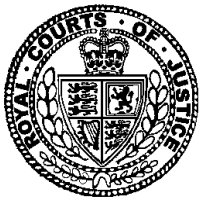

Neutral Citation Number: [2024] EWHC 1838 (Admin)

Case No: AC-2023-LON-001810

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2024

Before :

HIS HONOUR JUDGE AUERBACH
(Sitting as a Judge of the High Court)

- -

Between :

THE KING (on the application of MOYNUL ISLAM)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

David Chirico KC and **Daniel Grütters** (instructed by **Riverway Law**) for the **Claimant**
Tom Tabori (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 16 May 2024

- -

JUDGMENT

HIS HONOUR JUDGE AUERBACH:

Introduction and Factual Background

1. This is a claim for judicial review in respect of the decision of HM Passport Office (for which the Defendant has ministerial responsibility), of 9 March 2023, to refuse the Claimant's application for a British passport. The background is as follows.

2. The Claimant's paternal grandfather was born in Sylhet, then part of British India, in 1927. He became a British subject in 1947, entered the UK in 1959 and registered as a Citizen of the UK and Colonies (CUKC) (pursuant to the **British Nationality Act 1948**) in 1964. In 1974 the Claimant's father was born in Sylhet, which was by then part of Bangladesh. He was, pursuant to the **1948 Act**, a CUKC by descent. The Claimant's father came to the UK in 1981. Pursuant to the **British Nationality Act 1981** he became a British citizen by descent on 1 January 1983.

3. The Claimant's parents were married in 1994. Thereafter they applied for a spouse visa to enable her to join him in the UK.

4. The Claimant was born in Sylhet, Bangladesh, on 11 February 1995. A request was thereafter made for him to be added to the visa application for his mother.

5. In June 1996 the Claimant's father and mother attended an interview at the British High Commission in Bangladesh.

6. In February 1997 the visa application was granted. On 13 April 1997 the British High Commission in Bangladesh endorsed a Certificate of Entitlement to the Right of Abode (COE) on the Claimant's mother's passport and endorsed the Claimant's name and date of birth on that certificate.

7. In August 1997 the Claimant and his mother travelled to the UK, where he has lived ever since. The Claimant's mother subsequently became a naturalised British citizen. The Claimant has three younger siblings, all born in the UK, and all British.

8. On 7 September 2018, having considered and rejected the Claimant's human-rights claim under section 33 **UK Borders Act 2007**, the Defendant decided to proceed with a decision to deport him pursuant to section 32(5), because of criminal convictions and on the basis that he is not a British citizen and that the right of abode endorsed in his mother's passport had expired when her passport expired in 2000.

9. The Claimant challenged that decision by appealing to the First-tier Tribunal (Immigration and Asylum Chamber) (FtT). He did so on the basis that his human-rights claim had been unlawfully refused, pursuant to sections 82(1)(b) and 84(2) **Nationality, Immigration and Asylum Act 2002** and section 6 **Human Rights Act 1998**.

10. Following a hearing on 4 December 2019 at which both parties were represented, and the witnesses included the Claimant's parents, the FtT's written reasoned decision was promulgated on 30 December 2019. The FtT decided that the Claimant was not liable to deportation and allowed the appeal. I will come to the FtT's reasons shortly.

11. The Defendant did not seek to appeal the FtT's decision to the Upper Tribunal.

12. In the years that followed, further applications by the Claimant for a British passport and for a new COE were refused.

13. In January 2023 the Claimant's representatives submitted a fresh application for a British passport, setting out why he claimed to be entitled to one. The attachments included a copy of the decision of the FtT, to which the application itself also referred.

14. The Defendant's decision to refuse that application was set out in a letter of 9 March 2023 (although service was only effected on 30 March 2023).

15. That letter stated as follows:

> "British nationality is a matter of law and we issue British passports to those that have a claim under the British Nationality Act 1981. This is decided mainly by a person's place and date of birth and their parents' places and dates of birth. From the information you have provided it would appear that you are not a British national."

16. The letter stated that a person born outside of the UK will be a British citizen if, at the time of their birth, either of their parents is a British citizen otherwise than by descent, or their British citizen parent was born outside the UK to a parent who was in Crown, or similar, service at the time of their birth.

The litigation in the Administrative Court

17. Following pre-action correspondence, the Claimant's claim for judicial review began on 13 June 2023. The claim form identified that the substantive relief sought is the quashing of the decision refusing to issue a passport, a declaration that the Claimant is a British citizen, as well as a declaration that the decision was contrary to the Article 8 rights of the Claimant, his partner and daughter.

18. The original claim form and detailed statement of facts and grounds set out three grounds of challenge, to which I will come. An acknowledgment of service with summary grounds of defence was filed in July 2023. This set out a summary response to each of the three grounds of challenge. A Claimant's reply was filed in August 2023, responding in particular to arguments set out in the summary grounds of defence, by reference to authorities referred to in it, and clarifying aspects of the Claimant's case.

19. On 5 December 2023, having considered the matter on the papers, Deputy High Court Judge Benjamin Douglas KC permitted the Claimant to rely on the reply and directed that permission be considered at an oral hearing. That hearing came before His Honour Judge Jarman KC on 15 February 2024. Having heard counsel for both parties he granted permission in respect of all three grounds and gave further directions.

20. On 21 March 2024 the Defendant applied for an extension of time to file Detailed Grounds of Defence from 21 March to 28 March 2024. The Claimant did not object to that application. When dealing with a subsequent application in May 2024 (see below) I formally granted that application, retroactively.

21. Detailed Grounds of Defence were filed on 28 March 2024. This referred to a settlement proposal tabled the same day by the Defendant, by way of a draft consent order providing for the Claimant, upon invitation, to submit a new passport application without charge and for HM

Passport Office to aim to issue a decision within three months thereof. It was contended that, in light of that settlement offer, the claim was now academic.

22. In further open communications in April 2024 the Defendant's proposal was rejected. The Claimant's team indicated that he would be prepared to contemplate settlement on the basis of being issued a British passport as proof of British nationality. A draft consent order to that effect was tabled by them on 18 April 2024.

