

Supreme Court: Gender-Based Distinctions in Immigration Law Violate Equal Protection

By Michael H. Neifach and Amy L. Peck

June 13, 2017

A federal citizenship statute setting different residency requirements for U.S. citizen fathers and mothers seeking to transmit birthright citizenship to their non-marital children born outside the U.S. violates the Equal Protection Clause of the Constitution, the U.S. Supreme Court has ruled. *Sessions v. Morales-Santana*, No. 15-1191 (June 12, 2017).

The Immigration and Nationality Act provides the general method for a child born outside the U.S. to become a U.S. citizen at birth when one parent is a U.S. citizen who was physically present in the U.S. for a period of years and the other is not. An exception to the general method shortens the durational requirement where the child's mother is an unmarried U.S. citizen. 8 U.S.C. § 1409(c).

Background

Luis Ramon Morales-Santana was born in 1962 in the Dominican Republic to unwed parents. His father was a U.S. citizen and lived in Puerto Rico for close to 20 years. At age 19, Morales-Santana's father left Puerto Rico to obtain employment in the Dominican Republic. At the time of Morales-Santana's birth, the rules of birthright citizenship for children born outside of the United States to one U.S. citizen parent provided that:

- The U.S. citizen parent must have lived in the United States for at least 10 years and
- Five of those years must have been after the age of 14.

(Congress has since lowered the requirement for parents of children born after 1986 to five years and two of those years after the age of 14.)

Morales-Santana's father had left Puerto Rico 20 days before fulfilling the five-year requirement.

At age 13, Morales-Santana moved to the U.S., where he resided for most of his life. He was in his 50s when, fighting deportation for several convictions under the New York State Penal Code, he asserted that he should be granted U.S. citizenship because his father had been a U.S. citizen. Although Morales-Santana was not eligible because his father had left Puerto Rico before fulfilling the five-year requirement, Morales-Santana argued that he should be eligible because the rules at that time were discriminatory.

Morales-Santana noted the exception for U.S. citizen mothers who were unwed at the time of their child's birth abroad provided that those mothers had to have lived in the U.S. for only one continuous year, instead of five, before the child's birth in order to pass on citizenship. He wanted that rule to be applied to his father and to him. He argued that because the law was biased against U.S. citizen fathers, it was unconstitutional and discriminatory.

Law Unconstitutional

The Supreme Court, in an opinion delivered by Justice Ruth Bader Ginsburg, agreed that "[p]rescribing one rule for mothers, another for fathers" is unconstitutional unless there is an "exceedingly persuasive justification." The Court found no such justification, opining that the disparate rules had been based on stereotypical assumptions about women's roles as caregivers.

The Court normally would strike the discriminatory exception (that U.S.-citizen mothers who were unwed at the time of their child's birth abroad must have lived in the U.S. for just one continuous year before the child's birth in order to pass on citizenship). However, because married parents and unwed fathers are covered by the same rule (10 years and five years), the Court explained that if the one-year rule for unwed U.S.-citizen mothers were to be applied to Morales-Santana and his father, the standard rule would be nullified. Therefore, the Court, acting as it believed Congress would act, decided to strike the exception.

Accordingly, children born prior to 1986 to one U.S.-citizen and one non-U.S.-citizen parent will have to meet both the 10-year and the five-year requirements, unless Congress changes the rule and eliminates

Meet the Authors



[Michael H. Neifach](#)

Office Managing Principal
Washington, D.C. Region 703-483-8300
Email



[Amy L. Peck](#)

Principal
Omaha 402-391-1991
Email

Practices

Immigration

any gender bias. The Court stated, “We must therefore leave it to Congress to select, going forward, a physical presence requirement (10 years, one year or some other period) uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed.”

Morales-Santana, instead of benefitting from the more lenient rule for children of unwed U.S.-citizen mothers, as he sought, had brought about the elimination of the less demanding standard. Thousands of individuals born outside of the United States prior to 1986 to unwed U.S.-citizen fathers might have been granted U.S. citizenship if the Supreme Court had decided differently.

Prior to this Supreme Court ruling, the Second Circuit Court of Appeals also held the gender-based distinctions were unconstitutional, but it ruled in favor of Morales-Santana, holding he had derived citizenship through his father. In the end, the Supreme Court reversed this decision and remanded the case.

Now, the citizenship rules are left to Congress to determine a fair physical presence requirement for derivative citizenship.

Jackson Lewis attorneys are available to answer inquiries regarding this case.

©2017 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.

©2022 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.