Upper Tribunal
(Immigration and Asylum Chamber)

De Souza (Good Friday Agreement: nationality) [2019] UKUT 00355 (IAC)

THE IMMIGRATION ACTS

Heard by video-link between Field House and Laganside, Belfast

Decision & Reasons Promulgated

On 10 September 2019

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

JAKE PARKER DE SOUZA

(ANONYMITY ORDER NOT MADE)

Respondent

Representation :

For the Appellant: Mr T McGleenan QC and Mr P Henry , instructed by Crown Solicitor's Office

For the Respondent: Mr R Lavery QC and Ms H Wilson, instructed by MSM Law

The Belfast (or Good Friday) Agreement did not amend the law of British citizenship, as contained in the British Nationality Act 1981

DECISION AND REASONS

A. THE CLAIMANT'S APPLICATION AND THE SECRETARY OF STATE'S RESPONSE

1.
The respondent (hereafter referred to as the claimant) is a citizen of the United States of America. He is married to Mrs De Souza, who was born in Northern Ireland in 1987.

2.

At the time of Mrs De Souza's birth, section 1(1) of the British Nationality Act 1981 ("the BNA") provided (so far as applicable) that:-

"A person born in the United Kingdom after commencement … shall be a British citizen if at the time of the birth his father or mother is –

(a) a British citizen; …"

3.
It is common ground that, by reason of the nationality law of the Republic of Ireland, Mrs De Souza is also a citizen of that country.

4.
On 15 December 2015, MSM Law applied on behalf of the claimant for him to be issued with a residence card, in confirmation of his right to reside in the United Kingdom, pursuant to European Union law, as given effect by the Immigration (European Economic Area) Regulations 2006.

5.
The obligation of the Secretary of State to issue a residence card to a family member was contained in regulation 17(1), which provided as follows:-

"17.- (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of –

(a) a valid passport; and

(b) proof that the applicant is such a family member."

6.
There is no dispute that the claimant satisfied regulation 7(1)(a) of the 2006 Regulations, as he was the spouse of Mrs De Souza. The Secretary of State, however, refused the claimant's application because she considered that Mrs De Souza did not fall within the definition of "EEA national" (which also governed whether she could meet the definition of "a qualified person" in regulation 6. Regulation 2 (General interpretation) defined an EEA national as follows:-

"'EEA national' means a national of an EEA State who is not also a British citizen".

B. THE REASON FOR THE WORDS "WHO IS NOT A BRITISH CITIZEN IN THE DEFINITION OF "EEA NATIONAL"

7.
The words "who is not also a British citizen" were inserted into the 2006 Regulations with effect from 16 October 2012. This amendment gave effect to the decision of the Court of Justice of the European Union in McCarthy v Secretary of State for the Home Department [2011] 3 CMLR 10 (Case C-434/09). Mrs McCarthy was a dual British/Irish national who was born in and had always lived in the United Kingdom. The CJEU held that the Citizens Directive (to which, amongst other things, the 2006 Regulations were intended to give effect) did not enable Mrs McCarthy's spouse to be recognised as a family member for the purposes of the Directive. This was because:-

"43. … Directive 2004/38 is to be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State."

8.
Mr McCarthy also sought to rely upon Article 21 of the Treaty of the Functioning of the European Union but, here too, he was unsuccessful:-

“56. … Art 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has also resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.”

9.
At paragraph 54 of its judgment, the CJEU held that:-

“The fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States.”

C. THE CLAIMANT’S POSITION

10.
In the present case, the claimant takes no issue with the Secretary of State’s view that Mrs De Souza’s position is, to the extent just described, analogous with that of Mrs McCarthy. The claimant’s position, however, is that, notwithstanding she was born in Northern Ireland, she identifies only as Irish. Accordingly, the claimant says, she satisfies the definition of “EEA national” in regulation 2 because, as a result of her self-identification, she “is not also a British citizen”.

D. THE BELFAST AGREEMENT

11.
At the heart of the case for the claimant is the Belfast (or Good Friday) Agreement 1998. The Belfast Agreement comprises two separate instruments. The first is a multi-party agreement between both of the Northern Ireland political parties who participated in the negotiations leading to it. Annexed to the multi-party agreement is the British-Irish Agreement. This is a bi-lateral international treaty, executed by the governments of the United Kingdom and Ireland.