23. These communications did not lead to any proposed agreed draft consent order.

24. On 10 May 2024 the Defendant applied for the full judicial review hearing, listed for 16 May, to be postponed, and for further directions, including allowing for further detailed grounds of defence to be filed by 30 May 2024. A supporting witness statement was filed on 13 May. A note of objection was filed on behalf of the Claimant on 14 May. I refused those applications for reasons communicated to the parties on 15 May.

25. Thereafter the Defendant filed and served a (late) skeleton argument. The Claimant had already filed and served a skeleton argument, but then replied with a short supplementary skeleton. The Defendant also filed and served, and sought permission to rely upon, a statement of Barry Richardson of the Passport Casework team.

The FtT's decision

26. As we shall see, central to this claim is the FtT's decision. I will turn now to its material content.

27. Mr Chirico of counsel (as he then was) appeared for the Claimant and Ms Gill, a Presenting Officer, for the Defendant.

28. The FtT first set out its findings about what it called the immigration history relating to the Claimant and his family, covering broadly the same aspects as I have. It then made findings about the Claimant's criminal record and the reasons for the deportation decision.

29. It then referred to the conduct of the appeal hearing, including noting that there was a detailed skeleton argument from the Claimant's counsel, and that, as well as having a bundle, it heard oral evidence from witnesses including both the Claimant's parents.

30. Under the heading "Findings and Conclusions" there is then the following section:

> "*Is the Appellant a British Citizen?*
>
> 14. I am satisfied that if the appellant is able to persuade me, on the balance of probabilities, he is a British Citizen the respondent has no power to deport him (s.5 and 6 of the Immigration Act 1971).
>
> 15. It is not disputed that the Certificate of Entitlement issued to the appellant and his mother on 13 April 1997 was validly issued. I am satisfied that in accordance with s.3(9) of the Immigration Act 1971 this is evidence that he had a Right of Abode at that time. Mr Chirico submits that this is also evidence that it was accepted that the appellant was a British Citizen at that time, because, simply put, he would not have been issued with the Certificate otherwise. Mr Chirico directed my attention to s.2(1) of the Immigration Act 1971 to corroborate this submission:

'2 Statement of right of abode in United Kingdom

(1) A person is under this Act to have the right of abode in the United Kingdom if –

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who –

(i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile.'

16. I am satisfied that Mr Chirico's submission is correct in this respect. I am satisfied that the Immigration Act 1971 clearly states that a person has a Right of Abode in the UK in one of two circumstances; they are either a British Citizen or a Citizen of the Commonwealth. The appellant clearly was not a Citizen of the Commonwealth and therefore the only other conclusion that I find I can reach is that he was a British Citizen and the decision to issue a Certificate of Entitlement was an acknowledgment of this status.

17. I am satisfied that the Certificate of Entitlement did not confer status on the appellant but simply proof of his status which therefore enabled him to enter the UK. The expiration of his mother's passport (and the consequent expiration of the Certificate of Entitlement) did not therefore affect the appellant's status as a British Citizen.

18. I am therefore satisfied that the appellant was a British Citizen in 1997 and continues to be a British Citizen at this time. He is not therefore liable to deportation."

The Law – British nationality, Right of Abode, Deportation, Passport Applications

31. In summary a person can be, or become, a British citizen by any of four routes: birth, descent, registration as a child or naturalisation as an adult. As to registration as a child, at the time of the Claimant's birth, section 3 **British Nationality Act 1981** (the "**BNA 1981**") provided, in part, as follows:

"3 Acquisition by registration: minors.

(1) If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.

(2) A person born outside the United Kingdom and the qualifying territories shall be entitled, on an application for his registration as a British citizen made while he is a minor, to be registered as such a citizen if the requirements specified in subsection (3) or, in the case of a person born stateless, the requirements specified in paragraphs (a) and (b) of that subsection, are fulfilled in the case of either that person's father or his mother ("the parent in question").

(3) The requirements referred to in subsection (2) are—

> (a) that the parent in question was a British citizen by descent at the time of the birth; and
>
> (b) that the father or mother of the parent in question—
>
> > (i) was a British citizen otherwise than by descent at the time of the birth of the parent in question; or
> >
> > (ii) became a British citizen otherwise than by descent at commencement, or would have become such a citizen otherwise than by descent at commencement but for his or her death; and
>
> (c) that, as regards some period of three years ending with a date not later than the date of the birth—
>
> > (i) the parent in question was in the United Kingdom or a qualifying territory at the beginning of that period; and
> >
> > (ii) the number of days on which the parent in question was absent from the United Kingdom and the qualifying territories in that period does not exceed 270."

32. During this period the **British Nationality (General) Regulations 1982** (SI 1982/986) set out the procedure to be followed when making an application for registration, which is the procedure that would have applied to any such application made to the High Commissioner in Bangladesh.

33. As to the Right of Abode, the FtT set out section 2 **Immigration Act 1971** in the extract from its decision I have set out above, so I will not set it out again. Section 3(9) of that Act provides that a person claiming to have the Right of Abode shall prove it by one of the documents listed there. The list includes a certificate of entitlement.

34. As to deportation, a person may be liable to deportation pursuant to sections 3(5) and (6) of the **1971 Act**, and in some cases section 32 **UK Borders Act 2007**, but in all cases it is a condition that the person is not a British citizen.

35. As to the power to issue passports the position was summarised by Lang J in **R (Easy) v SSHD** [2015] EWHC 3344 (Admin) at [33]. The power is

> "derived from the prerogative, not from any statutory powers. However, in modern times, the executive does not exercise the power arbitrary or capriciously. Passports will generally be issued to those who have established that they are British citizens, unless there are exceptional reasons not to do so."

36. Statements of policy are issued from time to time, on the manner in which the prerogative will normally be exercised. The policy current at the relevant time pointed to some circumstances in which a British person may be refused a passport. But none of these was relied upon in this case.

Overview of the grounds of challenge and the issues.

