Neutral Citation Number: [2022] EWHC 3160 (Admin)

Case No: CO/16/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2022

Before :

PHILIP MOTT KC
Sitting as a Deputy High Court Judge

- -

Between :

INDRAN MURUGASON	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Zane Malik KC and Arif Rehman (instructed by **Lincolns Solicitors**) for the **Claimant**
William Hansen (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 14 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Philip Mott KC :

1. This judicial review raises a short but important question as to the proper interpretation of section 2(1) of the Immigration Act 1971, as originally enacted. For the Claimant, the significance is that it governs whether he has a right of abode in the UK.

2. The challenge is to a decision of the Secretary of State on 11 October 2021, maintaining her earlier decision that the Claimant has no right of abode in the United Kingdom. Permission was granted on the papers on 15 July 2022 by Richard Clayton KC, sitting as a Deputy High Court Judge.

3. I have been greatly assisted by concise and skilful submissions from Mr Zane Malik KC for the Claimant and from Mr William Hansen for the Defendant.

4. It is common ground that in a case such as this it is for this court to decide for itself whether a person has the status of a British citizen, which includes whether he has a right of abode (see *Harrison v Secretary of State for the Home Department* [2003] EWCA Civ 432, at paragraph [34]; and *Rasul v Secretary of State for the Home Department* [2017] EWHC 1306 (Admin) at paragraph [16]). In this case the relevant facts are not in dispute, so questions of burden and standard of proof do not arise.

5. The relevant agreed facts may be shortly summarised as follows:

   i) The Claimant's father was born on 31 December 1948 in Penang. At that date Penang was one of His Majesty's dominions, and the Claimant's father was therefore deemed to be a natural-born British subject by virtue of section 1 of the British Nationality and Status of Aliens Act 1914.

   ii) On 1 January 1949 the British Nationality Act 1948 came into force. It established for the first time the status of "citizen of the United Kingdom and Colonies" ['CUKC']. The provisions of section 12(1)(a) of the 1948 Act meant that the Claimant's father automatically became a CUKC within a day of his birth.

   iii) On 31 August 1957 Malaya and other territories became independent, forming the state of Malaysia. The Claimant's father, as a resident of Penang, was allowed to retain his status as a CUKC despite independence.

   iv) The Claimant was born on 13 October 1972 in Penang. By virtue of section 5(1) of the 1948 Act the Claimant became a CUKC by descent, as a result of his father's status as a CUKC at that time.

6. The Immigration Act 1971, which came into force on 1 January 1973, introduced the 'right of abode'. It divided British subjects into two groups, 'patrials' and others. Patrials enjoyed the 'right of abode', which allowed them "*to live in, and to come and go into and from, the United Kingdom without let or hindrance*". Others, even if CUKCs, did not have that right, and could only "*live, work and settle in the United Kingdom by permission*". This was a change in immigration status, not citizenship or nationality. Henceforth the two were separate.

7. Section 2(1) of the 1971 Act, as originally enacted, provided as follows:

> ***2 Statement of right of abode, and related amendments as to citizenship by registration***
>
> *(1) 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.*

8. The British Nationality Act 1981 made further changes with effect from 1 January 1983. By section 11 those who immediately before the commencement of the Act had been CUKCs and had the right of abode under the Immigration Act 1971 became British citizens. The 1981 Act amended section 2 of the Immigration Act 1971 so that the right of abode was only granted to British citizens (the alternative route for certain Commonwealth citizens is not relevant here).

9. Whether the Claimant became a British citizen depends on the correct interpretation of section 2(1) of the 1971 Act, and whether it gave him the right of abode.

10. The submissions on behalf of the Claimant have concentrated on section 2(1)(b)(i). It is argued that the Claimant has a right of abode because –

    i) he is a citizen of the United Kingdom and Colonies who was;

    ii) born to a parent who had that citizenship at the time of the birth; and

    iii) the parent had that citizenship by his birth.

11. There is no dispute that the Claimant fulfils each of these requirements. The dispute is simply whether the third requirement is accurately expressed above. Specifically, the issue is whether the qualifying words "*in the United Kingdom or in any of the Islands*" in section 2(1)(b)(i) apply only to '*registration'* [as the Claimant submits] or qualify all the options '*birth, adoption, naturalisation or ... registration*' [as the Defendant submits]. If the Defendant is right, the Claimant does not have a right of abode, as his father was not born in the UK (there are other ways in which a person may acquire a right of abode, but none are relied upon in this case).

Statutory interpretation

12. I have been referred to the recent decision of the Supreme Court in *Project for the Registration of Children as British Subjects & O v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343. The modern approach to statutory interpretation is set out in the judgment of Lord Hodge DPSC at paragraphs [29] and [30]:

> "29 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. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."
>
> 30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to

> assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and A Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.

