Neutral Citation Number: [2022] EWHC 2942 (Admin)

Case No: CO/1934/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2022

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

- -

Between:

Gloria Noren

Claimant

- and -

The Secretary of State for the Home Department

Defendant

- -

Jonathan Martin (instructed by **Juris Matrix Solicitors Limited**) for the **Claimant**
William Hansen (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 22 September 2022

- -

APPROVED JUDGMENT

This judgment will be handed down by the Judge 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 10.00 AM on Monday 21 November 2022.

Margaret Obi:

Introduction

1. This is an application for judicial review. Permission to seek judicial review was granted on 29 June 2022 by HHJ Auerbach (sitting as a Judge of the High Court).

2. Ms Noren ('the Claimant') challenges the Secretary of State for the Home Department's ('the Defendant's') decision:

   i. to refuse her application which sought recognition as a British citizen or the grant of Indefinite Leave to Remain (ILR); and

   ii. to determine that she was ineligible for all products under the Windrush Scheme.

3. The 'Windrush generation' is a term used to refer to those who, from the late 1940s to the early 1970s, came from various Commonwealth countries to make their lives in Britain and to help rebuild it after the war. The Windrush generation who were settled in the UK on 1 January 1973, were granted ILR by virtue of the Immigration Act 1971 ('the 1971 Act'). Although this meant that they were lawfully entitled to live in the UK they were not provided with documentation confirming their right to enter or remain.

4. On 23 April 2018, the then Secretary of State for the Home Department declared in a ministerial statement that:

   "*…steps intended to combat illegal migration have had an unintended, and sometimes devastating, impact on people from the Windrush generation, who are here legally, but have struggled to get the documentation to prove their status*."

   The Windrush Scheme, which was launched on 30 May 2018, was intended to put right these wrongs.

5. The relevant version of the Windrush Scheme, dated 24 January 2022, sets out four categories of person who qualify for settlement or leave to remain in the UK, or to have either status recognised. The four categories are as follows:

   i. Commonwealth citizens who were either settled in the UK before 1 January 1973 or who have the right of abode;

   ii. A Commonwealth citizen who was settled in the UK before 1 January 1973, whose settled status lapsed because they left the UK for a period of more than 2 years, and who is now lawfully in the UK and who has strong ties to the UK;

   iii. A child of a Commonwealth citizen parent, where the child was born in the UK or arrived in the UK before the age of 18, and has been continuously

resident in the UK since their birth or arrival, and the parent was settled before 1 January 1973 or has the Right of Abode;

iv. A person of any nationality, who arrived in the UK before 31 December 1988 and is settled in the UK.

The Claim

6. The Claimant asserts in the Statement of Grounds that the Defendant:

   i. acted unfairly by failing to properly consider her application on the basis on which it was submitted (Ground 1); and/or

   ii. acted irrationally by failing to grant the application (Ground 2).

7. The Claimant invites the Court to quash the decision made on 25 February 2022 ('the Decision letter'), grant a mandatory order requiring the Defendant to make a lawful decision, make any other order the Court sees fit and grant a costs order in the Claimant's favour.

8. The application for judicial review fails on both grounds. This judgment explains why.

Background

9. The background to this claim including the immigration and procedural history is not materially in dispute and can be summarised as follows.

10. The Claimant's father was born in Nigeria on 8 November 1941 and first entered the UK on 10 December 1964. Her mother was born in Nigeria on 22 December 1943 and first entered the UK in December 1960. The Claimant's parents were married in the UK in 1967. The Claimant was born in Nigeria on 16 April 1973. She is a Nigerian national.

A Brief History of British and Nigerian Nationality

11. Prior to the commencement of the British Nationality Act 1948 (BNA 1948), the principal form of nationality was British subject status, which was obtained by virtue of a connection with a place within the Crown's dominions. The BNA 1948 came into effect on 1 January 1949. For the first time it established the status of Citizen of UK and Colonies (CUKC). The Nigeria Colony came within the UK and Colonies for the purposes of the BNA 1948. In accordance with section 4, a person born within the UK and Colonies on or *after* 1 January 1949, became a CUKC. By virtue of section 12, a person who was a British subject immediately *before* the date of commencement of

the BNA 1948 became a CUKC if he had been born within the territories of the UK and Colonies and would have been a CUKC if section 4 had been in force at the time of his birth.

