



**Convention on the Elimination of All Forms of
Discrimination against Women**

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Committee on the Elimination of Discrimination against Women

Communication No. 38/2012

Decision adopted by the Committee at its fifty-third session, 1 - 19 October 2012

Submitted by: Mr. J.S. (not represented by counsel)

Alleged victims: The author

State party: United Kingdom of Great Britain and Northern Ireland

Date of communication: 24 February 2011 (initial submission)

References: Transmitted to the State party on 23 February 2012 (not issued in document form)

Date of adoption of decision: 12 October 2012

Annex

**Decision of the Committee on the Elimination of Discrimination against
Women under the Optional Protocol to the Convention on the Elimination of
All Forms of Discrimination against Women**

concerning

Communication No. 38/2012 *

Submitted by: Mr. J. S.

Alleged victims: The author

State party: United Kingdom of Great Britain and Northern Ireland

Date of communication: 24 February 2011 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 15 October 2012,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. J. S., an Indian national born in 1976. He claims to be a victim of a violation by the State party of his rights under articles 1, 2, 3 and 9 of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention). The author is acting on his own behalf and is not represented by counsel. The United Kingdom of Great Britain and Northern Ireland ratified the Convention on 7 April 1986 and acceded to the Optional Protocol to the Convention (the Optional Protocol) on 17 December 2004, which came into force on 17 March 2005.

1.2 Upon ratification of the Convention, the State party made the following reservation concerning article 9: "The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date".

1.3 On 21 May 2012, the Working Group on Communications, acting on behalf of the Committee pursuant to rule 66 of the Committee's rules of procedure, decided to examine the admissibility of the communication separately from its merits.

Facts as presented by the author

2.1 The author's mother was born in Kenya in 1943 and holds United Kingdom and Colonies' citizenship (CUKC). This citizenship could not be passed on to the author at the time of his birth pursuant to section 5 of the British Nationality Act 1948, which only allowed the passing on of citizenship from the father, and not from the mother, to the children.

2.2 In 2011, the author inquired about the acquisition of British citizenship with the UK Border Agency. On 17 February 2011, through an e-mail correspondence, he was informed that, before 1983, British women were unable to pass on their citizenship in the same way as men and that he would not have been able to acquire British citizenship under section 5 of the British Nationality Act 1948 through a mother who was a citizen of the United Kingdom and Colonies at the time of his birth. However, as of 1979, within the British Nationality Act 1948, a child under 18 could be registered as a citizen of the United Kingdom and Colonies. In 2002, a section 4 C was added to the British Nationality Act 1981, allowing registration as British citizens if the persons interested could have been registered in accordance with the policy announced in 1979. The authorities' aim in introducing section 4 C was to allow those who would have acquired British citizenship automatically on 1 January 1983, but for the sexual discrimination in section 5 of the British Nationality Act 1948, to register as British citizens. The author was not able to acquire citizenship of the United Kingdom and Colonies through his mother, as women were not able to pass that status on before 1983, but he was informed that he might be able to register as a British citizen if he met the criteria of section 4 C. To qualify, he needed to show that he could have become a citizen of the United Kingdom and Colonies and had the right of abode in accordance with the Immigration Act in the United Kingdom, had women been able to pass on citizenship in the same way as men.

2.3 The author made a claim for citizenship to the Home Office but he maintains that the law needs to be changed and he does not have the necessary financial means to exhaust domestic remedies in this connection, as it would entail a challenge to an Act of Parliament.

Complaint

3.1 The author claims that he is a victim of discrimination of a continuous nature, because the revision of the 1948 British Nationality Act in 1981 and 2002 did not eliminate the discrimination against women. He claims that if he had been born of a father with United Kingdom and Colonies' citizenship, or after 1983, he could have applied for a British passport.

3.2 The author claims that he cannot enjoy his family life, as his parents live in the United Kingdom and he lives in India.

3.3 The author claims that the Convention recognizes women's autonomy and equality in the transfer and acquisition of nationality, and permits either spouse to confer nationality on their children. On the issue of nationality, the granting of equal rights to women requires having an independent nationality, regardless of the nationality of one's husband, and granting equal rights regarding the nationality of children. States parties are also expected to uphold equal rights with regard to laws relating to the movement of persons and the freedom to choose one's residence and domicile. They must also take measures to eliminate discrimination against women in matters relating to marriage and family relations, and ensure that overall equality between men and women exists. Any State which does not respect these provisions in practice and law fails in its duties under articles 1 and 2 of the Convention.

3.4 The author claims to be a victim of a violation of article 9 of the Convention. In substantiation, he refers to the Committee's general recommendation No. 21 (1994) on equality in marriage and family relations (which emphasizes the importance of granting equal rights to women concerning acquisition and retention of citizenship. The author notes in particular that paragraph 6 of general recommendation No. 21 reads as follows: "Nationality is critical to full participation in society [...]. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality."