12.
The following extracts from the multi-party agreement are of relevance for present purposes:-

“ **DECLARATION OF SUPPORT**

1. We, the participants in the multi-party negotiations, believe that the agreement we have negotiated offers a truly historic opportunity for a new beginning.

2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.

…

CONSTITUTIONAL ISSUES

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

…

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

… (our emphasis)

DRAFT CLAUSES/SCHEDULES FOR INCORPORATION IN BRITISH

LEGISLATION

1. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

2. The Government of Ireland Act 1920 is repealed; and this Act shall have effect notwithstanding any other previous enactment."

13.
The International Treaty between the governments of the United Kingdom and Ireland contains the following:-

"ARTICLE 1

…

(vi) **recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.**

…

The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence." (our emphasis)

E. THE NORTHERN IRELAND ACT 1998

14.
Certain provisions of the two instruments comprising the Belfast Agreement were given domestic United Kingdom legislative effect in the Northern Ireland Act 1998. The interpretation of the 1998 Act fell for consideration in Robinson v Secretary of State for Northern Ireland and Others [2002] UKHL 32.

15.
At paragraph 3 of his opinion in that case, Lord Bingham said:-

"3. The Northern Ireland Act 1998 was enacted to implement the Belfast Agreement, as the long title to the Act and section 3(1) make clear. The purpose of the Act (so far as relevant to this appeal) is to provide for the restoration of devolved government in Northern Ireland but on a basis significantly different from that provided under the 1920 Act. There is to be a new Northern Ireland Assembly. There are also to be a First Minister and Deputy First Minister ("FM" and "DFM"). And there are to be up to ten Ministers, acting as the political heads of Northern Ireland departments. But in respect of each of these key elements the Act provides mechanisms to prevent the exercise of power by either of the two main communities, unionist and nationalist, to the exclusion of the other."

16.
In Robinson , the House had to construe the provisions of section 16 of the 1998 Act. This provided that the Assembly "shall, within a period of six weeks beginning with its first meeting, elect from amongst its members the First Minister and the deputy First Minister". As Lord Bingham noted at paragraph 6, however, section 16 "leaves an important question unanswered: what was to happen if the six week period expired and no FM and DFM had been elected?". Lord Bingham held:-

"10. The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding (see section 1 of the Act) a popular decision at some time in the future on the ultimate political status of Northern Ireland. If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.

11. The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.

…

12. It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude.

13. All these general considerations have a bearing, in my opinion, on the statutory provisions at the heart of this case.

…”

17.
Lord Bingham’s conclusion, with which the majority of the House concurred, was that the Assembly had the power to make a valid election for the two officers in question, even though the six week period prescribed under section 16(8) had expired.

18.
Agreeing with Lord Bingham, Lord Hoffmann held:-

33. Mr Larkin QC, in the course of his admirable argument for the appellant, politely but firmly reminded your Lordships that your function was to construe and apply the language of Parliament and not merely to choose what might appear on political grounds to be the most convenient solution. It is not for this House, in its judicial capacity, to say that new elections in Northern Ireland would be politically inexpedient. Mr Larkin cited Herbert Wechsler's famous Holmes Lecture, Towards Neutral Principles of Constitutional Law ((1959) 73 Harvard LR 1). My Lords, I unreservedly accept those principles. A judicial decision must, as Professor Wechsler said (at p. 19) rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved." But I think that the construction which I favour satisfies those requirements. The long title of the Act is "to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland...". According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.”

F. THE APPEAL

19.
In the present case, the position of the the claimant is that the 1998 Act is a “constitutional” statute that overrides the words enacted by Parliament in section 1 of the BNA. Mrs De Souza’s constitutional right to identify only as Irish means that she cannot be treated under United Kingdom law as British.

20.

