CASE NOTE

THE US SUPREME COURT IN *SESSIONS v MORALES-SANTANA*: PREVENTING STATELESSNESS FOR CHILDREN BORN ABROAD

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I INTRODUCTION

This case note examines the 2017 United States Supreme Court case *Sessions v Morales-Santana* ('*Morales-Santana*').[1] In the interests of gender equality and equal protection under the *Fifth Amendment* to the *United States Constitution*,[2] the Court made it more difficult for some US citizen women to pass on their nationality to their children born abroad. This case is noteworthy to the global fight against statelessness because it restricts the right to a nationality for children born abroad under US law, specifically through changes to §§ 1401 and 1409 of the US *Immigration and Nationality Act*.[3] In restricting US nationality law, the case implicated the *International Covenant on Civil and Political Rights* ('*ICCPR*')[4] and the *1961 Convention on the Reduction of Statelessness*.[5] It also involved issues of US constitutional interpretation not directly related to statelessness; specifically the 'Due Process Clause' of the *Fifth Amendment* to the *United States Constitution*.[6]

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1 (15-1191, 12 June 2017) ('*Morales-Santana*').

2 *United States Constitution* amend V ('*Fifth Amendment*').

3 *Immigration and Nationality Act*, 8 USC §§ 1401, 1409 (1952) ('*Immigration and Nationality Act*').

4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered in force 23 March 1976) art 24(3).

5 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 185 (entered into force 13 December 1975).

6 *Fifth Amendment* (n 2); *Weinberger v Wiesenfeld*, 420 US 636, 638 n 2 (1975).

II FACTS

The applicant, Luis Ramon Morales-Santana was born in the Dominican Republic to a US citizen father and a Dominican Republic citizen mother.[7] At the time of his birth, Mr Morales-Santana's parents were not married.[8] At the time of the case, §§ 1401 and 1409 of the US *Immigration and Nationality Act*[9] stated that US citizens living abroad and married to non-citizens could only pass on their US nationality if they had lived for ten years in the US, a common requirement in US immigration law often called a 'physical presence' test.[10] The law also imposed a ten year physical presence requirement on unwed, US citizen fathers, five of which had to be after the father's 14th birthday. For unwed US citizen mothers, however, the required period of physical presence in the US was only one year.

Mr Morales-Santana's father had not lived in the US for five years after his 14th birthday, so he did not qualify under the law.[11] He had been in the US for longer than one year after his 14th birthday. Had he been a woman, therefore, he would have met the one-year exception for unwed mothers.[12] As a result, Mr Morales-Santana did not qualify as a US citizen under the law. Facing removal from the US, he argued that he was the victim of unconstitutional gender discrimination and filed a motion with the Board of Immigration Appeals[13] to re-open his case based on an Equal Protection claim under the *US Constitution*.[14] The motion was denied, but the US Court of Appeals for the 2nd Circuit ('2nd Circuit') reversed the decision, holding that the gender discrimination in the law was unconstitutional and that, therefore, Mr Morales-Santana derived US citizenship from his father. The 2nd Circuit crafted a remedy that extended the one-year physical presence exception to unwed fathers. The government appealed to the US Supreme Court to decide whether (1) §§1401 and 1409 of the *United States Code* violated the *Fifth Amendment*'s guarantee of equal protection and (2) if so, '[w]hether the court of appeals properly remedied the equal protection violation by extending to unwed citizen fathers of foreign-born children the same rights available to similarly situated unwed citizen mothers'.[15] To settle this area of law, which had previously been raised, but not addressed, by the US Supreme Court decision in *Flores-Villar*

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7 *Morales-Santana* (n 1) slip op 1, 4.

8 ibid slip op 5.

9 *Immigration and Nationality Act* (n 3) §§ 1401, 1409. These sections have since been amended and the physical presence requirement is now five years instead of ten years.

10 Many US immigration and nationality laws require periods during which the applicant must be continuously physically present within the territory of the US or one of its outlying possessions, such as American Samoa. For more information, see US Citizenship and Immigration Services, *USCIS Policy Manual* (Manual, vol 12, 28 August 2019) pt H ch 3 <https://www.uscis.gov/policy-manual>.