State party's observations on admissibility

4.1 The State party presented its observations on admissibility by note verbale of 23 April 2012. It requested the Committee to examine the admissibility of the communication separately from its merits. The State party considers that the communication should be declared inadmissible under article 2 of the Optional Protocol and rule 68 of the Committee's rules of procedure, as the author does not have "victim standing". According to the State party, the communication should also be declared inadmissible under article 4, paragraph 1, of the Optional Protocol, for non-exhaustion of domestic remedies, and also for incompatibility with the provisions of the Convention under article 4, paragraph 2 (b), of the Optional Protocol. Moreover, the communication should be declared inadmissible under article 4, paragraph 2 (c), of the Optional Protocol, as manifestly ill-founded, and under article 4, paragraph 2 (e), of the Optional Protocol, as the relevant facts occurred before the entry into force of the Optional Protocol for the State party.

4.2 The State party recalls the facts of the case. The author is an Indian national, born in 1976 in India, where he presently resides. His mother was born in Kenya in 1943 and was a British Subject at birth. The author's mother became a citizen of the United Kingdom and Colonies (CUKC) under the British Nationality Act 1948 (the 1948 Act). She retained CUKC status when Kenya became independent in 1963 because she was not eligible for Kenyan nationality. When the British Nationality Act 1981 (the 1981 Act) entered into force, she did not become a British citizen under section 11 of that Act because she did not have a right of abode under section 2 of the Immigration Act 1971 (the 1971 Act). Instead, she became a British Overseas Citizen (BOC) under section 26 of the 1981 Act. On 27 July 2003 the author's mother registered as a British citizen, acquiring right of abode in the United Kingdom, where she now lives.

4.3 The State party notes that in 2010, the author applied to the Secretary of State through the United Kingdom Border Agency (UKBA) for registration as a British Citizen by descent, under section 4 C of the 1981 Act. By letter dated 3 March 2010, UKBA refused his application on the ground that his circumstances did not satisfy the criteria set out in section 4 C of the 1981 Act. The reasons given were that, although the author would have become a CUKC under section 5 of the 1948 Act, had that section allowed mothers, as well as fathers, to pass on their nationality, he did not meet the other criteria in section 4C relating to the requirement that

applicants must also have been eligible to acquire a right of abode. By letter dated 24 April 2010, the author asked for reconsideration of the refusal and on 27 May 2010, in reply, UKBA reiterated its earlier decision. Between 19 January and 17 February 2011, the author sent a number of e-mails to UKBA inquiring as to how a British Overseas Citizen can become a British citizen and questioning the decision to deny his citizenship by descent from his mother, and claiming that the legal basis for the decision was discriminatory. UKBA responded to each query, through e-mail, on 19 January, 24 January, 14 February and 17 February 2011, informing the author that he was ineligible for registration as a British citizen by descent from a CUKC/BOC mother, explaining the background to the development and application of the relevant aspects of nationality law to the author and confirming that he does not have an automatic claim or registration entitlement to British citizenship.

4.4 The State party explains that the 1948 Act which is the subject of this communication was the subject of communication No. 11/2006, which the Committee declared inadmissible. As a matter of general principle, under domestic law, the acquisition of British citizenship by birth or descent is determined by reference to the individual's and his or her parents' circumstances at the time of his or her birth and by reference to the law in force at the time of his or her birth. Exceptions to this general rule would have to be expressly provided for in legislation. At the time of the author's birth, British nationality law was governed by the 1948 Act which provided for "citizenship of the United Kingdom and Colonies" to be acquired in certain circumstances by birth, descent, registration or naturalization. The relevant provision which is the subject of this communication is section 5 of the 1948 Act, which stated: "[...] 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." The same right to (automatic) citizenship by descent was not available to children whose mother was a CUKC at the time of their birth. The 1948 Act provided further means of acquiring CUKC status. Under section 4, "subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth. Under section 7 (1), the Secretary of State may cause the minor child of any citizen of the United Kingdom and Colonies to be registered as a citizen of the United Kingdom and Colonies upon application made in the prescribed manner by a parent or guardian of the child."