12. Section 5 of the BNA 1948 provided that:

> "(*1) Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by* ***descent*** *if his* ***father*** *[emphasis added] is a citizen of the United Kingdom and Colonies at the time of the birth…"*

The discriminatory effect of being able to acquire CUKC status by descent from a father, but not a mother has been removed subject to certain conditions (see - section 4C of the BNA 1981 as introduced by section 45 of the Borders, Citizenship and Immigration Act 2009). However, these provisions are not relevant to this case.

13. On 1 October 1960, Nigeria became an independent Commonwealth state and ceased to be part of the UK and Colonies. Section 2(2) of the Nigeria Independence Act 1960 (NIA) provided that, as a general rule, any person who immediately prior to 1 October 1960 was a CUKC, would on that day cease to be a CUKC, if he became a citizen of Nigeria *and,* if he, his father or paternal grandfather was born in the Colony or Protectorate (the territories of modern Nigeria comprise the former Nigeria Colony, Nigeria Protectorate and the northern part of what used to be the British Cameroons). CHAPTER II of Nigeria's federal independence constitution, which was contained in Schedule 2 to the Nigeria (Constitution) Order in Council 1960/1652, set out the Nigerian citizenship provisions. Section 7(1) of the constitution provided that any person who immediately prior to 1 October 1960 was a CUKC by birth in the Colony or Protectorate, became a citizen of Nigeria on that day, unless neither of his parents and none of his grandparents was born in the Colony or Protectorate (see extracts from Fransman's British Nationality Law, B.154).

14. As stated above, the Windrush generation who were settled in the UK on 1 January 1973, were granted ILR by virtue of the 1971 Act. Further changes to the right of abode and British nationality were made with effect from 1 January 1983 by the British Nationality Act 1981 ('BNA 1981'). The key provisions under the BNA 1981 for present purposes are sections 2 and 11:

Section 2 states that:

> *"A person born outside the United Kingdom … after commencement shall be a British citizen if at the time of the birth his father or mother—*
>
> *(a) is a British citizen otherwise than by descent; …"*

Section 11 provides as follows:

> *"**Citizens of U.K. and Colonies who are to become British citizens at commencement**.*

(1) Subject to subsection (2), 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 as then in force,

shall at commencement become a British citizen."

Nationality and Immigration History of the Claimant's Parents

15. The Claimant's father became a CUKC when the BNA 1948 came into force on 1 January 1949. Both of his parents were born in Nigeria. Therefore, the Claimant's father was not a British citizen by descent. He became a Nigerian citizen on 1 January 1960 and lost his CUKC status in accordance with s.2(2) NIA.

16. The Claimant's parents were settled in the UK prior to 1 January 1973. According to the Case Information Database (CID) notes this was evidenced by educational records, college certificates, marriage and birth certificates (at least two of their children were born in the UK) and employment contracts. However, the Claimant's parents left the UK prior to her birth on 16 April 1973. Had the Claimant's father been recognised as a British citizen at the time of her birth she would have been a British citizen at birth. Both parents visited the UK on numerous occasions and claimed that they had never spent more than 2 years at any one time outside the UK. However, the Defendant was only able to confirm returns to the UK from 1998 onwards and therefore concluded that both parents had, on occasion, been absent for more than 2 years.

17. The Claimant's father obtained Leave to Remain as a Tier 1 (Entrepreneur) with his wife as his dependant partner in 2016 and subsequently made applications under the Windrush Scheme in 2018. The Claimant's parents' Windrush Scheme applications were considered at the same time. Both parents were granted ILR on 24 June 2019, pending consideration of their requests for British citizenship. The Claimant's parents were both granted British citizenship on 9 January 2020.

Immigration History of the Claimant

18. The Claimant first entered the UK as an adult on a visitor's visa in 2004. Thereafter, her immigration history is not relevant to this claim, until 30 April 2021, when she applied for '*confirmation of her nationality status*'. The Claimant's application was refused on 6 June 2021, on the basis that she had been born abroad prior to 1 January 1983, at a time when her father was not a British citizen. The decision-maker also considered eligibility under the Windrush Scheme. It was concluded that the Claimant was not eligible for any Windrush product because she had first entered the UK as an adult after 31 December 1988.