11 *Morales-Santana* (n 1) slip op 4.

12 ibid slip op 1–3.

13 The US Board of Immigration Appeals is 'the highest administrative body for interpreting and applying immigration laws' in the US. See United States Department of Justice, *Board of Immigration Appeals* (Web Page, 15 October 2018) <https://www.justice.gov/eoir/board-of-immigration-appeals>.

14 *Morales-Santana* (n 1) slip op 1–3. Under the Due Process Clause of the *Fifth Amendment* to the *US Constitution*, the US government is required to apply the laws equally to everyone and to not draw arbitrary distinctions that are not based on a legitimate state interest. For more information on equal protection under the *Fifth Amendment* to the *US Constitution*, see Kenneth L Karst, 'The *Fifth Amendment*'s Guarantee of Equal Protection' (1977) 55(3) *North Carolina Law Review* 541.

15 *Lynch v Morales-Santana*, Petition for a Writ of Certiorari (23 May 2016) i.

v United States,[16] the US Supreme Court agreed to review the case, granting writ of *certiorari*.

III ISSUES

This case examined gender discrimination under the *US Constitution*'s *Fifth Amendment* Due Process Clause and discussed appropriate remedies for removing gender discrimination. It also examined the US Government's obligations to prevent statelessness, particularly insofar as it results from gender discrimination.

IV HOLDING

The US Supreme Court agreed with the 2nd Circuit that §§ 1401 and 1409 of the US *Immigration and Nationality Act* contain elements of unconstitutional gender discrimination. It differed in its ruling, however, as to the correct remedy.[17] The majority decision, written by Justice Ginsburg, struck down the exception for unwed mothers, applying the ten-year rule to all US citizens living abroad.[18]

V REASONING

This case involved a complex interpretation of the *Fifth Amendment* to the *US Constitution*. This note will mainly focus on the aspects of the US Supreme Court's reasoning that touched on the problem of statelessness. As several of the constitutional questions ended up being highly relevant to the problem of statelessness, however, this note will also summarise the relevant constitutional questions. This case concerned the risk of statelessness stemming from gender discrimination. It also concerned the risk of statelessness caused by restricting access to nationality, although this issue was not mentioned in the decision.

The problem of statelessness was first raised by the US Government. It argued that gender discrimination in the law served an important government interest, that of preventing statelessness.[19] The 2nd Circuit acknowledged that the 'avoidance of statelessness' served 'an important government interest', but rejected the argument that gender discrimination was necessary to reach that aim.[20] The US Supreme Court discussed the risk of statelessness arising from gender discrimination, though it did not expressly say that preventing statelessness serves an important US Government interest. The Court merely noted the importance of the United Nations High Commissioner for Refugees' *#IBELONG* campaign to end statelessness and discussed the role of gender discrimination in causing

16 *Flores-Villar v United States*, 564 US 610 (2011) ('*Flores*'). *Flores* raised similar issues to the present case, but the Supreme Court affirmed the holding of the lower court, in this case the 9th Circuit decision, without taking up the merits. The 9th Circuit had held that the law was not unconstitutional, upholding an earlier US Supreme Court case, *Nguyen v Immigration and Naturalization Service*, 533 US 53 (2001). See *United States v Flores-Villar*, 536 F 3d 990 (9th Cir, 2008).

17 *Morales-Santana v Lynch*, 792 F 3d 256 (2nd Cir, 2015); *Morales-Santana v Lynch*, 804 F 3d 520 (2nd Cir, 2015); *Morales-Santana* (n 1) slip op 1–5. As stated above (see n 10), under current law, the physical presence requirement is five years.

18 *Morales-Santana* (n 1) 1–5.

19 Loretta E Lynch, Attorney-General, Petitioner, 'Brief for the Petitioner', Submission in *Sessions v Morales-Santana*, 15-1191, August 2016, 11.