13. I also note the observations of Lady Arden in her additional judgment in that case.

14. Having read and heard submissions from both sides I have concluded that the Defendant's submission is correct for a number of reasons.

The language of the subsection

15. First, a purely linguistic analysis of section 2(1)(b)(i) taken by itself suggests that, if Parliament had intended the qualifying words to apply only to 'registration', there should have been an additional ('Oxford') comma after 'naturalisation'. There is a difference in sense between the two constructions –

    i) "*by his birth, adoption, naturalisation or registration in the United Kingdom*"; or

    ii) "*by his birth, adoption, naturalisation, or registration in the United Kingdom*".

16. An even clearer way in which to signal that the qualifying words only applied to 'registration', if that was what was intended, would have been to insert another 'or' and 'by his' as follows:

> "*by his birth, adoption or naturalisation, or by his registration in the United Kingdom*"

17. Conversely, Mr Malik submits that, if Parliament had wanted the qualifying words to attach to all the possible ways of acquiring CUKC status, they should have appeared immediately after the words "*that citizenship*". But then the provision would read as follows:

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

That would be a nonsense. Whether the words are intended to qualify all four ways of acquiring CUKC status, or just registration, it is clear that they must apply to the route to acquiring citizenship, not to the citizenship itself. I accept that Mr Malik's submission would make sense with the addition of further words, as follows:

> *"(i) 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*"

18. The fact that a statutory provision could have been more clearly expressed does not show that it bears the opposite of its natural meaning, if that meaning is sufficiently

clear. In my judgment, the language of section 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*".

The context within the 1971 Act

19. Secondly, other provisions in the same Act point towards the construction that the words "*in the United Kingdom*" are intended to qualify all four methods of acquiring CUKC status, by birth, adoption, naturalisation or registration.

20. Section 2(1)(d), set out in paragraph [7] above, provides an alternative method of acquiring a right of abode to a Commonwealth citizen by descent, but only where the parent was a CUKC "*by his birth in the United Kingdom or in any of the islands*". I can see no logical reason why this route should be limited to those whose parent was born in the UK, but the route under section 2(1)(b)(i) should not, which is what Mr Malik's submission entails.

21. Section 2(3) deals with children born posthumously. It provides as follows:

> *(3) In relation to the parent of a child born after the parent's death, references in subsection (1) above to the time of the child's birth shall be replaced by references to the time of the parent's death; and for purposes of that subsection —*
>
> *(a) ...*
>
> *(b) references to birth in the United Kingdom shall 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, and similarly with references to birth in any of the Islands;*

22. If this provision was intended only to refer to the route provided in section 2(1)(d) it should have said so. Since it refers more broadly to "*references in subsection (1)*", and birth may be a qualifying factor under paragraphs (a), (b)(i) and (d), I infer that in each of those paragraphs the birth in question must be a "*birth in the United Kingdom*".

The analysis in SSHD v Ize-Iyamu

23. Thirdly, the Claimant's submissions conflict with the analysis of the 1971 Act by Moore-Bick LJ in *SSHD v Ize-Iyamu* [2016] EWCA Civ 118. Although this may be strictly *obiter*, his analysis of the provisions carries great weight. He said:

> [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"…" [emphasis added]
>
> "… the broad scheme of the legislation was that the right of abode was restricted to those citizens of the United Kingdom and Colonies who had acquired that status in the United Kingdom, or one of whose parents or grandparents had himself acquired that status in the United Kingdom."

24. Moore-Bick LJ went on to paraphrase the effect of section 2(1)(b) in that case. With the substitution of the word 'father' for 'mother', the same analysis would apply to the present Claimant:

> [17] "In order for the respondent to have acquired the right of abode under that section, therefore, it would be necessary for his mother 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]

I accept Mr Malik's submission that this involves a rewriting of the words of the section, substantially as set out in paragraph [17] above. It is not what the Act actually says. But in my judgment it is what the Act means.

25. Moore-Bick LJ continued by setting out the context of the provision in the scheme of the Act:

> [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."

26. I accept this analysis of Moore-Bick LJ as accurately setting out the context of section 2, and the parliamentary purpose which can be deduced from reading the section in that context.

R v IAT, ex p. De Sousa

27. Fourthly, Mr Malik accepts that if the qualifying words are not restricted to registration, they must cover all four ways of acquiring the right of abode. So, for example, if naturalisation has to take place in the UK to be effective in granting a right of abode, then birth would also have to be treated the same way.