19. The present claim relates to a further application which the Claimant made on 27 January 2022. The application letter, sent on the Claimant's behalf by her legal representative, requests either recognition as a British Citizen or the grant of ILR. The application was advanced on the following basis:

> "*...Ms Noren's case is that her parents have been recognised as British citizens under the Windrush Scheme. They should have had that status at the time of her birth. If they had [the Claimant] would be British by descent. The only way the historic wrong can be righted is if all of the family's rights are recognised.*
>
> *In the alternative as her parents are now British and have shown their strong connections here established over 50 years they have always brought their daughter up in a British way and she has been established here over the last 20 years. Her parents are old and rely on her and they share a strong family life together. ...We submit that there is a strong family life here and real and effective and committed support exists.*
>
> ...
>
> *In the circumstances we ask that you grant the application as requested and right this historic wrong. To only grant her parents' status satisfies on1y half of the problem. To fully answer the case the whole family need to be granted permission to be here. Accordingly this application should be granted."*

The Decision Letter and Other Correspondence

20. The Decision letter reads as follows:

> *"A person's nationality status is a legal matter which only the courts can determine conclusively. However, based on evidence seen, the Secretary of State is of the opinion that [Ms Noren] is not a British Citizen under the British Nationality Act 1981.*
>
> *You were born abroad before 01 January 1983. At the time of your birth your father did not hold British Nationality. I have noted the references to the Windrush scheme in your letter. You appear to have first entered the UK as an adult in 2004 on a visit visa. As you have provided no further evidence and no other entry date it would appear you first entered the UK on this visit visa valid between 02/08/2004 and 02/02/2005 making you 31 on first entry to the UK.*
>
> *As a result you do not meet the requirement for Windrush as you appear to have first entered the UK when you were over the age of 18 and after 31/12/1988; as [a] result you are ineligible for all products under the Windrush scheme"*.

21. On 18 May 2022, the Claimant's solicitors sent a pre-action protocol (PAP) letter, in which it was alleged that her parents were recognised as British citizens "*on the basis of rights they had acquired prior to [her] birth*". The letter stated that the decision-

maker, by referring to the Windrush Scheme products, had misunderstood the basis upon which the application had been made. It was submitted that the Claimant had asked "*that discretion be exercised in her favour owing to the historic injustice*" and on that basis she should either be granted British citizenship or ILR.

22. The Defendant responded by letter dated 1 June 2022. The Claimant was referred to the nationality status guidance - *Guide NS, Confirmation of British nationality status* (March 2019) which states at pages 5 and 9 that:

> "*British nationality is defined in law. Whether a person has a claim to British nationality can be determined by applying the definitions and requirements of the British Nationality Act 1981 and related legislation, to the facts of their date and place of birth and descent.* [page 5]
>
> …
>
> *Citizenship may only be claimed through a qualifying connection with the UK, which is recognised as such by relevant legislation.*
>
> *You must ensure that you have a clear idea of why, as a matter of law, you believe that you are a British citizen, and provide sufficient evidence in support of your claim.* [page 9]"

The Defendant went on to state that it is not possible to apply discretion when considering whether someone is a British citizen. The Claimant's attention was drawn to the reply that had been provided in response to her MP's query. The response to the MP, dated 31 October 2021, states that the Claimant is not eligible under the BNA 1981. Although her parents entered the UK before 1 January 1973, and the Defendant considers them to have held ILR since that date, they did not hold British citizenship until 9 January 2020. The response to the MP also states that the Claimant is not eligible under the Windrush Scheme as she first entered the UK on a visitor visa in 2004, when she was over the age of 18 years old. However, it is explained that she can apply for leave to remain under any of the other immigration and nationality routes.

Other Relevant Provisions

<u>*The Windrush Scheme Guidance*</u>

23. The Windrush Scheme Guidance (version 5.0) ('the Guidance'), published for Home Office staff on 24 January 2022, states under the heading '*Intention*' that:

> *"The Windrush Scheme has been introduced to enable people who originally came to and settled in the UK prior to 1 January 1973 from Commonwealth countries as part of the 'Windrush generation' and their children, to obtain evidence of their immigration or settled status, or apply for British citizenship free of charge. These are people who are, or have in the past been, continuously*

resident in the UK, but because of the law applying at the time of their arrival, did not need a formal grant of leave and may not have, since then, obtained evidence of their status.

The Windrush Scheme also allows for certain people who are nationals of countries other than the Commonwealth, who arrived in the UK before 31 December 1988, who are not British citizens and are settled but no longer hold documentary evidence of their lawful status, to make an application free of charge for a document that confirms it.