The Secretary of State did not accept this argument. On appeal to the First-tier Tribunal, however, it found favour with the First-tier Tribunal which, following a hearing in Belfast on 29 August 2017, allowed the claimant's appeal under the 2006 Regulations. In doing so, the First-tier Tribunal Judge placed weight on an unreported decision of the Upper Tribunal, without (it seems) having any regard to the restrictions on, and requirements relating to, the citation of unreported decisions, contained in Practice Direction 11.

21.
Permission to appeal to the Upper Tribunal was granted by that Tribunal on 3 May 2018. The judge who granted permission considered that the Secretary of State's grounds were "eminently arguable".

G. JURISDICTIONAL AND OTHER ISSUES

22.
Before going any further, it is necessary to deal with an issue of jurisdiction. In his submissions, Mr McGleenan QC contended that the claimant did not have a right of appeal against the Secretary of State's decision to refuse to issue him with a residence card.

23.
Reliance is placed on Article 26(3) of the 2006 Regulations, which provides:-

"(3) If a person … claims to be … the family member … of an EEA national he may not appeal under these Regulations unless he produces—

(a) ... a passport; and

(b) either—

(i) an EEA family permit;

(ia) a qualifying EEA State residence card;

(ii) proof that he is the family member or relative of an EEA national; or

…"

24.
The Secretary of State's position is that the claimant did not, and could not, provide proof that he is the family member of an EEA national because Mrs De Souza does not fall within the definition of such a person in regulation 2. Mr Lavery QC, by contrast, asserts that this submission is circular in nature and that the claimant's case is that, for the reasons we have described, he is married to an EEA national.

25.
On this issue, we agree with Mr Lavery QC. The plain purpose of regulation 26(3) is to preclude an appeal where the evidence submitted does not, on its face, amount to proof of the claim being made. Thus, where an individual asserts that he or she is the family member of a person who plainly falls within the definition of "EEA national," the individual needs to put forward evidence to show that this is, as a matter of fact, the position. Regulation 26(3) cannot be invoked by the Secretary of State to close down the argument before an independent tribunal that the individual is, as a matter of law, entitled to say that he or she is married to a person who falls within the definition of an "EEA national". Were the position otherwise, much of the purpose of the 2006 Regulations, in giving a right of appeal, would be lost, with the result that a person in the position of the present claimant would be

required to resort to judicial review, in order to make good his case. It cannot have been the legislature’s intention in enacting the 2006 Regulations.

26.
The Upper Tribunal had previously raised the question whether the 2006 Regulations govern the present proceedings, or whether they are governed by the Immigration (European Economic Area) Regulations 2016. Given that we have found a right of appeal lay, in the present case, to the First-tier Tribunal under the 2006 Regulations, the effect of paragraph 3 of Schedule 4 to the 2016 Regulations is to make the 2006 Regulations the governing instrument, notwithstanding that they were otherwise revoked by the 2016 Regulations.

27.
It is common ground that the sole ground of appeal against the Secretary of State’s decision in the present case is that the Secretary of State‘s decision breaches the claimant’s rights under the EU treaties in respect of residence in the United Kingdom (paragraph 1 of Schedule 1 to the 2006 Regulations, as amended).

H. DECIDING THE SUBSTANTIVE QUESTION

28.
The British-Irish Agreement is, on any view, an international treaty between the governments of the United Kingdom and the Republic of Ireland. Even if we assume that the legal significance of the provision regarding “the birthright of all the people in Northern Ireland to identify themselves and be accepted as Irish or British, or both” has the reach for which the claimant contends, its existence in an international treaty, whilst binding in international law, does not thereby make it binding under the domestic law of the United Kingdom.

29.
In JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, the House of Lords (per Lord Oliver) held:-

“It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in Cook v. Sprigg [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in Secretary of State in Council of India v. Kamachee Boye Sahaba (1859) 13 Moo. P.C.C. 22, 75:

“The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see Blackburn v. Attorney-General [1971] 1 W.L.R. 1037. The Sovereign acts.

"throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:" Rustomjee v. The Queen (1876) 2 Q.B.D. 69, 74, per Lord Coleridge C.J .”

