Neutral Citation Number: [2023] EWCA Civ 1336

Case No: CA-2023-000009

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Philip Mott KC sitting as a Deputy High Court Judge
CO/16/2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2023

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE KING (on the application of INDRAN MURUGASON)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik ZC and Arif Rehman (instructed by **Lincolns**) for the **Appellant**
William Hansen (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 9 November 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 16 November 2023.

LORD JUSTICE BAKER :

1. This appeal concerns a short point of statutory interpretation. The appellant claims that he was a citizen of the United Kingdom and Colonies with a right of abode in the United Kingdom immediately before the British Nationality Act 1981 came into force. That status is significant to him because, if he is right, on the commencement of the 1981 Act he became (and continues to be) a British citizen.

2. The relevant facts are not in dispute and can be summarised very briefly. The appellant's father was born on 31 December 1948 in Penang. As explained in detail in the decision of the Asylum and Immigration Tribunal in *AL and Other Malasia BOCs) Malaysia* [2009] UKAIT 00026, Penang had been one of three areas on the Malayan peninsula which were part of a British Colony. Under the British Nationality and Status of Aliens Act 1914 the residents of Penang were therefore British subjects. That position was unaffected by the formation of the Federation of Malaya in 1948 although the residents of Penang were also granted citizenship of the new Federation. On his birth, the appellant's father was therefore a British subject. The very next day, the British Nationality Act 1948 came into force. Under s.4 of that Act, save for two exceptions which have no application to this case, every person born within the United Kingdom and Colonies after the commencement of the Act was a "citizen of the United Kingdom and Colonies by birth". Under section 12(1)(a) of the 1948 Act, a person who had been born within the territories comprised at the commencement of the Act in the United Kingdom and was a British subject immediately before that date become a citizen of the United Kingdom and Colonies. Thus, at the age of one day, the appellant's father acquired that status.

3. On 31 August 1957. Malaya became independent. In most cases, upon a former British colony becoming independent, its population acquired citizenship of the new country and ceased to be citizens of the United Kingdom and Colonies. Exceptionally, however, in circumstance described in *AL*, supra, those residents of Penang and Malacca who were citizens of the United Kingdom and Colonies were allowed to retain that citizenship in addition to their new nationality. Accordingly, the appellant's father continued to be a citizen of the United Kingdom and Colonies by birth.

4. The appellant was born on 13 October 1972. Under s.5(1) of the 1948 Act, "a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of the birth". It further provided that this status, subject to certain exceptions, could descend only by one generation. The appellant was therefore born, and remains, a citizen of the United Kingdom and Colonies.

5. A few weeks after his birth, on 1 January 1973, the Immigration Act 1971 came into force, restricting the rights of certain citizens of the United Kingdom and Colonies to live in this country. As originally enacted (which is the provision with which this appeal is concerned), s.2(1) of that Act provided:

> "A person is under this Act to have the right of abode in the United Kingdom if—
>
> (a) he is a citizen of the United Kingdom and Colonies who has that citizenship by his birth, adoption, naturalisation

> or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or
>
> (b) he is a citizen of the United Kingdom and Colonies born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption, and the parent either—
>
> (i) then had that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or
>
> (ii) had been born to or legally adopted by a parent who at the time of that birth or adoption so had it; or
>
> (c) he is a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more ; or
>
> (d) he is a Commonwealth citizen born to or legally adopted by a parent who at the time of the birth or adoption had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or in any of the Islands."

The islands referred to in s.2 were the Channel Islands and the Isle of Man: s.33.

6. S.11(1) of the British Nationality Act 1981, which came into force on 1 January 1983) created the new status of British citizen by providing that

> "… a person who immediately before commencement,
>
> (a) was a citizen of the United Kingdom and Colonies, and
>
> (b) had the right of abode in the United Kingdom under the Immigration Act 1971,
>
> shall at commencement become a British citizen."