20 *Morales-Santana v Lynch*, 804 F 3d 520 (2nd Cir, 2015) 531, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 160–61 (1963); *Trop v Dulles*, 365 US 86, 102 (1958) (plurality opinion) ('*Trop v Dulles*').

statelessness.[21] The Court also agreed with the 2nd Circuit that preventing statelessness was a goal of some sections of the original *Nationality Act of 1940*, but not of the specific sections at issue in this case.[22] Like the 2nd Circuit, the Supreme Court rejected the argument that gender discrimination in the law was necessary to prevent statelessness.[23] As Justice Ginsburg, writing for the majority, put it: 'the Government [has not] shown that the risk of statelessness disproportionately endangered the children of unwed US-citizen mothers' as opposed to those of unwed fathers.[24]

Gender discrimination, however, was not the only potential cause of statelessness at issue in this case. Statelessness may also arise from changes in the law that make it harder for children to gain a nationality at birth. Yet neither court addressed this fact. Instead, when crafting a remedy, both courts focused only on their constitutional powers and those of Congress, rather than on the goal of preventing statelessness or the human right to a nationality.

In applying the one-year physical presence rule to both unwed US citizen fathers and mothers, the 2nd Circuit held that it had no power to strip citizenship from an individual as such powers lay only with Congress.[25] But while the Supreme Court acknowledged that the 2nd Circuit was correct in stating this general rule,[26] the majority decision held that the US Congress clearly intended the clause on unwed mothers to be an *exception* to an otherwise general rule for both married and unmarried persons.[27] In such cases, the Court determined it was required to remove the exception for unwed mothers, the one-year requirement, and apply the ten-year requirement to everyone. This method of crafting a remedy to an unconstitutional law, often called 'levelling down',[28] resulted in stripping citizenship from Mr Morales-Santana and, potentially, many others.[29]

Morales-Santana provides an excellent example of how restricting nationality at birth can exacerbate the problem of statelessness, violating the right to a nationality.[30] Yet, the creation of statelessness as the result of restricting the right to a nationality at birth was not discussed by either court in crafting a remedy,

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21 *Morales-Santana* (n 1) slip op 22.

22 ibid slip op 20. To determine legislative intent, an important part of US Supreme Court legal interpretation, the Court looked to the drafting of the original *Nationality Act of 1940*, which forms the basis of much of the modern law.

23 *Morales-Santana* (n 1) slip op 4, 19–23.

24 ibid slip op 23.

25 *Morales-Santana v Lynch*, 804 F 3d 520 (2nd Cir, 2015) 41.

26 *Morales-Santana* (n 1) slip op 23–28. The majority cited *Heckler v Mathews*, 465 US 728, 740 (1984), quoting *Iowa–Des Moines National Bank v Bennett*, 284 US 239, 247 (1931) in crafting a remedy.

27 *Morales-Santana* (n 1) slip op 28.

28 As the 2nd Circuit explained:

> 'equal treatment' might be achieved in any one of three ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year continuous presence provision in § 1409(c) and requiring every unwed citizen parent to satisfy the more onerous ten-year requirement if the other parent lacks citizenship; or (3) severing the ten-year requirement in § 1409(a) and § 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship.

Morales-Santana v Lynch, 804 F 3d 520 (2nd Cir, 2015) 535–36.

29 Michael Dorf, 'Equal Protection and Levelling Down as Schadenfreude', on Michael Dorf, *Dorf on Law* (Blog, 14 June 2017) <http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html>.

30 UN High Commissioner for Refugees, *Good Practices Paper — Action 2: Ensuring That No Child is Born Stateless* (Good Practices Paper, 2017) <https://www.refworld.org/docid/58cfab014.html>.

meaning that the interest of the US Government in preventing statelessness was only partially addressed. This gap was mirrored in briefs filed by *amici curiae* organisations.[31] Briefs by experts on statelessness focused on the role gender discrimination plays in creating statelessness,[32] but did not adequately focus on the danger of statelessness due to restricting nationality at birth.[33] Meanwhile, possible remedies were extensively discussed by scholars of constitutional law in a separate brief, but the risk of statelessness as a result of 'levelling down' was only mentioned in passing.[34] It is not clear to what extent these omissions influenced the Supreme Court's failure to discuss statelessness as a result of 'levelling down', but the omissions mark an unfortunate missed opportunity to address the problem of statelessness as a result of restricting access to US nationality. These omissions are particularly glaring in light of the fact that the Dominican Republic, the country at issue in this case, has a large population of stateless persons who cannot pass on their nationality to their children.[35] Children born in the Dominican Republic to stateless persons and US citizens therefore must rely on the US citizen parent in order to gain a nationality.