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

30.
More recently, in R (Miller) v Secretary of State [2018] AC 61 [2017] UKSC 5, the Supreme Court reiterated Lord Oliver's statement of the law:-

"(e) The effect of treaties on the domestic law of the UK

32. The general rule that the conduct of international relations, including the making and unmaking of treaties, is a matter for the Crown in exercise of its prerogative powers arises in the context of the basic constitutional principle to which we have referred at para 25 above, that the Crown cannot change domestic law by any exercise of its prerogative powers. The Crown's prerogative power to conduct international relations is regarded as wide and as being outside the purview of the courts precisely because the Crown cannot, in ordinary circumstances, alter domestic law by using such powers to make or unmake a treaty **. By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights** ." (our emphasis)

31.
The point being made in these cases is an important one. It would infringe Parliamentary sovereignty if, by entering into a treaty with a foreign state, the executive branch could thereby change the domestic law of the United Kingdom, without recourse to Parliament.

32.
There is nothing in the 1998 Act or anywhere else in the United Kingdom's statute book that amounts to domestic legislation giving effect to Article 1(6) of the British-Irish Agreement or, we should also note, the corresponding provision in the multi-party agreement.

33.
The fact that this is so is, we consider, of considerable significance, when it comes to examining the submissions made on behalf of the claimant. The 1998 Act gave effect in domestic law to many of the elements of the Belfast Agreement; in particular, those relating to the scheme of devolved governance for Northern Ireland. The 1998 Act also placed into domestic law certain commitments in the British-Irish agreement, such as the guarantee of no change to the constitutional position, without the consent of the people of Northern Ireland.

34.
Against this background, the claimant faces a profound difficulty. In his oral submissions, Mr Lavery QC suggested that there was, in fact, no need for the 1998 Act expressly to amend section 1 of the

BNA on the basis that section 1 was capable of being interpreted consistently with the Belfast Agreement.

35.
That is, with respect, not a submission that can find favour. On the contrary, in the skeleton argument prepared by Mr Lavery QC and Ms Wilson, it is suggested that section 1 of the BNA requires to be read in the following way, if it is to be compatible with the self-identification principles to which we have already referred:-

"1 - (1) A person born in the United Kingdom after commencement … shall [**if they consent to identify as such]** be a British citizen if at the time of the birth his father or mother is –

(a) a British citizen; or

…"

36.
Even assuming that this amendment would apply only to those born in Northern Ireland, it would represent a radical departure from the existing law of British nationality. To make citizenship by birth in the United Kingdom (or any part of it) dependent on consent raises a host of difficult issues.

37.
Amongst these is the point in time at which consent would be required. It cannot rationally be contended that an infant, for example, would be expected to give consent. But, even if it were assumed that consent becomes a prerequisite only once a person had achieved the age of majority, there remain questions as to whether, and, if so, how, such a person would be expected to signify consent. A person's nationality cannot depend in law on an undisclosed state of mind, which could change from time to time, depending on how he or she felt.

38.
These examples of the problems inherent in a system of nationality based on consent make it plain that the omission from the 1998 Act of anything touching upon the issues of self-identification and nationality was entirely deliberate on the part of the United Kingdom Parliament. The omission cannot be explained on the basis that there was no need to amend the BNA because it could be construed compatibly with Article 1(iv)/(vi), without Parliament having to spell out the necessary amendments.

39.
The omission also underscores the correctness of the Secretary of State's submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multi-party agreement and the governments of Ireland and the United Kingdom had intended the concept of self-identification necessarily to include a person's ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly. By the same token, it is equally inconceivable that the far-reaching consequences for British nationality law would not have been addressed by the 1998 Act.

40.
Before leaving this particular issue, we agree with the written submissions of Mr McGleenan QC and Mr Henry that, if Article 1(iv)/(vi) needs to be construed as preventing the United Kingdom from conferring British citizenship on a person born in Northern Ireland, at the point of birth, the inescapable logic is that Ireland cannot confer Irish citizenship on such a person at that point either.

The result is that a person born in Northern Ireland is born stateless. That would be a breach of both countries' international obligations to prevent statelessness. It is not conceivable that the two governments intended such a result.

