

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

ALLISON DAWN BLIXT and L.Z.-B.	:	
	:	
Plaintiffs,	:	
v.	:	Civ. No. 1:18-cv-00124-EGS
	:	
The UNITED STATES DEPARTMENT	:	PLAINTIFFS' SUPPLEMENTAL
OF STATE and MICHAEL R. POMPEO in	:	MEMORANDUM OF LAW IN
his official capacity as Secretary, U.S.	:	OPPOSITION TO DEFENDANTS'
Department of State	:	MOTION TO DISMISS
	:	
Defendants.	:	

Pursuant to the Court’s February 25, 2019 Order, Plaintiffs respectfully submit this supplemental memorandum of law concerning *Dvash-Banks et al. v. Michael R. Pompeo, et al.*, No. 18-cv-00523-JFW (C.D. Cal. Feb. 21, 2019) (“*Dvash-Banks*”), and in further opposition to Defendants’ motion to dismiss the Complaint.¹ (ECF No. 31.)

PRELIMINARY STATEMENT

Dvash-Banks’s central holding is that “Section 301 [of the INA] does not require a person born during their parents’ marriage to demonstrate a biological relationship with both of their married parents.” (Slip Op. at 8.) Under this rule, L.Z.-B.—like the minor plaintiff in *Dvash-Banks* (“E.J.”)—acquired U.S. citizenship at birth under Section 301. Other than the gender of L.Z.-B.’s parents and their residence outside the U.S., the situation here substantially mirrors *Dvash-Banks*. L.Z.-B. was born abroad to married parents, one of whom is a U.S. citizen, but not his biological parent. Both of L.Z.-B.’s parents appear on his birth certificate and have acted as his parents from the day that he was born. On similar facts, *Dvash-Banks* held that E.J. acquired U.S. citizenship at birth, rejecting the State Department’s imposition of an extra-statutory biological requirement under Section 301, as well as the State Department’s reliance on the FAM.

As a non-U.S. resident, L.Z.-B. cannot pursue his citizenship claim directly under Section 1503(a), as the plaintiffs did in *Dvash-Banks*; but this distinction does not require a different citizenship determination here. To the contrary, the APA’s “central purpose” is to provide “a broad spectrum of judicial review of agency action,” *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep’t of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005), precisely when, as here, there is no adequate alternative remedy available to the plaintiff.

¹ All capitalized terms used in this memorandum have the same definitions as set forth in Plaintiffs’ initial memorandum in opposition to Defendants’ motion to dismiss. (ECF No. 32.)

ARGUMENT

A. Under *Dvash-Banks*, L.Z.-B. Acquired U.S. Citizenship At Birth Under Section 301.

Dvash-Banks is the latest in an unbroken line of decisions holding that the INA does not require a child born abroad to married parents, one of whom is a U.S. citizen, to prove a biological tie to a U.S. citizen parent. As every federal court to consider the issue has held, the proper interpretation of Section 301 compels the conclusion that L.Z.-B. acquired U.S. citizenship at birth under Section 301 and that the denial of his applications for a CRBA and U.S. passport was arbitrary, capricious, and unlawful.²

Relying on this consistent line of precedent—*Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) and *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), both of which pre-date the State Department’s denial of L.Z.-B.’s applications, and *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018)—*Dvash-Banks* unequivocally rejected the interpretation of Section 301 that Defendants advance here, noting that “the dramatic difference in the language of Section 301 and Section 309 makes it clear that a biological relationship is not required.” (Slip Op. at 9.)³ The court specifically rejected the defendants’ attempt there, as here, to rely upon the FAM to impose a biological relationship requirement that is absent from the INA. (*Id.* at 8-9.) The court reasoned that “[t]he basis for the State Department’s imposition of a biological requirement is its strained interpretation of the language in Section 301(g)” (*id.* at 5), as reflected in the FAM, and cited

² Because E.J. was born abroad to married parents, the court adjudicated his claim to U.S. citizenship *de novo* under Section 301, not Section 309. Plaintiffs here similarly allege that the State Department should have adjudicated L.Z.-B.’s applications under Section 301.

³ This conclusion also undermines Defendants’ theory that Plaintiffs here lack standing because, even if the State Department were required to adjudicate L.Z.-B.’s CRBA and U.S. passport applications under Section 301, the State Department still would impose on L.Z.-B. a biological relationship requirement and reject his application. (ECF No. 31-1 at 9-10.) *Dvash-Banks* endorsed and applied prior precedent—*Scales*, *Solis-Espinoza*, and *Jaen*—rejecting the defendants’ attempt to read any such requirement into Section 301. (Slip Op. at 5, 8-9.)

