1948 Act had always

"provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father", nevertheless an application for citizenship on that basis must fail because no such assumption would or could have been made by the officials responsible for registration at the time. To this conundrum there are logically only three possible solutions:

> (1) Section 4C requires one to assume not only that section 5 of the 1948 Act had always provided for citizenship by descent in the female line, but that the historic facts were different, ie that consular officials in fact acted on that basis. The argument is that in terms of subsection (3) Ms Romein "would … have become a citizen" under section 5 of the 1948 Act if Assumption A had applied, because on that hypothesis consular officials would have registered her. This is Ms Romein's case, which was substantially adopted by the Inner House.
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> (2) Section 4C requires one to assume only that section 5 of the 1948 Act had always provided for citizenship by descent, but not to make any assumption that the facts were other than they were. The result is that applications based on descent through the female line must fail in every case where citizenship was dependent on the fact of registration under section 5(1)(b). This is the case which the Advocate General makes in support of the Secretary of State's decision, and which was substantially accepted by the Lord Ordinary.
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> (3) Effect cannot be given to the registration condition in section 5(1)(b) of the 1948 Act at all, as applied to applications for citizenship by descent through the female line, because insisting on that condition would nullify the practical effect of making Assumption A. This possibility was raised with Counsel in the course of argument before us, but does not appear to have been considered below.

10. I start with the first hypothesis, which is the one that found favour with the Inner House. There are formidable difficulties about the counterfactual assumption on which this hypothesis depends. In the first place, Ms Romein's contention is that on the assumption made about the law in Assumption A, she would have acquired citizenship under section 5(1)(b) of the 1948 Act. No other provision of that Act could be relevant to her case. The registration condition is an integral part of section 5(1)(b). If any effect is to be given to it, the only counterfactual assumption that would enable her application to succeed is that consular officials not only made Assumption A but actually registered the applicant as a British citizen. But that assumption cannot be made consistently with subsection (3D), because registration is one of the "requirements" of section 5 of the 1948 Act, which is one of the provisions mentioned in subsection (3). It follows that the decision-maker cannot

assume that the registration condition "was met". Since without such an assumption, one is left with the fact that she was not registered, she would not have become a citizen. I cannot accept the view of the Inner House that subsection (3D) is concerned only to cast on the applicant the burden of proving his or her claim, without the assistance of any presumption of fact. It does not say this. Moreover, she would have that burden anyway. Secondly, on the present hypothesis the question whether an applicant would have acquired citizenship under section 5(1)(b) of the 1948 Act if Assumption A is made, depends not just on what action consular registrars would have taken if the law had been in accordance with Assumption A, but on what steps the child's parents would have taken to have her registered on that assumption. It so happens that in Ms Romein's case the answer is reasonably clear if her mother's affidavit is accepted. Her mother would have received a different answer to her enquiry of the Johannesburg consulate and would have sought to register the birth. If consular officials had made Assumption A in 1978, that attempt would have succeeded. It is clear that Ms Romein's mother not only attached a high value to her unborn child's future nationality, but not realising the legal impediments, took some steps towards registering her. Someone who knew about the legal impediments would have done nothing and generated no evidence of this kind. Yet it is not obvious why that should make any difference. There is a conceptual problem about making the operation of section 4C dependent on an enquiry conducted years later into the question whether a parent would before 1983 have wished or intended or attempted to avail herself of a right which did not then exist. Thirdly, that problem is immeasurably increased when one examines the other implications of this approach. Subsection (3D) applies to all the provisions mentioned in section 5 of the 1948 Act, including sections 5(1)(a) and (c). There is nothing to suggest that claims under these provisions fall to be treated differently from those made under section 5(1)(b). If the counterfactual assumption to be made includes the steps which the parents would have taken, then it would be open to an applicant to say that had the law allowed citizenship by descent in the female line the mother would have moved to a British-controlled territory for the birth so as to qualify under section 5(1)(a), or one or other parent would have entered or continued in Crown service in time for the birth so as to qualify under section 5(1)(c). It seems extremely unlikely that Parliament envisaged in 2002 or 2009 that the operation of this provision would depend on the practically unanswerable question what adjustments parents would hypothetically have made to their lives with a view to obtaining British citizenship for their children. Subsection (3D) appears to have been added precisely to rule out any such unrealistic enquiries. In my view the only counter-historical assumptions authorised by the Act are Assumptions A and B.

11. However, the Advocate General's case faces, as it seems to me, equally formidable objections. He submits that Assumption A requires section 5 of the 1948 Act to be read as providing for citizenship by descent from a mother "in the same terms as it provided for citizenship by descent from a father". Since those terms included the registration condition in section 5(1)(b), effect must be given to that condition. Subsection (3D) then provides that it is not to be assumed that these terms,