37. The three grounds of challenge are as follows.

38. The headline of ground 1 is that the Defendant acted unlawfully "by failing to abide by the FtT's determination". It contends that the FtT's decision was conclusive, as between the parties, on the issue of the Claimant's nationality. The Defendant was then required to abide by the findings on which that decision was based, when making the decision on the Claimant's passport application. In the alternative, the Defendant had not identified any basis (which would need to amount to cogent reasons based on material not reasonably available when the FtT took its decision) which would entitle the Defendant to reach a different decision on that question from the FtT.

39. Ground 2 contends, in the alternative, that the FtT's decision was a relevant consideration, which the Defendant irrationally failed to take in to account. The Defendant also irrationally failed to take into account that the FtT had before it the substantive basis on which it was said that the Claimant could have acquired British nationality, being by discretionary registration at the time when the 1997 COE was issued.

40. Ground 3 contends that the impugned decision was a significant, arbitrary and unjustified interference with the Article 8 rights of the Claimant, his partner and their daughter, having regard to matters set out in the detailed statement of facts and grounds, and the Claimant's witness statement that had accompanied his passport application.

41. In summary, the response in the summary grounds of defence is as follows.

42. In response to ground 1 it is contended that the Defendant was not bound by the FtT determination. There was and is no cause of action estoppel and no issue estoppel. The FtT decision was based on an acceptance that the issuing of the COE constituted evidence of Right of Abode (ROA). That, at most, established "fact estoppel".

43. As to ground 2 it is said that the lack of reference to the FtT determination was not irrational, because it did not give rise to an estoppel. That is said to be so because the Claimant could not be a British citizen, as his father was British by descent. Alternatively, it was highly likely that consideration of the FtT determination would not have led to a different outcome (invoking section 31(2A) **Senior Courts Act 1981**).

44. As to ground 3, it is contended that, as the underlying decision was not arbitrary and not in error, there was no arbitrariness that could be compounded by reference to Article 8 considerations. It is also said that the Claimant could not rely on his relationship to his daughter as a freestanding ground. He was also not submitting that he was entitled to limited leave to remain for Article 8 reasons.

45. The Claimant's reply included, in relation to ground 1, identification that, in relation to the FtT decision, he does not rely on cause of action estoppel, but does rely on issue estoppel. In relation to ground 2, the reply highlighted (a) the Claimant's case that before the FtT the Defendant had accepted that the COE was validly issued, and (b) that the Claimant had advanced a specific case before the FtT that he had acquired British citizenship, not by descent but by registration pursuant to section 3 **BNA 1981**.

46. At the hearing before me Mr Chirico KC appeared for the Claimant, leading Mr Grütters of counsel. Mr Tabori of counsel appeared for the Defendant. Mr Chirico KC did not object to the late-filed statement of Mr Richardson, but contended that its contents should be treated as irrelevant and/or of no weight. Mr Chirico KC also contended that in some respects Mr Tabori's skeleton strayed beyond his pleadings.

47. As to that, on points of law I considered that Mr Chirico KC was in a position to respond to Mr Tabori's points (and indeed had done so in his reply skeleton). On points of fact Mr Tabori confirmed that he was not seeking a factual finding from me that the Claimant *did not* acquire citizenship by registration in 1997, nor a finding that he was *not entitled* at that time to be registered as such. Beyond that, given the nature of the issues, if Mr Tabori required permission to amend to advance some of his arguments relating to the evidence in that regard, I granted it, as I considered it fair to both sides to do so.

48. As I have noted, the 28 March 2024 detailed grounds of defence asserted that, in view of the offer made by the Defendant that day, this application for judicial review had become academic. However, at the start of the hearing Mr Tabori told me that that contention was not pursued. Mr Chirico KC confirmed to me that all of the Claimant's grounds of challenge were maintained, including, after some discussion, ground 3.

The Law – Issue Estoppel

49. The Claimant relies on the finding in the decision of the FtT that he is a British citizen. Specifically, he relies upon the doctrine of issue estoppel. The FtT decision is said to have been determinative of the issue of whether the Claimant is a British citizen. The Defendant was, and is, estopped from revisiting that issue, when taking the impugned decision on the Claimant's passport application, and the Court must treat that question as having been determined when deciding this claim, as there is no reason sufficient in law to conclude that the estoppel does not bite.

50. In view of the arguments, I need to consider the relevant authorities, as to the nature of issue estoppel, and its applicability in the public law context.

51. *Thoday v Thoday* [1961] P 181 (CA) was an appeal in divorce proceedings. The husband petitioned for divorce on the grounds of separation. In resisting that claim, and advancing her own counter-petition, the wife sought to rely upon allegations of fact that she had previously relied upon in her own unsuccessful petition. The husband contended that she should not be permitted to do so, as that petition had failed before the court.

52. Willmer LJ, at 189 - 190, held that "where the cause of action or the plea in defence in the second action is precisely the same as has been raised in the previous case, and where that has been the subject of a full examination and adjudication in the previous case, the party seeking to re-litigate the matter will normally be held to be estopped." But, where the cause of action or defence in the second action was different then the party would "not normally be held to be estopped from raising the plea." At 191, he said:

> "Fourthly, however, apart from cases in which the same cause of action or the same plea in defence is raised, there may be cases in which a party may be held to be estopped from raising particular issues, if those issues are precisely. the same as issues which have been previously raised and have been the subject of adjudication. But, in formulating that proposition, I would go on to say that it is very necessary to look at the particular circumstances of the individual case. The reason for saying that is that the adjudication in the previous suit may have been arrived at for a number of different reasons. If it is not clear from the judgment in the previous suit that the particular issue has in fact been specifically dealt with, a party will not be held to be estopped from raising that issue again in a subsequent suit."

53. Diplock LJ, in his discussion of the concept of estoppel, said at 197 - 198:

> "I do not think that any estoppel in its common law concept arises in the present case. The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "causa" bears its literal Latin meaning. The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.
>
> But "issue estoppel" must not be confused with "fact estoppel," which, although a species of "estoppel in pais," is not a species of estoppel per rem judicatam. The determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatam either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court. It may not always be easy to draw the line between facts which give rise to "issue estoppel" and those which do not, but the distinction is important and must be borne in mind. Fortunately, it does not arise in the present case."