Scales for the proposition that the FAM “was so divergent from the statutory language as to not even be appropriately considered ‘an interpretation of § 1401’” (*id.* at 8-9 (citing *Scales*, 232 F.3d at 1165-66)). The *Dvash-Banks* court applied the same framework for adjudicating E.J.’s applications as applied in *Scales*, *Solis-Espinoza*, and *Jaen* even though he, like L.Z.-B. here, was conceived using ART. As the court observed, “the presumption of legitimacy that applies when a child is born to married parents—as codified in the INA—cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent.” (*Id.* at 9.) *Dvash-Banks* thus supports the sufficiency of the Complaint and denial of Defendants’ motion.⁴

B. Unlike in *Dvash-Banks*, Section 1503 Does Not Provide An Adequate Remedy Here.

The ruling in *Dvash-Banks* that the defendants were entitled to summary judgment on their APA claim does not support the dismissal of the APA claim here. That determination was premised solely on the court’s conclusion that the plaintiffs’ separate claim under 8 U.S.C. § 1503(a) “offers an adequate alternative remedy to APA review.” (Slip Op. at 7.) Here, as Defendants concede, Section 1503(a) is not available to Plaintiffs because the Zaccari-Blixt family does not reside in the U.S. (*See* ECF No. 31-1 at 21.) As Plaintiffs’ opposition to Defendants’ motion explains, Sections 1503(b) and (c) do not provide an adequate remedy for L.Z.-B. (*See* ECF No. 32 at 29-31.) Those provisions were enacted to address persons fraudulently applying at the border to gain entry into the U.S., *see Rusk v. Cort*, 369 U.S. 367, 379 (1962), not the citizenship of children of U.S. citizens residing abroad. If relegated to those provisions, L.Z.-B., who recently turned four, and one or both of his parents, would be forced to abandon their home,

⁴ *Dvash-Banks*’ holding that Section 1503(a)’s remedies were adequate because “[t]he injunction sought by Plaintiffs is well beyond that needed to provide Plaintiffs with complete relief” (Slip Op. at 7), is irrelevant to Defendants’ motion here. At the motion to dismiss stage, the non-moving party is not required to prove that he or she “can obtain the *specific* relief demanded so long as the court can ascertain from the face of the complaint that *some* relief can be granted.” *Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (emphasis in original).

schools, and jobs, and move to the U.S. for an indeterminate time while L.Z.-B.'s applications are adjudicated and any appeals litigated. As the history of this case and *Dvash-Banks* show, this could be a prolonged and arduous process. Uprooting, and potentially separating, families in this way flatly contradicts the INA's "inten[t] to keep families together." (*Dvash-Banks*, Slip. Op. at 10 (citing *Solis-Espinoza*, 401 F.3d at 1094)). Under these circumstances, the APA is the proper vehicle for redressing Plaintiffs' injury.⁵ Any other conclusion would be inconsistent with *Dvash-Banks*'s holding that resort to the APA was unnecessary because Section 1503(a) clearly entitled the plaintiffs to their requested relief. It is precisely because Plaintiffs have no similar access to direct relief under the INA that their APA claim is necessary.

C. The Complaint Sufficiently Pleads a Due Process Claim.

As described in Plaintiffs' opposition (ECF No. 32 at 33-38), the Complaint sufficiently pleads that the State Department's policy, articulated in the FAM, which *Dvash-Banks* fully rejects, infringes the fundamental right to marry by denying same-sex couples and their children the full constellation of rights and benefits linked to marriage and, further, fails strict scrutiny review. *See Pavan v. Smith*, 137 S. Ct. 2075, 2076 (2017) ("the Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples" (internal quotation marks omitted)); *see also Miller v. Albright*, 523 U.S. 420, 433 (1998) (under the INA, if a married U.S. citizen and a foreign national conceive a child, "*citizenship will follow*" (emphasis added)). *Dvash-Banks*, which dismissed as moot the due process claim, after discovery,

⁵ *See Rusk*, 369 U.S. at 375 ("[T]he language of [§ 1503(b) and (c)] shows no intention to provide an exclusive remedy"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *see also Rafeedie v. INS*, 880 F.2d 506, 511 (D.C. Cir. 1989) (holding that Section 1503 does not foreclose claims under the APA); *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 303 n.5 (D.D.C. 2018) (holding that Section 1503 "is not an exclusive remedy" and stating that "*Cort*'s holding that § 1503 is not an exclusive remedy . . . remains good law" (internal quotation marks omitted)).

at the summary judgment stage, in view of the relief granted under Section 1503, does not undercut these allegations. (*See* ECF No. 1 ¶¶ 73-80.)

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' opposition, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss and award to Plaintiffs such other and further relief as the Court deems just and proper.

Dated: March 19, 2019

Respectfully submitted,

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