The Scheme will allow Commonwealth citizens, settled in the UK prior to 1 January 1973, but who have subsequently moved overseas, to apply for the necessary document, free of charge, which will enable them to return to the UK either permanently, or to visit."

24. The Guidance explains at page 25 of 54 that:

"Children in the UK whose parent is confirmed as being part of group 1, will have their status considered in their own right, taking account of their parent's status, their date of arrival or birth in the UK, and relevant Nationality law. The parent's status may need to be resolved first under the Windrush Scheme, before the child's case can be concluded. To qualify under the scheme, the parent must be within group 1 and the child must have been continuously resident in the UK since birth or their arrival in the UK. For those not born in the UK, they must have arrived in the UK before they were 18."

Section 31 of the Senior Courts Act 1981

25. Section 31 of the Senior Courts Act 1981 states:

"(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

26. The proper approach to this test has been considered in a number of authorities (see for example: _Cava Bien Ltd v Milton Keynes Council_ [2021] EWHC 3003 Admin where Kate Grange QC (as she then was) sitting as a Deputy High Court Judge summarised the principles).

Grounds and Submissions

27. I turn to the Claimant's case. As stated above, the Claimant challenges the Defendant's Decision letter on two grounds. To a significant extent these grounds overlap.

Ground 1 – Unfairness

Claimant's submissions

28. Mr Martin, on behalf of the Claimant, submits that it is clear from the CID notes that the Claimant's parents were recognised as British citizens on account of their status pre-1973. He further submits that as the grant of ILR on 24 June 2019 was less than 6 months before their British citizenship was confirmed, it is obvious that the naturalisation of the Claimant's parents did not relate to that grant of ILR, because an applicant can only naturalise as a British citizen once they have been settled in the UK for at least 12 months.

29. Mr Martin invites the Court to conclude that the Defendant failed to properly consider the Claimant's application. He asserts that the Claimant was *not* claiming that she met the requirements of the Windrush Scheme. However, as it had been accepted that her parents were entitled to recognition as British citizens, on the basis that they had settled in the UK prior to 1 January 1973, "*then it followed that she was entitled to status as their daughter*". He further submits that where those affected by the '*historic wrongs*' (such as the Claimant's parents), had children outside the UK after establishing ties to the UK, it is appropriate for the Defendant to consider whether those children should be granted status as a result.

30. During his oral submissions, Mr Martin developed his argument further. He asserts that the Claimant's parents did not understand their rights or have any documents confirming the rights that they possessed. He submits that they fell into the category of those that were not provided with sufficient support, as to what steps they needed to take, for themselves and their family. Had the Claimant's parents known what their position was they would have taken appropriate steps, and the Claimant would have been a British Citizen by birth.

Defendant's Submissions

31. The submissions made by Mr Hansen, on behalf of the Defendant, can be summarised as follows.

32. First, the claim appears to be based on a fundamental misunderstanding. The Defendant did not recognise that the Claimant's parents held British nationality or were entitled to recognition of this status, prior to their naturalisation in January 2020. The basis of the decision-making in relation to the Claimant's parents, is entirely clear from the CID notes, and undermines the premise of the claim.

33. Secondly, there is no merit in the contention that the Defendant failed to consider the application on the basis that it was made and is entitled to a fully reasoned decision. The Defendant considered the Claimant's eligibility for confirmation of British nationality status, and concluded she was not eligible. The Defendant then considered whether the Claimant might benefit from the Windrush Scheme, even though she had not applied under that scheme. The conclusion was that she was not eligible.

34. Thirdly, the claim totally disregards the statutory requirements now contained in the BNA 1981. In considering the Claimant's application, the Defendant had to apply the relevant provisions of the BNA 1981. There is no flexibility to ignore the normal statutory requirements and there is no discretion to make grants to people who do not fall within the Windrush Scheme.

35. Fourthly, there is no historic injustice to remedy within the proper meaning of that term. The Claimant is not within the class of persons who have been classed as having suffered an injustice. No useful purpose would be served by re-making the decision. Furthermore, it is not only highly likely, but inevitable, that the outcome for the Claimant would not have been substantially different, if the conduct complained of, had not occurred.