4.5 The 1971 Act introduced the concept of "right of abode" under which a CUKC who had acquired that status by birth, naturalization or adoption in the United Kingdom or Islands had an automatic right to enter and live in the United Kingdom. On 1 January 1983, the 1981 Act entered into force. This repealed the provisions of the 1948 Act and introduced six forms of British nationality, including the status of "British citizen". Section 11 (1) of the 1981 Act provides that a person who, immediately before commencement, was a CUKC and had the right of abode in the United Kingdom under the 1971 Act would at commencement become a British citizen. The 1981 Act also introduced the residuary category of BOC for those hitherto CUKC who did not become British citizens or British Dependent Territories Citizens. Before the entry into force of the 1981 Act, in the mid- to late 1970s, the United Kingdom Government recognized the discriminatory impact of section 5 of the 1948 Act. As a result, the Home Secretary announced a transitional policy change to the House of Commons on 7 February 1979, applicable to any child born abroad between 8 February 1961 and 7 February 1979 to a CUKC mother who was herself born in the United Kingdom (i.e. those CUKC with a right to abode under the 1971 Act). It did not apply to the children of CUKC mothers who were born outside of the United Kingdom and Islands and therefore did not have a right of abode under the 1971 Act, e.g. those CUKC born in the former Colonies. The State party notes that as the author's mother was born in Kenya, she would not have benefited from this change in policy.

4.6 The State party further points out that there is no evidence that the author's mother ever made an attempt to apply for the author to be registered under section 7 (1) of the 1948 Act, before or following the change in policy. It is not possible to register the author retrospectively under this provision given that nationality law has since been amended to remove identified discrimination in earlier legislation. With effect from 1 January 1983, Section 2 (1) of the 1981 Act changed the provision for acquisition of citizenship by descent equally applying to the father and mother. The 1981 Act did not apply retroactively to children born before it came into force, however children born outside the United Kingdom between 1 January 1965 and 31 December 1982 to CUKC mothers born in the United Kingdom continued to benefit from the practice of discretionary registrations provided for under Section 3 (1) of the 1981 Act.

4.7 The 1981 Act was amended by Section 13 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), introducing a new Section 4 C into the 1981 Act, which gave persons who were covered by the policy announced on 7 February 1979 in relation to the discretionary registration of minors under the 1948 Act a statutory entitlement to register as British citizens. The effect of the new provision was that they were able to apply for registration even after they had attained the age of majority.

4.8 The reason why the author would not have become a British citizen under the 1981 Act is that his mother was born outside the United Kingdom and he could not show that a right of abode had otherwise arisen. Had the author's father been a CUKC, he would have become a CUKC by descent under section 5 of the 1948 Act. However, he would still not have had the right of abode in the United Kingdom as the conditions under section 2 of the 1971 Act are not met. He would therefore have become a BOC on 1 January 1983, under section 26 of the 1981 Act. Consequently, persons born outside the United Kingdom before 1983 (when the 1981 Act came into force) whose mothers were CUKCs were from 30 April 2003 (when section 4 C came into force) in the same position as those whose fathers were CUKCs, i.e. they have a right to British citizenship provided they had a right of abode in the United Kingdom when the 1981 Act came into force, or would have had it, if their father rather than their mother had been CUKC. The author's application for citizenship was rejected because he would not have had a right of abode in the United Kingdom when the 1981 Act came into force, even if his father, rather than his mother, had been a CUKC.

4.9 With regard to the admissibility of the communication, the State party notes that the preamble to the Convention explains that article 9 of the Convention deals with the legal status of women and that the definition of discrimination contained in article 1 concerns the protection from discrimination of women, in particular in areas where women's rights are lacking as compared with those of men. The State party further submits that the purpose of article 9 (2) read together with articles 1 and 2 (f) of the Convention is to put women in the same situation as men when it comes to the right to pass on their nationality to their children and it does not confer a corresponding right on a child to acquire the nationality of his or her mother even though the nationality of a child may be a consequence of the right under article 9 (2) being denied to the mother. Therefore, the author cannot be said to be a victim of a

violation of article 9 (2). Moreover, in as far as the author is seeking to claim that he has suffered discrimination because of his association with his mother who, as a woman, was unable at the relevant time to pass on her nationality to him, the State party submits that nothing in the provisions of articles 1, 9, or elsewhere in the Convention suggests that it is intended to protect individuals from discrimination which may result from their association with a woman covered by the Convention. Furthermore, it is clear from the wording of article 2 of the Optional Protocol, read together with rule 68 of the Committee's rules of procedure that only women whose rights under the Convention had been violated can be seen as victims. In accordance with article 2 of the Optional Protocol, the author – a man – is therefore not a victim of a violation of the Convention. The State party thus submits that, if anyone, it is not the author but his mother who would have had a right under article 9, read in conjunction with articles 1 and 2, of the Convention and under its Optional Protocol, if either had been in force and ratified by the United Kingdom at the relevant time.