41.
The claimant attempted to draw support from a principle of statutory interpretation, whereby the courts will tend to interpret domestic statutory law in such a way as to be compatible with the United Kingdom's international treaty obligations. In Salomon v Commissioners of Customs and Excise [1967] QB 116, the Court of Appeal held, obiter , that if it had been necessary to do so in order to construe the Customs and Excise Act 1952, the court would have been obliged, on the grounds of international comity, to take judicial notice of the European Convention on the Valuation of Goods for Customs Purposes 1950. Mr Lavery QC also drew attention to the proposition in Bennion on Statutory Interpretation (6 th Edition), which reads:-

" **Section 270 Municipal law should conform to international law**

It is a principle of legal policy that the municipal law (that is the law of the individual state) should conform to public international law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle."

42.
It is important to appreciate the limits of this principle. It is not to be regarded as a back-door way of circumventing the fundamental duality principle, set out above, whereby international treaties do not operate domestically, save to the extent that Parliament has ordained that they should. The fact that the 1998 Act gave effect to aspects of the Belfast Agreement – and that Robinson shows the 1998 Act is to be regarded as "constitutional" in nature – does not give us licence to read into the 1998 Act provisions which Parliament simply did not include on a subject (nationality) with which it does not deal.

43.
A similar point falls to be made in response to the claimant's reliance in this regard upon Robinson itself. It is one thing to engage in judicial creativity in construing a provision such as section 16 of the 1998 Act, by reference to the Belfast Agreement. It is quite another to conclude that the 1998 Act has impliedly amended a central pillar of nationality law, in a way that remains unclear but which on any view has potential serious consequences, including for the international obligations of Ireland and the United Kingdom under the Convention on the Reduction of Statelessness.

44.
Reliance was placed by Mr Lavery QC and Ms Wilson upon the judgment of the Divisional Court in Thoburn v Sunderland City Council and Others [2002] 3 WLR 247; [2002] EWHC 195 (Admin); the so-called "Metric Martyrs" case. In Thoburn Laws LJ rejected the submission that the Weights and Measures Act 1985 had impliedly amended the European Communities Act 1972. Laws LJ held that the 1972 Act was a "constitutional statute", in the sense that it conditioned the legal relationship between citizens and state in some general, overarching manner or enlarged or diminished the scope of what were regarded as fundamental constitutional rights. If an Act is to be regarded as constitutional in this sense, the court would ask whether it had been shown that the legislature's actual intention, as opposed to its imputed constructive or presumed intention, was to affect the alleged repeal (paragraphs 60 to 63).

45.
Laws LJ concluded as follows:-

“64. This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand. Nothing is plainer than that this benign development involves, as I have said, the recognition of the ECA as a constitutional statute.”

46.
We do not consider that Thoburn advances the claimant’s case. Accepting that the 1998 Act is a “constitutional” Act means, according to Laws LJ’s dictum, that the 1998 Act cannot be amended by later legislation, other than expressly. There is, however, no corollary that a “non-constitutional” Act, such as the BNA (if one assumes it to be of this nature) can be overridden or re-written in the way the claimant contends.

47.
Mr Lavery QC and Ms Wilson point out that, on one of the webpages of the Northern Ireland Administration, there is a passage which says: “people born in Northern Ireland can choose to be British citizens, Irish citizens or both”. This webpage is not, however, an authoritative source of law. For the reasons we have given, it must be regarded as wrong.

48.
We turn to Article 8 of the ECHR. Although this is not a discrete ground of appeal, we accept that if the operation of section 1(1) of the BNA as regards Mrs De Souza is such as to violate her Article 8 rights, then section 3 of the Human Rights Act 1998, which requires legislation to be read and given effect in a way that is compatible with her Convention rights (so far as possible to do so), might have a bearing on how one should interpret section 1(1). In other words, section 3 is a further potential interpretative tool that, the claimant says, requires section 1(1) to be read in the way described above.

49.
In Ghaidan v Godin–Mendoza [2004] 2 AC 557; [2004] UKHL 30, the House of Lords invoked section 3 of the Human Rights Act 1998 in order to construe paragraph 2(2) of schedule 1 to the Rent Act 1977 as extending to same sex partners, as well as “spouses”, in order to eliminate what otherwise would be a discriminatory effect of the provision.

50.
Lord Nicholls held that:-

“30. … the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section

3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.”