7. The issue on this appeal is whether, under s.2(1) of the 1971 Act, the appellant has a right of abode in the United Kingdom and is therefore, under s.11(1) of the 1981 Act, a British citizen. This all turns on the interpretation of s.2(1)(b)(i) of the 1971 Act. There are two elements of this provision. First, the appellant must demonstrate that he is "a citizen of the United Kingdom and Colonies born to .. a parent who had that citizenship at the time of the [i.e. the appellant's] birth …." Secondly, he must show that his parent "then [i.e. at the date of the appellant's birth] had that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands". It is not disputed that the appellant satisfies the first element. The question is whether he satisfies the second. The issue of interpretation is

whether, as the appellant contends, the qualifying words "in the United Kingdom or in any of the Islands" in section 2(1)(b)(i) apply only to "registration" or, as the Secretary of State argues, they qualify all the options "birth, adoption, naturalisation or … registration".

8. The procedural history leading to this appeal can be summarised as follows. The appellant's original application for a certificate of entitlement to the right of abode in the UK was declined by the Secretary of State on 14 September 2020. On a request for reconsideration the Secretary of State came to the same conclusion, on 13 February 2021. The SSHD's decision was challenged by way of judicial review. However, this claim was settled by consent when the SSHD offered to reconsider the application. On 11 October 2021, a fresh decision was issued again refusing the application. On 16 December 2021, the appellant filed a second application for judicial review. Permission to bring the application was granted on 19 July 2022 and the substantive hearing took place on 1 December 2022.

9. In his judgment (reported at [2022] EWHC 3160 (Admin), [2023] 1 WLR 1706), the deputy judge found in favour of the Secretary of State, for five reasons.

(1) The language of s.2(1)(b)(i) taken in isolation points clearly towards the qualifying words "in the United Kingdom or in any of the Islands" being intended to apply to all four of the options "birth, adoption, naturalisation or … registration (paragraph 18). "If Parliament had intended the qualifying words to apply only to 'registration', there should have been an additional ('Oxford') comma after 'naturalisation'" (paragraph 15).

(2) Other provisions in the Act, in particular s.2(1)(d) and s.2(3), point towards the same construction (paragraphs 19 to 22).

(3) That construction was consistent with the analysis of Moore-Bick LJ in *SSHD v Ize-Iyamu* [2016] EWCA Civ 118, in particular at paragraph 6:

> "Section 2(1) of the Act defined those who had the right of abode. The section has since been amended, but for present purposes it is sufficient to note that as originally enacted such persons included (i) citizens of the United Kingdom and Colonies who had acquired that citizenship by birth in the United Kingdom or any of the Islands, (ii) citizens of the United Kingdom and Colonies born to a parent who had that citizenship at the time of the birth and had himself acquired it by birth in the United Kingdom or any of the Islands and (iii) citizens of the United Kingdom and Colonies born to a parent who had that citizenship at the time of the birth and had himself been born to a parent who 'so had it'."

He added (at paragraph 17)

> "In order for the respondent to have acquired the right of abode under that section, therefore, it would be necessary for his mother [in that case] at the date of his birth to have acquired the status of a citizen of the United Kingdom and Colonies *in the*

> *United Kingdom* by birth, adoption, naturalisation or registration …" [emphasis in the original]
>
> Although Moore-Bick LJ's analysis was strictly obiter, it carried great weight (paragraphs 23 to 26).

(4) That construction was also supported by the decision of the Divisional Court in *R v Immigration Appeal Tribunal, ex parte De Sousa* [1977] Imm.A.R. 6 which, if the claimant was correct, would have been wrongly decided.

(5) The claimant's suggested interpretation conflicted with the clear and unambiguous purpose of Parliament in enacting section 2(1) of the 1971 Act deduced from reading the Act as a whole (paragraphs 29 to 30).