54. Pearson LJ gave a concurring speech.

55. In *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46; [2014] 1 AC 460, at [17] and following Lord Sumption JSC (with whose reasoning on this aspect of the appeal all of the other Justices agreed) considered the "portmanteau term" of res judicata, which "is used to describe a number of different legal principles with different juridical origins." The first was cause of action estoppel. We can pass over the second and third. He continued:

> "Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v*

> *Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

56. In the ensuing discussion, the authorities discussed included *Arnold v National Westminster Bank plc* [1991] 2 AC 93. The issue in that case was whether the tenants of a property were bound by the construction of a rent review clause in the lease given by the court in previous litigation, in light of the Court of Appeal having subsequently taken a materially different view of the law. At [20] Lord Sumption JSC observed that *Arnold* was not a *Henderson v Henderson* case. "The real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the Committee agreed, held that it did."

57. Lord Sumption continued:

> "21. Lord Keith first considered the principle stated by Wigram V-C that res judicata extended to "every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time." He regarded this principle as applying to both cause of action estoppel and issue estoppel. Cause of action estoppel, as he had pointed out, was "absolute in relation to all points decided unless fraud or collusion is alleged". But in relation to points not decided in the earlier litigation, *Henderson v Henderson* opened up
>
> > "the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action" (105B).
>
> He considered that in a case where the earlier decision had decided the relevant point, the result differed as between cause of action estoppel and issue estoppel:
>
> > "There is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different." (108G-H)
>
> The relevant difference between the two was that in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected. He formulated the latter exception at 109B as follows:
>
> > "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice

> between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."
>
> This enabled the House to conclude that the rejection of Walton J's construction of the rent review clause in the subsequent case-law was a materially altered circumstance which warranted rearguing the very point that he had rejected.
>
> 22. *Arnold* is accordingly authority for the following propositions:
> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

58. It was not controversial before me that it is now established that these principles apply in public law as they do in private law.

59. Lord Carnwath JSC so opined in obiter remarks in a concurring speech in *R (on the application of DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7; [2020] AC 698. His review of the authorities included *Thrasyvoulou v Secretary of State for the Home Department* [1990] 2 AC 273. He observed, at [46], that in *Thrasyvoulou* Lord Bridge of Harwich "made clear that for these purposes there was no distinction between public and private law". Further on, at [48], Lord Carnwath noted that Lord Bridge cited "the classic description of Diplock LJ in *Thoday v Thoday*"; and Lord Carnwath himself set out Diplock LJ's exposition of the concept of issue estoppel.

60. Lord Carnwath continued at [49] that a "useful illustration of the strength of the principle in a quasi-public context" was *Watt v Ahsan* [2007] UKHL 51; [2008] AC 696. In *Watt*, I interpose, the EAT had decided that the Labour Party was a qualifying body within the meaning of section 12 **Race Relations Act 1976**. In further litigation between the same parties the Court of Appeal held that it was *not* in law a qualifying body. The House of Lords agreed, but also held that issue estoppel prevented the Labour Party from reopening the EAT's decision on that issue in the first claim. Lord Hoffman (with whose speech the other Law Lords concurred) observed at [33]: "The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision." At [34], citing Lord Keith in *Arnold*, he observed that "the severity of this rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so." But he considered that it would work injustice if the estoppel did *not* apply in that case.

61. In *R (on the application of Balhav Singh) v Secretary of State for the Home Department*, JR/05767/19, 27 January 2021, Fordham J, deciding an application for judicial review in the Upper Tribunal (Immigration and Asylum Chamber) said, at [33]:

> "In my judgment, the commentary of Lord Carnwath in DN (Rwanda) persuasively gathers together relevant passages from relevant authorities, accompanied by observations which constitute a reliable guide for the purposes of the present case. Mr Malik identified no reasoned basis for departing from that analysis, and cited no authority supporting taking such a course. The two essential points for the purposes of the present case, in my judgment come to this. (1) There is a strong role of public policy which establishes that the issue of a determination relating to the legal right of a public authority to take action should be given finality. (2) A court or tribunal in subsequent proceedings in the public law arena may disapply that rule of public policy in the interests of justice, as where material relevant to the correct determination of a point involved in earlier proceedings has become available to a party and could not by reasonable diligence have been adduced in the earlier proceedings."

62. A month later, in *R (on the application of Al-Siri) v Secretary of State for the Home Department* [2021] EWCA Civ 113; [2021] 1 WLR 1137 the Court of Appeal applied the principles of finality and abuse of process in a public law context. Phillips LJ, for the Court, drew on the discussion in *Thrasyvoulou*, *Arnold*, *Virgin Atlantic Airways* and (without demur) Lord Carnwath's speech in *DN (Rwanda)*. The real issue in that case was said to be whether there was fresh evidence which satisfied the *Ladd v Marshall* test.

Argument, Discussion

Ground 1

63. In light of the foregoing authorities my starting point is that, as a matter of law, the FtT's 2019 decision could, doctrinally, potentially give rise to an issue estoppel as between the Claimant and Defendant. Its decision was a judicial adjudication, in a matter involving the same parties, in which it found the facts and applied the law to determine the issues and the claim. The decision arose out of a contested hearing at which it heard and considered evidence, and it heard argument from representatives on both sides. The decision was not the subject of a successful appeal, or an appeal at all, and so still stands.

64. Issue estoppel prevents an issue that was decided as a necessary part of a decision in previous litigation, from being reopened in later litigation involving the same parties. Formally, the ground of challenge to the Defendant's decision itself is abuse of power, put on the basis that the Defendant could not defend the decision to reject the Claimant's passport application, if challenged, because the FtT's determination means that the issue of whether he is a British citizen cannot be reopened in the judicial review proceedings.

65. Mr Chirico KC submitted that I should conclude that the decision of the FtT did give rise to an estoppel in relation to the issue of whether the Claimant is a British citizen. That is because, albeit on the balance of probabilities, the FtT made a clear, unambiguous and conclusive finding that he *is* a British citizen; and that finding was an essential part of its reasoning leading to its conclusion that the Defendant was not entitled to deport him. The Defendant has also not shown that there were any sufficient exceptional reasons why issue estoppel should not apply in respect of the impugned decision in this case.