Ground 2 – Irrationality

Claimant's Submissions

36. Mr Martin submits that the Claimant's case has "*obvious merits*." Although the Claimant does not come within the stated terms of the Windrush Scheme its very existence demonstrates that the Defendant has the discretion to grant status to right historic wrongs. He further submits that such schemes will rarely, if ever, address the circumstances of all those affected. However, unlike the powers under the Immigration Rules, the Defendant's discretion "*does not have bright lines which restrict access but rather is flexible to assist all of those who merit it*".

37. It is Mr Martin's contention, that the Defendant had already accepted that the Claimant's parents had been sufficiently settled in the UK prior to 1 January 1973 to merit being recognised as British citizens, and to refuse the Claimant any status in light of that fact, is irrational.

Defendant's Submissions

38. Mr Hansen submits that any entitlement on the part of the Claimant to British citizenship, depends on the proper application of British nationality law, and the Windrush Scheme. The decision-maker considered both and reached the right conclusion. Furthermore, the Windrush Scheme deliberately excludes children of pre-1973 settlers who came to the UK as adults, and even for the cohorts who are eligible for ILR, the Windrush Scheme only provides for ILR grants to people who are already in the UK lawfully. This does not apply to the Claimant as she has overstayed her leave.

39. Mr Hansen submits that the Claimant's application is devoid of merit and was rationally refused for unimpeachable reasons. In any event, it is not only highly likely, but inevitable, that the outcome for the Claimant would not have been substantially different, if the conduct complained of, had not occurred.

Decision

Ground 1 – Unfairness

40. The core issues to be determined in respect of Ground 1, can be addressed by answering the following questions:

    i. On what basis were the Claimant's parents granted British citizenship?

    ii. How did the Defendant approach the Claimant's application?

    iii. Did the Defendant fail to exercise a discretion?

    iv. If so, would reconsideration make any difference?

On what basis were the Claimant's parents granted British citizenship?

41. The premise of the Claimant's challenge is the grant of British citizenship to her parents. She submits that the CID notes make it clear, that her parents were "*recognised*" as British citizens, based on their settled status prior to 1973. In support of this submission, reliance is placed on the grant of citizenship to her parents within a year of the grant of ILR, the normal requirement being that a person is required to have ILR for 12 months before they can obtain citizenship. Reliance is also placed on an entry in the CID notes, dated 3 January 2020, in which it was stated that her parents had displayed ties to the UK and had a regular home here. This analysis was undertaken after ILR was granted as an earlier entry, dated 11 June 2019, states: "*The case type has therefore been changed to ILR LOTR [Leave outside the Immigration Rules] instead of NTL (No Time Limit) and can now be granted. The grant letter will*

need to confirm that Citizenship is still under consideration." It is also submitted, that there is a clear link between the nationality decision and the pre-1973 status of the Claimant's parents, as below "07-Jun-2019", the following words appear:

> "*Windrush Case Application Pending Nationality*
> *Commonwealth citizens who were settled in the UK before 1 January 1973 or who have the Right of Abode*"

42. I do not accept the Claimant's submission. The Claimant's argument is based on a misinterpretation of the CID notes. A fair and proper reading of the CID notes makes it clear that the Defendant initially considered whether the Claimant's parents already held ILR. The reference to "*Commonwealth citizens who were settled in the UK before 1 January 1973 or who have the Right of Abode*", is simply a heading which reflects the caseworker's acknowledgement that the applicants appeared to fall within the first of the four cohorts. The Claimant's parents were Commonwealth citizens who were settled in the UK pre-1973, and therefore eligible to make their applications under the Windrush Scheme (with the benefits this confers, e.g. no fees) rather than through the standard procedure. I am satisfied that a reasonable inference to draw from this entry, and the CID notes as a whole, is that at this stage the caseworker had not yet completed an assessment of the claim. This is consistent with the Guidance which requires caseworkers to consider all the *potential* Windrush categories that could be relevant to an individual's circumstances. It was not until the claim had been properly assessed, that it was determined that the Claimant's parents had lost their ILR status due to their absences from the UK, and therefore fell into the second cohort (A Commonwealth citizen who was settled in the UK before 1 January 1973, whose settled status lapsed because they left the UK for a period of more than 2 years, and who is now lawfully in the UK and who has strong ties to the UK). It was subsequently determined that the Claimant's parents were eligible for a new grant of ILR LOTR, and this was made on the basis that, despite their absences from the UK, "*their ties are continuous and strong enough to justify a grant of ILR LOTR under the Windrush Scheme*."