10. In attractively presented submissions to this Court on behalf of the appellant, Mr Zane Malik KC argued that the deputy judge's interpretation was wrong, for several reasons. First, he submitted that, on a straightforward linguistic interpretation, the words "in the United Kingdom" in s.2(1)(b)(i) qualified only "registration" and not "birth, adoption, naturalisation". The Administrative Court's construction was inconsistent with the natural and ordinary meaning of the words used. The absence of an Oxford comma after "naturalisation" was irrelevant. If Parliament had intended to stipulate a condition that the parent should have acquired citizenship "in the United Kingdom" by birth, adoption or naturalisation, it would have said so. In that case, one would have expected the words "in the United Kingdom" to appear immediately after the phrase "that citizenship". Reading the words "in the United Kingdom" as qualifying all four options amounts to re-writing the legislation. In his judgment, the deputy judge had acknowledged that reading the words "in the United Kingdom" into the subsection after the word "birth", as Moore-Bick LJ had done in *Ize-Iyamu,* involved a re-writing of the statute, adding: "It is not what the Act actually says. But in my judgment it is what the Act means." Mr Malik submitted that this went beyond interpretation and strayed into impermissible judicial legislation.

11. Secondly, Mr Malik submitted that the appellant's proposed construction was not only consistent with the plain language of the statute but also with its context and legislative history. The phrase "citizenship by his birth" in s.2(1)(b)(i) of the 1971 Act ought to be given the same meaning as "citizenship by birth" in s.4 of the 1948 Act. A person who met the condition in s.4 of the 1948 Act also met the condition in s.2(1)(b)(i) of the 1971 Act. S. 4 of the 1948 Act conferred "citizenship by birth" to "every person born within the United Kingdom and Colonies", and section 12(1) of the 1948 Act extended it to those British subjects who were born prior to the commencement date. There was no reason in principle to read "citizenship by his birth" in s.2(1)(b)(i) of the 1971 Act in a different manner.

12. Mr Malik also pointed out that citizenship by registration had been confined by s.6 of the 1948 Act to citizens of certain countries, principally the Dominions (Canada, Australia, New Zealand, South Africa and Newfoundland) and the wives of citizens of the United Kingdom and Colonies. He contended that such persons would not necessarily have a close connection with the United Kingdom so that it was understandable why Parliament aimed to exclude such individuals from having the right of abode unless they were registered "in the United Kingdom". In contrast, a person who had obtained citizenship by birth had a close connection by virtue of their birth.

Under further provisions of the 1948 Act, a person seeking naturalisation was required to demonstrate an intention to reside in the United Kingdom or colonies. In those circumstances, it was understandable why Parliament chose not to impose any additional qualification for those who obtained citizenship by birth or naturalisation to have the right to abode in the United Kingdom.

13. Thirdly, Mr Malik submitted that the purpose of the 1971 Act - to impose restrictions on the number of those British subjects who could enter and remain in this country as of right – would not be frustrated by his proposed interpretation because (1) citizenship by descent could descend only by one generation in any event and (2) apart from Penang and Malacca, residents of all other former colonies ceased to be citizens of the United Kingdom and Colonies upon independence. He submitted that the appellant's proposed construction is consistent with the fact that a unique arrangement was made in relation to Penang and Malacca in the light of their special status and representations made by their residents during the negotiations leading to the independence.

14. In *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343, Lord Hodge summarised the modern approach to statutory interpretation in these terms:

> "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

15. The particular context of s.2(1) of the 1971 Act was the clear purpose of the legislation to limit the right of abode to those persons with a close connection with this country. In that context, I agree with the deputy judge that the language of s.2(1)(b)(i) points clearly towards the qualifying words "in the United Kingdom or in any of the Islands" being intended to apply to all four of the options – birth, adoption, naturalisation or registration. The deputy judge suggested that any residual doubt could have been avoided had s.2(1)(b)(i) been drafted in the following terms:

> "had acquired that citizenship in the United Kingdom or in any of the Islands by his birth, adoption, naturalisation or (except as mentioned below) registration."

But it might be suggested that in that formulation the words "in the United Kingdom or in any of the Islands" qualify "citizenship" rather than "birth, adoption, naturalisation or (except as mentioned below) registration". It would, of course, have been open to the Parliamentary draftsman to have inserted the words "in the United Kingdom or in any of the Islands" after each of the four options ("birth in the United Kingdom or in any of the Islands", "adoption in the United Kingdom or any of the Islands" etc). But that would be an example of "immense prolixity in drafting" which is to be discouraged for the reasons identified by Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at paragraph 8.