including the registration condition, have been met. In the absence of a statutory assumption to that effect, he submits, the applicant must demonstrate that the terms, including the registration condition, have in fact been met, just as a claimant to citizenship by descent from a father would have to do. This accords with the literal words of section 4C. The difficulty about it is that while purporting to give effect to section 5(1)(b), its actual result is to make section 4C inapplicable to substantially all claims based on it. Section 4C(3)(a) assumes that by making Assumption A it will in principle be possible to claim citizenship by descent under section 5 of the 1948 Act, including section 5(1)(b). But if (as the Advocate General submits) effect must be given to the registration condition in section 5(1)(b) of the 1948 Act, then citizenship by descent through the female line would be available under section 5(1)(b) only in those anomalous cases where persons claiming descent through the female line were registered at a British consulate by mistake or in defiance of the regulations. There were apparently a few such cases. It is difficult to discern any rational reason why the legislature should have intended to help only them. Yet, except in cases where the birth of an ineligible child was registered unlawfully, the effect of the Advocate General's reading is to close off section 5(1)(b) as a route to citizenship by descent from a mother. Mr Johnston QC, who appeared for the Advocate General, suggested at one point that the intention was to allow claims to citizenship by descent from a woman only in the cases covered by section 5(1)(a), (c) or (d) of the 1948 Act where citizenship followed automatically from a specified state of affairs and was not dependent on steps being taken by any human actor. But the problem about this argument, apart from being inconsistent with his primary argument (that the registration condition in section 5(1)(b) must be given effect), is that if it was intended to rule out all applications under section 4C based on section 5(1)(b) of the 1948 Act, the provision as drafted would be a most extraordinary way of doing it. The obvious course would have been to limit the reference to section 5 of the 1948 Act in section 4C of the 1981 Act (as amended) to section 5(1)(a), (c) and (d). In fact, it must be in the highest degree unlikely that Parliament entertained any such intention. Since section 5(1)(b) of the 1948 Act seems likely to be the basis of a large proportion of applications under section 4C of the 1981 Act (as amended), it would have significantly undermined the purpose of the provision, for no reason that can readily be imagined.

12. I think that the solution to the paradox is more straightforward than either of these hypotheses. Because section 4C requires one to assume that section 5 of the 1948 Act had always provided for citizenship by descent in the female line, it is not possible to apply the registration condition in section 5(1)(b) of the 1948 Act to those claiming on that basis, because its application would make nonsense of that assumption. The past is done, and cannot be undone. For nearly 70 years, British consuls have declined to register the births of those claiming by descent through the female line. Throughout that period any purported registration of a person claiming citizenship only through the female line would have been legally ineffective. Given that we are forbidden by section 4C(3D) to assume contrary to the facts that the birth was in fact registered, the only way in which effect can be given to section 4C(3) is

to treat the registration condition in section 5(1)(b) as being inapplicable in cases where citizenship is claimed by descent from a mother.

13. I should, finally, notice two objections urged against this analysis, neither of which I would accept.

14. The first objection is that it leads to unacceptable discrimination between those born before and after the 1948 Act came into force on 1 January 1949. This is because claims to citizenship by descent from a mother by persons born before 1 January 1949 are governed by section 4C(3)(b) and (c) of the 1981 Act (as amended). These provisions deal with claims based on section 12(2)-(5) of the 1948 Act, which provide subject to certain conditions for persons who were British subjects immediately before the commencement of the 1948 Act to become Citizens of the United Kingdom and Colonies on the commencement date. The status of British subjects immediately before 1 January 1949 was governed by the 1914 Act, which contained provisions for citizenship by descent similar to those of the 1948 Act. Section 4C(3)(b) and (c) of the 1981 Act (as amended) provides for Assumption B to be made where an applicant was born before 1 January 1949. Assumption B is that the law in force before 1 January 1949, ie section 1 of the Act of 1914, provided for a "nationality status" to be acquired by descent from the mother on the same terms as from a father. For this purpose, section 4C(3C) of the 1981 Act (as amended) provides that a "nationality status" is acquired by descent where its acquisition depends on the nationality status of one or both parents and does not depend upon an "application" being made for registration as a person who has that status. The Advocate General submits that in the case of persons born before 1 January 1949 this rules out claims to citizenship by descent through the female line based on reading section 1(1)(b)(v) of the 1914 Act (which applied a condition of registration for any person born outside His Majesty's dominions) in accordance with Assumption B. The Inner House rejected this argument because section 1(1)(b)(v) of the 1914 Act did not require anything that could properly be described as an "application" for registration. An "application", they thought, suggested an appeal to discretion whereas registration of the birth of an eligible child was a right. They concluded that subsection (3C) must be taken to refer to the registration of a person as having British nationality by naturalisation under regulations envisaged by section 19(1) of the 1914 Act. This may be so, although it is right to point out that section 1(1)(b)(v) of the 1914 Act is the only statutory provision in force before 1 January 1949 which referred to registration as a requirement for British nationality *by descent*. I should, however, prefer not to decide this point. It does not affect Ms Romein's case. For the purposes of this appeal, it is enough to point out that the provisions of subsection (3C) referring to the claims of those born before 1 January 1949 and those of subsection (3D) referring to the claims of those born after that date are in different terms. If there is any difference between the treatment of the two categories under section 4C of the 1981 Act (as amended), it arises from differences in the language of the two subsections. It is not anomalous.

15. The second objection is that failing to apply the registration condition to those claiming under section 4C would lead to a different form of gender discrimination, because claimants through the female line would be free of the registration condition whereas claimants through the male line under the previous law were not. In other words there would be a difference of treatment between (i) persons who could have been registered as citizens because their fathers were citizens, but for whatever reason were not, and can do nothing about it, and (ii) persons who could not have been registered because their only claim was through their mother, in relation to whom no registration condition arises. I do not regard this as anomalous either. There is no discrimination between applicants, whether by gender or otherwise. There was historic discrimination between their parents, since a father was held to transmit his citizenship to his children while a mother was not. Section 4C simply corrects the subsisting consequences for their children of this historic discrimination. There is no question of current discrimination.

*Disposal*

16. I would dismiss the appeal and affirm the decision of the Inner House, albeit for the rather different reasons which I have given.