43. The application for British citizenship was then considered by reference to section 6 of the BNA 1981. By virtue of section 6(1) the Home Secretary may grant an application for naturalisation as a British citizen if the applicant meets the requirements in Schedule 1 to the BNA 1981. The applicant must: (a) meet a requirement of residence in the UK or service in the Crown service outside the UK; (b) be "of *good character*"; (c) have "*sufficient knowledge of English, Welsh or Scottish Gaelic Language*"; (d) have "*sufficient knowledge of life*" in the UK; and (e) intend if the application succeeds to make the UK his home or principal home or continue in Crown service (See paragraphs 1 and 2 of Schedule 1 of the BNA 1981). As future intentions are relevant to any application for naturalisation, it is unsurprising that the decision-maker recognised that the claimant's parents displayed ties to the UK and had a regular home here. The initial caseworker recommendation was that the Claimant's parents did not meet the requirements of paragraph 1(2)(a) of Schedule 1, BNA 1981 (i.e. were in the UK at the beginning of the period of five years ending with the date of the application, and no absences from the UK exceeding

450 days during the qualifying period). All other requirements of section 6 of the BNA 1981 for the parents to naturalise were deemed to be fulfilled. However, certificates of naturalisation were subsequently granted to both parents on the basis that the requirements of section 1(2)(a) could be treated as fulfilled and/or any difficulties waived. The fact that the Claimant's parents were settled pre-1973 would have had no bearing on the outcome of their naturalisation application and there is no evidence that it did.

44. There is a discretion, to waive the requirement to have ILR for 12 months before citizenship can be obtained, where there has been a 15 month or greater delay in considering an applicant's case. The Claimant's parents submitted their application under the Windrush Scheme in 2018. By the time the application for citizenship was determined more than 15 months had passed since the Claimant's parents first sought to obtain ILR, and therefore the 12-month requirement was eligible for waiver in line with the guidance: (see Nationality policy: Naturalisation as a British citizen by discretion, Version 4.0 (pages 24- 5 of 43). However, their eligibility for citizenship was still based on being granted ILR in 2019.

45. For these reasons, I am satisfied that the Claimant's parents were not granted British citizenship on the basis of rights they had acquired prior to the Claimant's birth. The premise of the consideration given to the parents' citizenship applications was that they were not already British citizens and had no automatic entitlement to British citizenship, whether pursuant to the BNA 1948, the Immigration Act 1971 and/or the BNA 1981. However, they were naturalised as British citizens and acquired this status on 9 January 2020.

How did the Defendant approach the Claimant's application?

46. The Claimant's online application form stated that the application was for '*confirmation of British nationality status.'* However, the enclosed letter stated that the application was either for recognition as a British citizen, or the grant of ILR, on account of her parents being recognised as British citizens under the Windrush Scheme. The application was based on the assertion that her parents' pre-1973 leave to remain was "*explicitly reinstated through the letter dated 13 June 2019*", and as this was less than a year after the ILR letter, this was "*clearly an acceptance*" that they were already eligible for citizenship on account of their earlier leave, which was active at the time of the Claimant's birth. In other words, the same argument that has been advanced during these proceedings and rejected for the reasons stated above. Although there are several references to how the Claimant and her parents "*should have*" or "*should be*" treated, the application does not expressly state that the Defendant is being invited to exercise a discretion in the Claimant's favour. It is the PAP letter which states in clear terms that the Claimant "*had asked that discretion be exercised in her favour...*"

47. However, there is no attempt within the Decision letter to engage with the suggested basis upon which the Claimant's parents were granted citizenship. As a consequence,

there is no indication that the Defendant acknowledged the link between their status and the request that was being made. The Decision letter reads as if the Claimant had simply asked the Defendant to confirm her nationality status. That said, any entitlement on the part of the Claimant to citizenship, *depends* on the proper application of British nationality law and the Windrush Scheme. I accept that it is conventional for the Defendant to express an opinion based on nationality law, in response to an application for '*confirmation of British nationality status*', and for the Courts to permit judicial review of that 'decision.' In considering such an application, the Defendant is required to apply the relevant provisions of the BNA 1981.

48. Therefore, although the Decision letter is not tailored to the Claimant's request, I accept the Defendant's submission that it sufficiently engages with the application, particularly when read in conjunction with the PAP response. The Decision and the PAP response when read as a whole and in context provides a complete response to the Claimant's application. In essence, she was informed that there is no flexibility to ignore the normal statutory requirements set out by the BNA 1981.