66. On the question of the approach to be taken to a contention that, in the particular circumstances of the case, a finding potentially giving rise to issue estoppel should not have that effect, the following points emerge from my survey of the authorities.

67. First, cause of action estoppel, where it applies, is an absolute bar to the same cause of action being relitigated. But the principle of issue estoppel is more flexible, and may yield where there are special circumstances such that it would cause an injustice for it to be applied, or applied with full rigour.

68. Secondly, specific examples of cases in which issue estoppel may not apply, or bite, are those in which: (a) new evidence has come to light, which essentially meets *Ladd v Marshall* [1954] EWCA Civ 1; [1954] 1 WLR 1489 criteria – it is apparently credible, could make an importance difference to the issue and could not with reasonable diligence have been discovered and relied upon when the first decision was taken; (b) there has been a material change in the factual position since the first decision was taken; or (c) there has been a material change in the law since the first decision was taken. Mr Chirico KC acknowledged that another category would be a case in which it emerged that the first decision had been procured by fraud, or turned on evidence that was fraudulent. But he noted that it is not, and never has been, suggested, that this is such a case.

69. Mr Tabori relied on the discussion by Lord Sumption in *Virgin Atlantic Airways*, in particular at [21]. He submitted that, in order to avoid injustice, the court should take a flexible approach to what may amount to materially altered circumstances, which could potentially be more generous than the application of *Ladd v Marshall* principles.

70. As to that, it appears to me from both *Arnold*, and Lord Sumption's discussion of it and other authorities in *Virgin Atlantic Airways*, that the touchstone of whether evidence not presented on the previous occasion, may give rise to an exception to issue estoppel, is ordinarily *Ladd v Marshall*, though Lord Sumption's summation at [22] (3) "that the bar will usually be absolute" does not entirely preclude a more generous approach ever being taken. That said, and more generally, it is inherent that the court must retain the flexibility to do justice in the particular circumstances of the case. So it cannot be said that the categories of circumstances in which the court might conclude that it would be unjust for issue estoppel to bite have all been identified or are closed.

71. Nevertheless, as Diplock LJ noted, the concept of issue estoppel, while more flexible than that of cause of action estoppel, is an application or extension of the same general principles of public policy as cause of action estoppel. Those principles – of finality and certainty in respect of determinations in litigation and of a party not being abusively "twice vexed" – exert a powerful gravitational force. So the countervailing circumstances must be correspondingly compelling in order to escape its pull.

72. Mr Tabori advanced the following contentions as to why, in the present case, issue estoppel does not arise at all, or should, in all the circumstances, be found not to bite.

73. First, he relied upon *R (on the application of Al Hashemi) v Secretary of State for the Home Department* [2023] EWHC 805 (Admin) at [56], citing *R (Harrison) v Secretary of State for the Home Department* [2023] EWCA Civ 432 at [31] to [34], for the proposition that the question of whether the Claimant is a British citizen is a pure question of statutory interpretation which falls to be determined by the Court. The Defendant has no power to confer such entitlement and the grant of a COE does not do so. The Defendant cannot be bound to act in a way that would exceed their statutory power, by issuing a passport to which the Claimant has not shown he is entitled.

74. Mr Tabori submitted that the Claimant bears the burden of showing that he is entitled to a passport. He had not discharged that burden because he has not produced any evidence to show

that he was registered as a British citizen pursuant to section 3(1) or (2), such as a registration certificate, nor that his father at the time met the requirements set out in section 3(3)(c) for such registration to be a matter of entitlement. He relies, in this connection, upon the statement of Mr Richardson that the Defendant, having made searches of the records, cannot find evidence of any registration application to the High Commission in respect of the Claimant, prior to the issue of the COE, nor of any decision letter covering its issuance or other record explaining the reason for the COE decision.

75. I am not persuaded by these arguments. That is for the following reasons.

76. First, whether an individual is or is not a British citizen turns upon a correct application of the provisions of the legislation to the facts of the given case. In *Al Hashemi* it was described as a "pure" question of statutory interpretation because in that case the underlying facts were not in dispute. But, in any event, as *Watt*, for example, confirms, issue estoppel may bite in relation to issues of both fact and/or law.

77. Nor does the evidence of Mr Richardson defeat this claim. I note that Mr Chirico KC does not accept that the fact that Mr Richardson says that his team has been unable to locate any paperwork of the kind to which he refers means that it cannot have existed; and in any event Mr Chirico KC also disagrees with Mr Richardson's analysis of what paperwork would have been required in connection with registration at that time.

78. But it is sufficient to my decision to say that I agree with Mr Chirico KC that in any event Mr Richardson's statement does not constitute new evidence of a kind that would amount to exceptional reasons for an issue estoppel not to bite. Even taking account of the fact that Lord Sumption left the door open to the possibility that, when considering whether an issue estoppel may bite, the court *could* take a more generous approach than a strict application of *Ladd v Marshall*, that is the approach that he said *usually* applies, and I do not consider that there is any sufficient reason not to take it in this case.

79. In the litigation before the FtT, the case advanced for the Claimant was *not* that he was entitled to British citizenship by birth or descent, nor that he had been granted citizenship by naturalisation. Rather, he relied upon the grant of the COE as *evidence* that he had become a British citizen, and advanced a case as to why it could not be said that the High Commission would have necessarily been wrong to treat him as one, relying upon the routes to registration as a minor pursuant to section 3 **BNA 1981**.

80. Nor did the FtT make the error of thinking that the issue of the COE itself amounted to a grant of citizenship. The judge said in terms that it was not, at [17]. Rather, as she explained at [15] and [16] she treated it as *evidence* that the Claimant was a British citizen when it was granted, because she reasoned that that was the only basis on which it *could* have properly been granted in this case. The judge's main point at [17] was that, as the COE did not itself *confer* citizenship, its expiry did not affect the Claimant's status either.

81. The Defendant could have contended before the FtT that, in the absence of positive evidence being adduced by the Claimant, that his parents *had* been treated as having applied for registration of him as a British citizen, the FtT should conclude that the more likely explanation for the issuing of the COE was that the High Commission mistakenly thought that the Claimant was a British citizen by descent, or made some other error of fact or law in that regard. It would also have been open to the Defendant, in those proceedings, to gather evidence along the lines of that now contained in Mr Richardson's statement and to adduce it before the FtT in support of

such a case. There has been no suggestion that the Defendant would have faced any particular impediment to doing so.

