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Questions of Automatic Acquisition of British Citizenship at Birth

Child whose biological father is a British Citizen and whose mother is married to another person at the time of the child's birth: Acquisition of British Citizenship automatically at birth?

A child born in the UK, whose biological father is a British Citizen, and whose mother is married to another person at the time of the child's birth: Does this child acquire British Citizenship automatically at birth? This was a question that I had to consider recently.

The short answer is that the child does not acquire British Citizenship automatically at birth. However, the child has a right to apply to be registered as a British Citizen under Section 4 G of the British Nationality Act 1981, provided they can show satisfactory proof of paternity.

Relevant legislative provisions:

Section 1 (1) of the British Nationality Act 1981 (BNA 1981) provides that a person born in the UK, automatically acquires British Citizenship at the time of birth if their father or mother was a British Citizen at the time of the birth.

The main question therefore is who is deemed the father of a child whose biological father is a British Citizen, and whose mother is married to another person at the time of the child's birth.

Section 50 (9A) of the British Nationality Act 1981 provides that for the purposes of the Act a child's father is—

- (a) the husband or male civil partner, 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 paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to proof of paternity.

Interpretation of Section 50 (9A) of the British Nationality Act 1981

The interpretation of Section 50 (9A) of the British Nationality Act 1981 was considered in the case of *K (A Child) v the Secretary of State for the Home Department* [2018] EWHC 1834 (Admin)

The claimant was a 4 year old girl born in the UK on 20 June 2014. Her mother left her husband in Pakistan because he was violent towards her. She was in a stable relationship with the claimant's biological father in the UK at the time of birth, but remained married to her Pakistani husband when the child was born. The biological father was named on the child's birth certificate as the father. At some point the claimant's mother and biological father applied for a British Passport for the child. She was issued with a British passport valid from 9 October 2014 to 9 October 2019. When it came to light that the mother was married to another man at the time of her birth, the child's British passport was revoked on the basis that it had been issued on the mistaken basis that she was a British Citizen.

Issue in this case

The issue in this case turned on the proper interpretation of Section 50 (9A) (a), (b), and (ba) and their relationships with Section 50 (9A) (c).

At the time of the case, the Secretary of State interpreted Section 50 (9A) as deeming the man to whom the mother was married to at the time of birth as the father, notwithstanding the existence of satisfactory proof that another man was the biological father. Their argument was that the child does not have a right to British nationality under Section 1 of the BNA 1981, as the child of a British citizen, because they are deemed not to be the child of the man who is their biological father even if the man is named as the father on the birth certificate. However, they could apply to the Secretary of State to grant them British nationality as a matter of discretion under Section 3 (1) of the BNA 1981.

Argument of the claimant

The claimant argued that Section 50 (9A), which deems a mother's husband to be the father, should be treated no more than a rebuttable presumption, which can be displaced by proof that someone else who satisfies the requirements of paternity is the father. Any other reading breaches the Claimant's rights under Article 8 and 14 of the European Convention of Human Rights, to be recognised as her true father's daughter and to acquire his nationality. It was submitted that Section 50 (9A) of the British Nationality Act 1981 can be read, using Section 3 of the Human Rights Act 1998, to make it consistent with Article 8 and Article 14. Alternatively, the court should declare that Section 50 (9A) is incompatible with the European Convention of Human Rights, using the power under Section 4 of the Human Rights Act 1998.

The claimant did 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 or after the child has achieved majority.

Section 50 (9A) Interpretation

The Secretary of State argued that the words under Section 50 (9A) cannot be read as a rebuttable assumption. 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 paragraph (a) to (ba) apply' cannot be read other than as giving priority to the definition of paternity in Section 50 (9A) (a) - (ba) over the fall back definition in Section 50 (9A) (c).

The court agreed that the Secretary of State's reading of Section 50 (9A) of the BNA 1981 is not only the natural reading, but the only possible one. 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 paragraph (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.

However, the court went on to consider whether the interpretation and application of Section 50 (9A) was discriminatory under Article 14, read together with Article 8 of the European Convention on Human Rights.