28. In the light of that concession, the old decision of the Divisional Court in *R v Immigration Appeal Tribunal, ex parte De Sousa* [1977] Imm.A.R. 6 creates a difficulty for this Claimant. The Applicant in that case had been granted a certificate of naturalisation by the Governor of Kenya just prior to that country's independence. The Divisional Court held that she did not have a right of abode because she was not

naturalised in the United Kingdom. It was argued on her behalf that naturalisation certified by the Governor was effectively the same as naturalisation in the UK, or that registration of that certificate in the UK sufficed. Both submissions implicitly accepted that the qualifying words in section 2(1)(a), which are in exactly the same terms as section 2(1)(b)(i), covered naturalisation as well as registration, and the Divisional Court proceeded on that basis.

The historical context of the 1971 Act

29. Fifthly, as Mr Hansen submits, the Claimant's suggested interpretation conflicts with the clear and unambiguous purpose of Parliament in enacting section 2(1) of the 1971 Act. That purpose can be deduced from reading the Act as a whole, and is as described by Moore-Bick LJ in the passages cited above.

30. If the qualifying words only apply to 'registration' in section 2(1)(b)(i), as Mr Malik submits, the same must also be true for the identical wording in section 2(1)(a). The Claimant cannot use this route to a right of abode because he was born after the independence of Malaysia. He therefore only became a CUKC by descent, not by birth. But many thousands of residents of Malaysia and of many other countries, who were born before independence and therefore became CUKCs by birth, would be able to claim a right of abode through that paragraph if Mr Malik's submissions are correct. That construction of section 2(1)(a) would drive a coach and horses through the clear intention of Parliament in the 1971 Act.

31. Mr Malik drew my attention to the words in section 2(3)(c) of the 1971 Act dealing with children born posthumously:

> *(c) references to citizenship of the United Kingdom and Colonies shall, in relation to a time before the year 1949, be construed as references to British nationality and, in relation to British nationality and to a time before the 31st March 1922, "the United Kingdom" shall mean Great Britain and Ireland; …*

He seemed to equate the words "British nationality" with the term "British citizen" which appeared only later, in the British Nationality Act 1981. In fact the 'nationality' referred to must be the status of "British subject" which the Claimant's father held very briefly prior to the implementation of the British Nationality Act 1948. It does nothing to show that either the Claimant or his father ever were "British citizens" or had a right of abode in the UK.

32. Mr Malik also pointed to section 6 of the 1948 Act as providing a reason why Parliament may have chosen to apply stricter requirements to those whose CUKC status came via registration. That section covers citizens of Eire, which became independent in 1922, and of a series of named countries generally comprising semi-autonomous Dominions, together with wives of CUKCs. Such people, Mr Malik submitted, might well have a lesser connection with the UK than other CUKCs. But in my judgment it is clear that Parliament wished to impose the same restrictions on all CUKCs, requiring a direct connection with the United Kingdom through birth, adoption, naturalisation or registration here.

33. Mr Malik puts great emphasis on the unique position of Penang after independence. The historical background is set out in *AL & Others v Sectrtary of State for the Home Department* [2009] UKAIT 00026, starting at paragraph [33], and also in *Fransman's British Nationality Law* at B.132 . In general, residents of newly independent countries lost their CUKC status. This was not a penalty imposed by the UK, but rather a necessary step to ensuring that the newly independent country was truly independent. Divided loyalties and allegiances would tend to conflict with this independence. The arrangements for Penang were unique, albeit a somewhat strange compromise. Why, Mr Malik asks rhetorically, would the UK Parliament then wish to withdraw that special arrangement by refusing the right of abode to residents of Penang.

34. The answer is that the special arrangement involved only the extension of citizenship in the form of CUKC status. That in turn allowed a new generation of children to become CUKCs, even when born long after independence. This Claimant was a beneficiary of that special arrangement. But there was never any special arrangement concerning the right of abode. Prior to the Immigration Act 1971 this additional status requirement did not exist, so that all CUKCs were treated the same. After the 1971 Act came into force there is no reason why the Penang CUKCs should have been treated any differently from all others when distinguishing patrials from non-patrials. As the Tribunal explained in *AL* at paragraph [37], there was a very large number of residents of Malaysia who were non-patrials, and became British Overseas Citizens [BOCs].

Conclusion

35. For all these reasons I conclude that the meaning of the statutory provision is clear. In those circumstances I have no need of external aids to interpretation. If I were wrong about this, the Defendant would want to rely on statements by the then Home Secretary in the House of Commons and the Minister of State in the House of Lords in 1971.

36. I have considered those statements. Despite Mr Malik's submissions to the contrary, they are in my view clear and unequivocal. They reflect the political mood at the time. But in view of my conclusions above, I do not need to rely on these parliamentary statements.

37. My conclusion is that the Claimant did not have the right of abode in the United Kingdom prior to the British Nationality Act 1981 coming into force, and therefore did not become a British citizen under section 11 of that Act. Accordingly this judicial review challenge fails and will be dismissed.