82. Further, were the Defendant of the view, at the time, that the FtT, one way or another, erred by concluding that the Claimant is a British citizen, and, hence, that he could not, for that reason, be deported, it would have been open to the Defendant to seek to appeal the FtT's decision to the Upper Tribunal. It has not been contended that there were particular reasons or circumstances explaining why the Defendant decided not to do so at the time, which should now be treated as amounting to exceptional reasons why issue estoppel should not apply in relation to a subsequent application for a passport.

83. Mr Tabori also relied upon a letter of 25 September 2018, in which the Claimant's father, in support of a passport application made by him at that time, asserted that the High Commission in Bangladesh had been satisfied that the Claimant is a British citizen "by descent". However, submitted Mr Tabori, he plainly is not; and so this was evidence that the High Commission had erred, as had, in turn, the FtT.

84. As to that, this letter, which was to the Passport Office, was, as such, available to the Defendant at the time of the FtT litigation. Indeed, I was told that it was in the bundle before the FtT. Further, as I have noted, the Claimant's father gave evidence at the FtT hearing. It would therefore have been open to the Defendant to advance an argument to the FtT that it was indirect evidence that the High Commission had formed the view – erroneously – that the Claimant was a British citizen by descent; and indeed there would have been an opportunity at the FtT hearing, to question the Claimant's father about how he had come to the belief or understanding which it set out. It was not suggested before me that there was any particular reason why that could not have been done.

85. For all these reasons I do not consider that the contents of this letter give rise to exceptional reasons why an issue estoppel should not bite.

86. Mr Tabori relied upon the passages in Willmer LJ's judgment in *Thoday* to which I have referred. For cause of action estoppel to bite, the cause of action in the previous case must be "precisely the same" and it is "very necessary to look at the particular circumstances of the individual case". A recent application of that approach was, he submitted, ***R (on the application of Agbaje) v Secretary of State for the Home Department*** [2020] EWHC 244 (Admin). In that case the claimant sought judicial review of a refusal of a COE. An immigration judge had previously decided that the claimant *was* entitled to a COE. The question was precisely the same. In the present case, by contrast, submitted Mr Tabori, the issues were not "precisely the same." The challenge in the FtT case was to a deportation decision. The present challenge relates to a passport application.

87. As to that, in so far as Willmer LJ first made this point in relation to cause of action estoppel, the Claimant does not rely upon cause of action estoppel. In so far as Willmer LJ also used similar language further on in relation to issue estoppel, it is correct that care must be taken to ascertain the nature of the specific matter now at issue, and whether the previous decision did contain a finding on precisely that same issue. In *Thoday* itself there was no issue estoppel, because the *specific* finding sought by the wife in the husband's claim was not contrary to any finding that had been made by the court in the first decision, rejecting her claim. In the present case, however, the FtT found that the Claimant *is* a British citizen and the Defendant seeks to rely upon the proposition that he is *not* a British citizen. The issue is precisely the same, and the

conclusion which the Defendant asserts is flatly contrary to the previous finding on that precise issue.

88. Next, submitted Mr Tabori, the FtT's finding that the Claimant is a British citizen was, at most, something which, in the language used by Diplock LJ in *Thoday*, gave rise to a "fact estoppel", but not an issue estoppel. However, the material point made by Diplock LJ in that paragraph is that a finding in a previous decision will not give rise to an issue estoppel if it was not a necessary part of the reasoning leading to the outcome in that case. As he observed, it may not always be easy to discern which side of the line a particular finding falls, but the point of principle is clear.

89. But in the present case it *is* clear that the finding that the Claimant is a British citizen *was* an essential link in the chain of the FtT's reasoning leading to its conclusion on the challenge to the deportation order. At [14] the judge said that she was satisfied that, were the Claimant able to persuade her that he is a British citizen, "the respondent has no power to deport him". The subsequent conclusion that he is a British citizen then led, at [18], directly to the conclusion that the Claimant was "therefore" not liable to deportation.

90. I add that Mr Chirico KC showed me that, in his skeleton argument for the FtT, the Claimant appealed the deportation on the ground, first, that he was a British citizen, so that his deportation would not be in accordance with the law for Article 8 purposes, and, *in the alternative*, that there were very compelling circumstances such that deportation would be a disproportionate breach of his Article 8 rights. However, it is clear from the FtT's reasons that it reached its decision based on its finding that he was a British citizen. That led directly to its conclusion that the respondent had no power to deport him.

91. I pause to observe that the FtT did not actually make an express finding that deportation would infringe the Claimant's Article 8 rights, before concluding that, as it would be unlawful, that infringement could not be justified. It might perhaps be said that this did not need to be spelled out, because the very act of deportation would inevitably infringe his Article 8 rights, to *some* degree. But in any event, the FtT did find in terms that, *because* he was a British citizen, his deportation would be contrary to law.

92. This was also the sole route by which the FtT reached its decision. It did not decide, in the alternative, that even if he was *not* a British citizen, deportation would be a disproportionate breach of his Article 8 rights. It did not, in its decision, engage with that alternative basis on which he advanced his challenge, at all.

93. Mr Tabori referred again to the speech of Willmer LJ and the need to consider with care what the reasons were for the decision said to give rise to an estoppel. Mr Tabori submitted that the FtT decision should not give rise to an estoppel because it contained no analysis of the relevant provisions of the **BNA 1981**. It contained no reasoning to explain by what *particular* route under that Act, and how by that route, the FtT considered that the Claimant was, or had become, a British citizen. Further, whilst it had been argued that the High Commission *could* have proceeded on the basis of a deemed application for registration, there was no positive evidence presented to the FtT that it *had* done so. This lack of reasoning meant that this was, at most, an aberrant decision in the deportation context, and was not sufficient to give rise to an issue estoppel on the citizenship issue.

94. In his skeleton argument Mr Chirico KC referred to the FtT having noted at [15] that it was not disputed that the COE issued to the Claimant and his mother in 1997 was "validly issued".