In choosing to 'level down', the majority erred, this case note argues, in failing to mention the right to a nationality at birth that finds support in US treaty law and norms, as well as US Constitutional law. The right to a nationality for children at birth is guaranteed by the *ICCPR* in art 24, which has been ratified by the US Government.[36] The US is not a signatory to the *1961 Convention on the Reduction of Statelessness*, but this treaty could have served as guidance to the Court in applying the *ICCPR*.[37] The *1961 Convention on the Reduction of Statelessness* supports the duty of states to prevent statelessness not only for children born in their territory, but also for children born abroad.[38] Article 4 states that:

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31 See, eg, Equality Now et al, 'Brief of Equality Now, Human Rights Watch, and Other Human Rights Organizations and Institutions in Support of Respondent', Submission in *Sessions v Morales-Santana*, 15-1191, 3 October 2016 ('Brief of Equality Now et al'); Scholars on Statelessness, 'Brief of *Amici Curiae* Scholars on Statelessness in Support of Respondent', Submission in *Sessions v Morales-Santana*, 15-1191, 3 October 2016 ('Brief of *Amici Curiae* Scholars on Statelessness').

32 *Morales-Santana* (n 1) slip op 25. 'Brief of *Amici Curiae* Scholars on Statelessness' (n 31) 9–10, cited in *Morales-Santana* (n 1) slip op 22.

33 'Brief of Equality Now et al' (n 31) 30. 'Brief of *Amici Curiae* Scholars on Statelessness' (n 31, 20–8.

34 Ahmad et al, 'Brief for *Amici Curiae* Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars in Support of Respondent', Submission in *Sessions v Morales-Santana*, 15-1191, 3 October 2016, 16–18.

35 See generally Amnesty International, *'Without Papers, I am No One': Stateless People in the Dominican Republic* (Report, 2015).

36 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered in force 23 March 1976) art 24(3) ('*ICCPR*'). The US Supreme Court has long held that treaties make up part of US law. See *Missouri v Holland*, 252 US 416 (1920). Though the Senate included a reservation that the *ICCPR* is not 'self-executing', it is part of US law: United States Congress, 'US Reservations, Declarations, and Understandings, *International Covenant on Civil and Political Rights*', 138 Cong Rec S4781 01 (daily ed, 2 April 1992) [II](a).

37 Consulting foreign and international laws as guidance in Supreme Court decisions is controversial, but for an example, see Justice Breyer's arguments in *Knight v Florida* 528 US 990 (1999) (Breyer J), where his Honour cites, among other foreign and international sources, the *European Convention on Human Rights*: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

38 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 185 (entered into force 13 December 1975) art 1.

> A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State.[39]

The right to a nationality further finds support under US constitutional law. For example, in *Trop v Dulles*, the Supreme Court held that Congress does not have the power to de-nationalise and, even if it had such power, de-nationalisation would be a violation of the *Eighth Amendment* to the *US Constitution*.[40] Even if the Court had declined to discuss the treaty obligations of the US Government, it should have discussed its own precedent on de-nationalisation.

VI CONCLUSION

By making it harder for some unwed, US citizen mothers to pass on their nationality to their children, the US Supreme Court has raised the risk of statelessness for some children born abroad. Some children who would have had the right to a nationality via their US citizen mother before *Morales-Santana* have now lost that right. In *Morales-Santana,* the Court gave more weight to abstract concepts of gender equality than to the human right to a nationality, creating a troubling precedent.

39 ibid art 4(1).

40 *Trop v Dulles* (n 20). The *Eighth Amendment* to the *US Constitution* prohibits cruel and unusual punishment.