Did the Defendant fail to exercise a discretion?

49. The Windrush Scheme has not re-written British nationality law. The Windrush Scheme itself is clear; every application must be considered under existing law and policy. When deciding the Claimant's application, the Defendant had no option but to make the decision by applying the statutory requirements in the BNA 1981. The Claimant seeks to escape this conclusion by contending that there is an inherent discretion to do justice to the case by describing the Windrush Scheme as "*flexible to assist all of those who merit it.*" I do not accept this submission. The Windrush Scheme has been very deliberately drawn to confer benefits on a specific cohort of people. There is no discretion to expand the cohort to achieve a particular outcome for individuals who do not fall within the scheme.

50. There is also no principled basis for ILR outside of the immigration rules. Such leave is reserved for compelling and/or compassionate grounds that are not related to family and private life, medical or protection matters (see Leave outside the Immigration Rules guidance, Version 1.0, dated 27 February 2018). There are no such grounds in this case.

51. Furthermore, the Claimant has not been subjected to a "*historic injustice*" within the proper meaning of that term. In *Patel* (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC) the headnote states:

> "*For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now.*"

The Claimant does not fall within the class of persons who have been recognised as having suffered an injustice in this context. Being the descendant of a person who is eligible for a Windrush product does not suffice. The Claimant entered the UK as an adult. Descendants who arrived in the UK aged 18 or above are not in a position analogous with those who arrived as minors who were reliant upon the decisions of their parents. I accept the submission made by the Defendant that the Claimant is in no relevantly different position from any other applicant seeking to enter the UK, or naturalise as a British citizen, to whom the ordinary immigration and other rules apply. The Claimant's family connections and ties to the UK will be considered, insofar as they are relevant, as part of any application for leave to remain or naturalisation, which she chooses to make.

52. For completeness, I also do not accept the submission that had the Claimant's parents known what steps they needed to take to acquire citizenship, they would have taken those steps, and the Claimant would have been a British citizen by birth. This is pure speculation. Under the 1971 Act, on leaving the UK, the Claimant's parents' leave lapsed under section 3(4). However, provided they applied for leave to enter for the purposes of settlement within two years of leaving, the relevant immigration rules created an expectation that leave to re-enter would be granted. An immigration officer could refuse leave to enter at the port on conducive grounds or by reason of a change in circumstances (see *Regina (C1) v Secretary of State for the Home Department* [2022] EWCA Civ 30 at para. 93(ii)). Inevitably, there are circumstances in which the Claimant's parents might have applied for citizenship pre-1973 and circumstances where they might not. There are also circumstances where, having left the UK in 1973, they might have returned to the UK sooner than they did, and circumstances where they might not. I accept the Defendant's submission there is no proper foundation, in the pleadings or in the evidence, for inviting the court to speculate about what might have happened in a wholly different set of circumstances.

Would reconsideration make any substantial difference to the outcome?

53. Even if I am wrong with regard to the merits of Ground 1, I am satisfied that section 31(2A) of the Senior Courts Act 1981 applies in this case and that the exception under subsection (2B) does not apply. In my judgment, for the reasons stated above, it is "*highly likely*" that providing a fuller response to the Claimant's request in the Decision letter would not have made any substantial difference to the outcome. In my view there is no element of speculation with regard to this, as the Decision letter and the PAP, when considered together, provide a complete answer to the Claimant's application, for the reasons that have already been stated.

54. Therefore, reconsideration of the Claimant's application would serve no useful purpose.

Ground 2 - Irrationality

55. The Claimant's application was not obviously meritorious. The Claimant's application for citizenship or ILR was dependent on the proper application of British nationality law and the Windrush Scheme. The Defendant considered the application and not only reached the conclusion she was entitled to reach but reached the right conclusion based on the relevant law and policy. The application was rationally refused for good reasons.

56. In any event, as stated above, it is "*highly likely*" that the outcome for the Claimant would not have been substantially different, if the conduct complained of, had not occurred.

Conclusion

57. The claim for judicial review fails in its entirety.

58. I am grateful to counsel and those instructing them for clear and focussed arguments, both in writing and at the hearing. The parties are invited to draw up an order which reflects my conclusions and agree the terms of any consequential matters including costs.