However, in oral argument he made clear that he was not contending that this showed that it was not disputed before the FtT that the High Commission correctly treated the Claimant as being a British citizen. He was right not to press that particular argument, as it seems to me that all that was being noted in that paragraph was that there was no dispute that the High Commission had the *authority* to issue a COE, and it followed the correct formalities, as such, when doing so in this case.

95. As to Willmer LJ's observation about reasons for the decision, I note that the context in *Thoday* was that the wife was seeking to rely upon a particular factual assertion. Care therefore needed to be taken to examine whether the reasons for the previous decision rejecting her petition had included findings on that particular factual issue. In the present case, the reasons for concluding that the Claimant could not be deported, did include a finding that he was a British citizen. *That* was the particular part of the FtT's reasons that gave rise to a potential issue estoppel in this case. Further, the FtT did set out *some* reasoning explaining why it inferred that the Claimant was a British citizen. It identified that he was only entitled to such a certificate if he was either a British citizen or a Commonwealth citizen who met certain conditions, and, as the latter could not have applied, it concluded that the grant of the COE must have been based upon the former.

96. Mr Chirico KC also relied on the fact that he, as the Claimant's then counsel, had also specifically argued before the FtT that it was not a legal and factual impossibility that what occurred was consistent with the application for a COE having been treated also as an application for registration of him as a minor pursuant to section 3 **BNA 1981**, which had been granted. The argument had been developed in some detail in his written submissions, including in relation to the **1982 Regulations** and what formalities were or were not required by them. The FtT referred to having had his detailed skeleton argument, and the judge could be assumed to have taken this into account in coming to her decision. The decision could not be said to be plainly wrong in law or perverse.

97. Mr Chirico KC went further, and contended that even if a second court did consider the decision of a first court to have been undoubtedly wrong, that would not necessarily mean that it did not give rise to an issue estoppel. He referred to *Agbaje*. In that case the Upper Tribunal had directed the Secretary of State to give effect to a determination by an Immigration Judge that the claimant was entitled to a ROA. The Court held that cause of action estoppel prevented the Secretary of State now from denying that he was so entitled. It reached that conclusion notwithstanding its view that the original decision in that case *was* wrong. Mr Chirico KC submitted that there was no good reason why a different approach should apply in relation to issue estoppel.

98. Taking that last point first, *Watt v Ahsan* provides an example of a case in which the court in the second claim (the House of Lords) considered that the court in the first claim (the EAT) had erred in law in its decision on the issue in question, but nevertheless concluded that the issue could not be reopened in the second round of litigation. It does appear to me, therefore, that, in relation to issue estoppel, even a conclusion by the second court that the first decision *was* wrong, may, but will not necessarily always, prevent the estoppel from biting. All depends on the particular circumstances, and justice, of the case.

99. It appears from paragraph [16] of the FtT decision that the judge reasoned that, as the Claimant could only have properly been granted a COE if he was either a British or a Commonwealth citizen, and as the latter could be ruled out, this *must* point to the conclusion that he had become a British citizen. What the decision does not expressly address is whether the

judge weighed the likelihood of the potential scenario as to the route by which that might have happened, advanced by Mr Chirico, against the possibility that the High Commission had mistakenly thought that, as a matter of law, the Claimant was a citizen by descent, or made some other error of law or fact. That said, the relevant passage opens with a reference to the standard of proof, being balance of probabilities.

100. Overall, notwithstanding these points about the reasoning, I cannot say that the FtT's conclusion on the citizenship point was plainly perverse or manifestly premised on some error of law. In any event, the Claimant's contention that he could not be deported because he was a British citizen, and the specific scenario advanced as to how that *could* have come about by registration, was at the centre of the first of the two ways that the Article 8 challenge was argued before the FtT. The Defendant's representative had the opportunity to engage with that argument, and to advance the case that it was more likely that there had been a mistake. Further, to repeat, had the Defendant considered the FtT's decision to be deficient in its reasoning or otherwise wrong, an appeal to the Upper Tribunal could have been pursued. In all those circumstances I do not consider that justice demands that the estoppel should not bite.

101. Finally, I should consider two further authorities on which Mr Tabori placed some reliance.

102. In *R (on the application of Salma Rasul) v Secretary of State for the Home Department* [2017] EWHC 1306 (Admin) the claimant challenged a decision to grant her limited, rather than indefinite, leave to remain. She had been treated as a British citizen on the footing that her father was Ghulam Rasul, a British citizen other than by descent. She had been given a COE of the right to abode and issued with a British passport. However, it had subsequently come to light that, unbeknown to the claimant, her father was not Ghulam Rasul at all, was not a British citizen and had been convicted of passport fraud. The court concluded at [16], [21] and [22] that the claimant's status did not derive from the endorsement of a COE, which did not confer citizenship. It was at all times dependent on her father being a British citizen, which he was not. Nor did the issuing to the claimant of a British passport confer citizenship. The claim failed.

103. Mr Tabori highlighted the statement, at [16], that, if none of the statutory conditions for the right of abode applied, it "makes no difference that the Secretary of State had previously believed in error that a person had the right of abode." However, *Rasul* does not assist the present Defendant, because in that case the decisions relied upon unsuccessfully as giving rise to an estoppel were not judicial decisions and they did not themselves confer British citizenship. Further, the earlier claim (albeit innocently) had been tainted by a third party's fraud. In the present case, as noted, there has never been any suggestion, still less a finding, of fraud on anyone's part.

104. Mr Tabori also relied upon *R (on the application of Xhelilaj) v Secretary of State for the Home Department* [2021] EWHC 408 (Admin). In that case the claimant was a naturalised British citizen. The Defendant wrote to him indicating that consideration was being given to depriving him of citizenship on the basis that he had given false information about his identity. Following the commencement of judicial review proceedings the Defendant issued a decision not to deprive him of British citizenship and the proceedings were resolved by consent. However, on account of continuing concerns about the claimant's identity, his passport, which was in the Defendant's possession at the time, was not returned. Fresh proceedings were then commenced in that respect.