16. As the deputy judge observed, the fact that a statutory provision could have been more clearly expressed does not show that it bears the opposite of its natural meaning, and the natural meaning of the subsection as drafted is that the qualifying words apply to all four options. But the more I have looked at this provision, the more confident I have become not only that the deputy judge's interpretation is correct but also that the way the statute is drafted is the best way in which the statutory intention could have been drafted without resorting to "immense prolixity". If it were necessary to seek support for this interpretation from within the subsection, one might cite absence of a comma after "naturalisation". Furthermore, the word "his" in s.2(1)(b)(i) (and earlier in s.2(1)(a)) clearly qualifies all four options – birth, adoption, naturalisation and registration – even though it only appears before the word "birth". Similarly, in my view, the words "in the United Kingdom or in any of the Islands" clearly qualify all four options even though they only appear after the word "registration".

17. Further support is provided by s.2(3)(b) which provides that, for the purposes of s.2(1), "references to birth in the United Kingdom" and "references to birth in any of the Islands" include "birth on a ship or aircraft registered in the United Kingdom, or on an unregistered ship or aircraft of the Government of the United Kingdom". The only point at which the phrase "birth in the United Kingdom or any of the Islands" is used in s.2(1) is in subsection (d). But s.2(3) is not confined to s.2(1)(d). It extends to the whole of s.2(1). Thus the fact that s.2(3)(b) refers to "references" (plural) is confirmation that the references to "birth" in s.2(1)(a) and s.2(1)(b)(i) mean "birth in the United Kingdom or any of the Islands".

18. This issue has not previously arisen for determination but there is strongly persuasive support from the obiter observations of Moore-Bick LH in *Ize-Iyamu*. I do not read those observations as amounting to a re-writing of the statute or to judicial legislation. They are merely an expression of his interpretation of the section. Some further support is derived from the Divisional Court's decision in *ex parte De Sousa* (supra). That case concerned s.2(1)(a), which is couched in the same terms and must therefore be interpreted in the same way. Mr Malik is correct in saying that in that case the point was conceded and never argued. Nevertheless, it is of some significance, in my view, that the parties and the Court all proceeded on the basis that the words "in the United Kingdom or in any of the Islands" qualified "naturalisation".

19. The interpretation favoured by the deputy judge is manifestly consistent with the clear intention of the statute to restrict the right of abode in the United Kingdom. As Moore-Bick LJ said in *Ize-Iyamu* (at paragraph 18),

> "The whole thrust of section 2 as originally enacted was to limit the right of abode to those who had a direct or indirect link to this country through the acquisition here of the status of a citizen of the United Kingdom and Colonies."

The right of abode was restricted to those with a close connection to this country. I do not accept Mr Malik's argument that those persons who acquired citizenship of the United Kingdom and Colonies by birth necessarily had a sufficiently close connection. To confine the qualifying words "in the United Kingdom or any of the Islands" in s.2(1)(b)(i) (and s.2(1)(a)) to registration would significantly limit the ambit of the provision and thus be plainly contrary to the intention of the legislation. And as the purpose of the 1971 Act (the restriction of rights of abode) was very different from the purpose of the 1948 Act (the conferring of citizenship), there is no merit in attempting to construe the meaning of s.2(1) of the 1971 Act by reference to the earlier provision.

20. In the circumstances, I do not consider it necessary to take up the suggestion by Mr William Hansen on behalf of the Secretary of State that, if this Court found the legislation to be ambiguous or obscure, we should refer to ministerial statements in Hansard. In *R (O) v SSHD*, supra, at paragraph 32, Lord Hodge reminded us that

> "Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering."

In this case, s.2(1) is neither ambiguous nor obscure, nor does its conventional interpretation lead to absurdity. Accordingly, it would be contrary to principle to refer to the statements cited by Mr Hansen.

21. For those reasons, I conclude that the decision of the Administrative Court was correct. I would dismiss the appeal.

LORD JUSTICE LEWIS

22. I agree.

LADY JUSTICE ELISABETH LAING

23. I also agree.