Discrimination under Article 14 in conjunction with Article 8

The Secretary of State accepted that conferral of citizenship falls within the ambit of Article 8. However, it was argued that there is no discrimination or breach of Article 14 under Section 50 (9A) on grounds of birth, in the sense of a

distinction between legitimate and illegitimate children. A child born out of wedlock could acquire citizenship through his or her father under Section 50 (9A) (c) of the British Nationality Act 1981, unless another person is deemed a father by virtue of section 50 (9A)(a- ba). The court disagreed.

There is a contrast between the treatment, in law, of a child whose mother is not married to anyone at the time of the child's 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 proven), 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 proven that the child is not his child.

Although it is highly probable that when Article 14 was drafted, the principle meaning of discrimination on grounds of birth was discrimination between those born inside and outside of marriage, the Convention is a living instrument. For the purpose of a provision intended to secure equal enjoyment, the characteristic of birth should be wide enough to include other unchosen circumstance of one's birth, such as whether or not one is born to a mother not free to marry someone else. In any event, it is not necessary to determine whether the distinction was discrimination on grounds of birth, 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 purpose of Article 14. A child has no choice over whether or to whom his or her parent was married at the time of their birth. The absence of choice is a significant factor in determining the existence of 'core' status in relation to which the right to equal enjoyment of other Convention rights will be particularly strongly protected under Article 14.

Justification for the Discrimination

The Court found that the Secretary of State had not adduced a proportionate justification for the discrimination under Section 50 (9A), which prevents a biological child of a British father, whose mother was married to someone else at the time of birth, to acquire the British father's nationality, as of right, on proof of paternity.

The court accepted that it is a legitimate goal of social policy that there should be reasonable legal certainty as to whom the law treats as parents for the purpose of automatic acquisition of British nationality by birth. It also accepted that some process of application is required if someone wishes to displace the presumption that a mother's husband is a child's father. Further, it is not disproportionate or discriminatory interference with Article 8 or 14 rights to require the child who wishes to establish that a person other than the mother's

husband is the father to make an application to displace the presumption under Section 50 (9A) (a) of the BNA 1981.

However, requiring there to be an application process through which facts must be proven in order to acquire British Citizenship of the biological father as of right, is different from replacing this with an application process under Section 3 of the BNA 1981, whereby the acquisition of British Citizenship from the biological father is merely discretionary. This process is disproportionate and discriminatory, as it does not achieve a fair balance between the interests of the child wishing to acquire the biological father's nationality and the identified social policy goals.

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 Section 50 9 (a), (b) or (ba) of the BNA 1981, may acquire that British father's nationality through that father as of right, whatever the child's character, or the father's character or association may be and however committed or the circumstances of the relationship which resulted in the child's conception. Nothing other than proof of the fact of paternity is relevant.

By contrast, a child whose mother is married to someone else at the time of their birth may only apply to the Secretary of State to exercise a discretion to confer British nationality on them. The discretion can take into account any considerations that the Secretary of State rationally considers to be relevant. If the Secretary of State considers either the biological father or child or associates of such persons, to be of bad character, it is possible to refuse to grant the child British citizenship under Section 3 (1) of the BNA 1981, even if satisfactory proof of paternity has been provided.

The procedure has the effect of potentially preventing some children from acquiring their biological father's nationality, simply on the basis of what is 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. Unless and until the Secretary of State exercises a discretion in favour of the child under Section 3 (1) of the BNA 1981, the child will continue to be subject to immigration control. 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 such jeopardy.

Declaration of Incompatibility

On the basis of the above, the court found that Section 50 (9A) of the BNA 1981, as it was applied by the Secretary of State, breached the claimant's right

under Article 14 European Court on Human Rights 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. Notwithstanding that the court considered the Secretary of State's reading of section 50 (9A) of the BNA 1981 was not only the natural reading, but also the only possible one, it found that Section 50 (9A) of the BNA 1981 was incapable of being read compatibly with Article 8 and Article 14. Accordingly, the court made a declaration of incompatibility.

Conclusion

Subsequent to *K (A Child) v the Secretary of State for the Home Department [2018] EWHC 1834 (Admin)*, the British Nationality Act 1981 was amended.

A child whose mother was married to someone else, other than their biological father at the time of their birth, is now entitled to acquire the British Citizenship of their biological father. However, this is not automatically at birth, but by right through a simple registration process under Section 4 G of the British Nationality Act 1981, provided paternity is proven.

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If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

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