105. The claimant in *Xhelilaj* contended that the Defendant was estopped from impugning his identify because of the previous decision not to deprive him of his British citizenship. The court

rejected that argument. At [66] – [67] it noted that the previous decision was "not a judgment or other decision which was clearly based on particular conclusions as to the issues." Rather, it was "an administrative decision in the exercise of discretion, whose reasons were not made explicit" beyond a statement that the case "does not fall within our policy" and "was not necessarily based on a concession in relation to identity". The court concluded at [74] – [75] that issue estoppel did not apply.

106. I agree with Mr Chirico KC that *Xhelilaj* also does not assist the present Defendant, once again because the previous decision in that case did not give rise to an estoppel, as it was an administrative, not a judicial, decision and/or because it did not contain, or necessarily turn upon, a determination in relation the matter at issue in the later challenge, being the claimant's identity. The present challenge is to a judicial decision which does, as I have held, contain a necessary finding in relation to the precise matter at issue.

107. Accordingly, I conclude that the finding by the FtT that the Claimant is a British citizen gave rise to an issue estoppel and that there is no sufficient reason for concluding that in the interests of justice such estoppel should not bite in respect of the decision to refuse the Claimant a passport that is impugned by this claim of judicial review.

108. Ground 1 accordingly succeeds, and this claim succeeds on that basis.

Ground 2

109. Notwithstanding that the Claimant's 2023 passport application referred to, and relied upon, the FtT's decision, the Defendant's decision to refuse that application made no reference to it, and it has not been suggested to me that it was considered. However, as ground 1 has succeeded, ground 2, as an effective alternative to it, falls away.

110. The Defendant also invoked section 31(2A) **Senior Courts Act 1981**, but only in respect of ground 2. In any event, as no reason was in fact relied upon for refusing this passport application, other than the view that the Claimant was not a British citizen, it cannot be said that, had the application been considered on the basis that it had been determined by the FtT that he *is* a British citizen, it is highly likely that the outcome would not have been substantially different.

Ground 3

111. The Claimant contends that the refusal of his passport application has unlawfully interfered with the exercise of his Article 8 right to respect for his private and family life. He seeks a declaration to that effect. In oral argument Mr Chirico KC indicated that this ground was maintained on the basis that it would not be otiose to grant such a declaration, as the Claimant may wish to seek damages in this regard.

112. The Detailed Statement of Facts and Grounds states as follows. Following his release from prison and until his sentence was completed in March 2021 the Claimant's probation officer was unable to assist him to find work due to his lack of evidence of his right to work in the UK. Since December 2021 he has not been able to access public funds. He entered into an Islamic marriage to his long-term partner, Khudeza Rahman, who is a British citizen in October 2021; but due to his lack of evidence of a right to reside in the UK he has been unable to legally marry her and they have been unable to move to their own shared accommodation. In October 2022 Ms Rahman gave birth to their daughter. She and their daughter live with her parents and he lives with his parents. It is stated that this has had an impact on their relationship, his daughter's best interests

and his mental health. Reference is made to a more detailed sworn statement from the Claimant setting out these matters, which had accompanied his passport application.

113. The Statement of Defence contends that the Defendant's impugned decision was lawful and therefore not arbitrary or unjustified, that there can be no basis for a freestanding Article 8 challenge, and that the Claimant cannot rely upon the Article 8 rights of his daughter in their own right.

114. Ground 3 is not, it seems to me, advanced as a freestanding ground. But as ground 1 has succeeded, and having regard to the relief sought, and the content of the claim advancing a factual case in relation to this aspect, I am satisfied that this ground can be considered. On the basis of the matters referred to in the sworn statement to which the Detailed Statement of Facts and Grounds refers, in particular as to the impact which the Claimant says lack of a passport, as evidence of his citizenship, has had on his domestic arrangements, I am satisfied that the Defendant's impugned decision unlawfully interfered with the Claimant's Article 8 right at least to some degree.

115. Mr Chirico KC, relying on *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] AC 115 submitted that the Claimant can also rely on the impact on his partner and daughter, over and above the impact on his family life with respect to his relationship with each of them. However, even if I have the power to do so, I am not persuaded by the evidence I have before me, that it is appropriate or necessary to make a declaration in respect of the Article 8 rights of either of them as such.

Outcome

116. I will grant a declaration to the effect that the Defendant unlawfully refused the Claimant's passport application by the decision of 9 March 2023 in view of it having been determined by the FtT that the Claimant is a British citizen.

117. I will therefore quash the 9 March 2023 decision. I have been asked to extend the relief also to a letter of 31 May 2023 written by a Litigation Officer on behalf of the Defendant responding to correspondence that followed the 9 March 2023 decision. That letter concluded that, having conducted a review, they were satisfied that the Claimant did not meet the nationality requirement to be issued with a British passport. In so far as that amounted to a further decision refusing a passport, I will quash it as well.

118. The Claimant has also sought a declaration from this court that he is a British citizen. I decline to grant that additional relief as it appears to me that it would be neither necessary nor appropriate to do so. That question has been determined by the FtT and the contents of my present decision explain the implications of that earlier decision. The issue estoppel having been established, I have not needed, in order to determine the outcome of this challenge, to make any further or independent determination of the citizenship issue.

119. Following circulation of this decision in draft under embargo terms, the Claimant's counsel has not pressed for such a declaration. However, the parties have submitted draft terms for an order giving effect to my decision, which also include a requirement for the Defendant to issue the Claimant with a British passport following submission of a fresh application. I am prepared to make that particular order, effectively by consent. The parties disagreed about how much time from receipt of such an application the Defendant should be allowed to do this. I have allowed

28 days, taking into account that this, albeit by consent, is a mandatory order, and as the Defendant has not agreed a shorter period.

120. As I have stated, I will make a declaration that the impugned decision unlawfully interfered with the Claimant's exercise of his Article 8 rights. The claim seeks "other relief"; and Mr Chirico KC indicated that the Claimant might, if successful on the substantive challenge, wish then to seek to pursue a claim for damages. I consider that the County Court would be the appropriate forum for any such enquiry, and further particulars, evidence and fact-finding may be required there. My order will, in line with the agreed draft submitted by the parties, include a transfer direction together with a three-month stay to enable settlement of this aspect to be explored.