4.10 The State party further submits that the relevant facts occurred before 7 April 1986, when the Convention came into force for it and before 17 March 2005, when the Optional Protocol came into force for it. There is no indication that his mother made any attempt to register him as a British citizen at the time of his birth or at any time while he was still a minor (i.e. before 18 May 1994). As of 18 May 1994, the author had a right to apply for British citizenship subject to the conditions set out by the State party's nationality laws. The State party recalls the Committee's findings in communication No. 11/2006, in which it held that the alleged discrimination originated at the time of birth and stopped on the date of majority. The conditions for registering as a British citizen under section 4 C of the 1981 Act are a date of birth before 1 January 1983, that but for the discrimination in the 1948 Act they would have had CUKC status under section 5 of that Act and that they would have had the right to abode under section 2 of the 1971 Act. The author however, was not able to show that he had a right of abode. The State party further submits that this is not a case in which the facts that are the subject of the communication continued after the date of entry into force of the Optional Protocol for the United Kingdom; nor does the refusal to register the author as a British citizen in 2010 give rise to a new violation. The consequence of the difference in treatment of the author's mother subsists in that he did not become a BOC on 1 January 1983 and this does not constitute a continuing or new violation under article 9, paragraph 2, of the Convention.

4.11 With regard to the exhaustion of domestic remedies, the State party notes that the author concedes that he has not availed himself of the possibility of judicial action against the refusal of his application for registration as a British citizen. The State party accepts that the author has taken the available administrative steps relating to his application to register under section 4 C of the 1981 Act. However, the author could have sought to challenge the decision by reference to the Human Rights Act 1998, which enables claims based on the European Convention on Human Rights to be brought in the domestic courts. Although it is unlikely that an attempt to register him by the author's mother from his birth to majority under the discretionary powers in section 7 (1) of the 1948 Act either before or following the change in policy announced in 1979 would have been successful, a refusal or indeed the policy behind the refusal would have been open to challenge by judicial review.

4.12 The State party finally submits that the communication is manifestly ill-founded under article 4, paragraph 2 (c), of the Optional Protocol as the State party entered a reservation to article 9 and therefore the effect of the reservation is that the United Kingdom incurs no responsibility under the Convention in respect of the continuing consequences of section 5 of the 1948 Act.

Author's comments on the State party's observations

5.1 On 11 May 2012, the author presented his comments on the State party's observations and noted that he is not an expert regarding the State party's immigration law or the Convention. He invokes articles 1, 2, 3 and 9 of the Convention and notes that the State party has never published the policy change in newspapers or notified his mother by letter and therefore his mother could not register his birth under section 7 (1) of the 1948 Act.

5.2 With regard to section 7 (1) of the 1948 Act, for children born abroad between 8 February 1961 and 7 February 1979, giving the full right to the mother as to the father with CUKC, the author notes that its effect is that children were able to apply for registration even after they had attained the age of majority and restoration of the right of abode would have had the added benefit of contributing to their social integration and removed the distinction between those who became British citizens. He notes that at majority, he lost his status of CUKC.

5.3 Regarding the 1981 Act amended by section 13 of the Nationality, Immigration and Asylum Act 2002 introducing a new section 4C to the 1981 Act covering only the mother who had a right of abode, the author claims that this is a restriction that should be examined by the Committee. He claims that not more than 1,000 children benefited from the provision in section 7 (1) of the 1948 Act.

5.4 The author does not dispute that his mother did not make any attempt to acquire British citizenship for him from the domestic authorities. He further explains that he has not attempted to involve his mother in the present communication as she believes the process for achieving justice to be ineffective, given the fact that the State party has not changed its policy on CUKC mothers since the 1970s.

5.5 The author submits that the Committee should recognize that a CUKC mother has a fundamental human right to pass on her nationality to her child on equal terms with men and with other mothers, whether that child is a minor or an adult; particularly as the same right has already been recognized for other persons, as minors and as adults, by two different nationality acts.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol to the Convention. Pursuant to rule 66 of its rules of procedure, the Committee may examine the admissibility of the communication separately from the merits.

6.2 In accordance with article 4, paragraph 2, of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.3 In accordance with article 4, paragraph 1, of the Optional Protocol, the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. The Committee notes that although the author's mother had not made an application for registration of the author at the time of his birth or any time before he reached majority under section 7 (1) of the 1948 Act, the author made an application for registration of citizenship with the Home Office in 2010. The Committee further notes that the author concedes that he did not exhaust domestic remedies to challenge the refusal of his application for registration as a British citizen and that he claims that he did not have the financial means to challenge an Act of Parliament, despite the possibility of judicial action including a legal action under the Human Rights Act 1998. The Committee is of the opinion that the author has not established that the application of remedies by the judicial court in the State party is unreasonably prolonged or unlikely to bring effective relief as the mere fact that the author cannot afford the legal proceedings does not, as such, without further explanation, suffice for the requirement stipulated in paragraph 1, article 4, of the Optional Protocol. The Committee therefore considers that the author has failed to exhaust all available domestic remedies and declares the communication inadmissible under article 4, paragraph 1, of the Optional Protocol.

6.4 In light of this conclusion, the Committee does not deem it necessary to examine any other inadmissibility grounds.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.