51.
Assuming, for the moment, that Mrs De Souza’s right to self-identification is an aspect of her private life, protected by Article 8, the claimant submits that the interference caused by section 1(1) of the BNA is not proportionate to the legitimate public end sought. In this regard, the claimant seeks to categorise the legitimate public end as avoiding statelessness. He points out that Mrs De Souza would not be stateless, if she is legally regarded as not having British citizenship, since she is a citizen of Ireland.

52.
There are a number of profound difficulties with this submission. First, we reiterate that this appeal is about whether the decision of the Secretary of State is contrary to the United Kingdom’s obligations under the EU treaties. It is well-established that EU law does not, as such, seek to regulate the way in which a member state determines who should, or should not, be one of its citizens. The question of who is a British citizen is, thus, a matter of United Kingdom domestic law.

53.
Secondly, in considering whether an ECHR signatory state’s nationality law may constitute a disproportionate interference with a person’s rights under the ECHR, it is necessary to examine the aim of the law. Here, the legitimate aim in question includes not only the prevention of statelessness. It extends to the need to have a clear and coherent mechanism for being able to establish whether a person is, or is not, a citizen. As we have seen, a system of citizenship based upon consent of the kind for which the claimant contends simply does not work.

54.

In our view, the present system enshrined in the BNA represents a proportionate way of achieving the legitimate public end, not only of avoiding statelessness but also of maintaining a clear and coherent system of nationality law. The element of consent is addressed by section 12 of the BNA:-

"12. **Renunciation**

(1) If any British citizen of full age and capacity makes in the prescribed manner a declaration of renunciation of British citizenship, then, subject to subsections (3) and (4), the Secretary of State shall cause the declaration to be registered.

(2) On the registration of a declaration made in pursuance of this section the person who made it shall cease to be a British citizen.

(3) A declaration made by a person in pursuance of this section shall not be registered unless the Secretary of State is satisfied that the person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship; and if that person does not have any such citizenship or nationality on the date of registration and does not acquire some such citizenship or nationality within six months from that date, he shall be, and be deemed to have remained, a British citizen notwithstanding the registration.

(4) The Secretary of State may withhold registration of any declaration made in pursuance of this section if it is made during any war in which Her Majesty may be engaged in right of Her Majesty's government in the United Kingdom.

(5) For the purposes of this section any person who has been married [or has formed a civil partnership] shall be deemed to be of full age."

55.
Mrs De Souza objects to any suggestion that she might avail herself of section 12 by making a declaration of renunciation of her British citizenship. This is because she does not consider herself to be a British citizen and does not wish to acknowledge that she is, in order to be able to renounce that status. For the reasons we have given, however, as a matter of law, Mrs De Souza is, at present, a British citizen at the current time. Whilst we fully appreciate her strength of feeling on this matter, it is not disproportionate in Article 8 terms for her nevertheless to be required to give notice of revocation, if she wishes only to be a citizen of Ireland.

56.
There is, we are informed, a fee of £200 to be paid. We have not, however, been told that that represents a material barrier to her use of section 12 or that it is otherwise disproportionate in Article 8 terms, for the Secretary of State to levy this sum.

57.
Accordingly, since section 1(1) of the 1981 Act does not disproportionately interfere with Mrs De Souza's Article 8 rights, it is not possible to invoke the interpretative principles contained in section 3 of the Human Rights Act 1998, in construing section 1(1) of the BNA.

I. FINAL POINT

58.
An important final point needs to be made. Nothing in this decision brings into question the past and continuing importance and constitutional significance of the Belfast Agreement to the people of

Ireland and the United Kingdom. On the contrary, our task has been to ascertain what the parties to that Agreement intended by way of Article 1(iv)/(vi).

J. CONCLUSION

The decision of the First-tier Tribunal contains the making of an error on a point of law. We set that decision aside and substitute a decision of our own, dismissing the claimant's appeal against the decision of the Secretary of State to refuse to issue him with a residence permit.

We wish to record our gratitude to Counsel for the helpfulness of their written and oral submissions and to all those responsible for preparing the appeal and the authorities bundles, which have been of considerable assistance to us.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber