[2024] EWHC 1833 (Admin)

AC-2023-LON-002241

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2024

Before :

DAVID PITTAWAY KC (SITTING AS DEPUTY HIGH COURT JUDGE)

- -

Between :

THE KING on the application of

OBN (a minor)
(By his litigation friend ASM)

Claimant

- and –

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

- -
- -

Ms Grace Brown (instructed by **ZYBA Law**) for the **Claimant**
Mr Michael Biggs (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 8 May 2024

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Approved Judgment

This judgment was handed down remotely at 11:00 on Tuesday, 16 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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David Pittaway KC (sitting as a Deputy High Court Judge):

1. The claim before me is for the judicial review of a decision made by the Secretary of State for the Home Department ["SSHD"] refusing to grant British citizenship to the claimant, who brings these proceedings by his father as his litigation friend. The refusal letter is dated 26 April 2023.

Background

2. The claimant is a Bangladeshi National, who was born on the 19 December 2013 in Dhaka. He is 10 years old. On 25 February 2023 the claimant's father, ASM, applied to the SSHD for the claimant to be registered as a British citizen. ASM, who was born on 1 January 1987, is now a British citizen. He was issued with the British passport on 12 June 2021.

3. The claimant arrived in the UK with his mother, ASM's wife, on 13 September 2020, when he was 6 years old. He was in possession of a UK residence permit issued on 15 July 2020 which was valid until 22 April 2023. The claimant's sister CBF, who was born on 18 September 2021, and shares the same parents as the claimant, is a British citizen. The family all live together in London, and it is their intention to live in the UK permanently. The claimant attends school and he is registered with a local GP. ASM is in full-time employment.

The Decision Under Challenge

4. In refusing the claimant's application under section 3(1) of the British Nationality Act 1981, the SSHD stated in an email:

> "You have not demonstrated that you meet the requirements for registration and your application has been refused. Section 3(1) allows for registration as a British citizen at the Home Secretary's discretion, the only requirements are that you are under 18 and of good character. I have considered whether to exercise discretion in your case. However, there are criteria that you would normally be expected to meet. These are set out in the Registration as a British citizen, children, Nationality Policy Guidance. …
>
> You do not meet the criteria because:
>
> • you are not 'settled' in the UK, to be settled you must be free of immigration time limits or have permanent residence under EEA regulations or settled status under the EU Settlement Scheme. You held LTE at the time of application which had expired on the 23 April 2023, meaning you were not free of immigration time limits at the time of your application and currently hold no valid leave to remain in the UK.
>
> • although one parent is a British citizen, your other parent is not 'settled' in the UK, to be settled, they must be free of immigration time limits or have Permanent Residence under

> EEA regulations or settled status under the EU Settlement Scheme. At the time of your application, your mother held LTE which has since expired and currently has an open application for further leave, meaning that she is still subject to immigration time limits and not 'settled'.
>
> I have considered whether there are grounds to exercise discretion to register you as a British citizen, however, I am not satisfied there are sufficient grounds to do so. As you are a child, I have considered your best interest in making this decision. You can find out more about why and how we consider a child's best interests at […]."

5. Section 3(1) of the British Nationality Act 1981 (the "BNA 1981") provides:

> "**Acquisition by registration: minors.**
>
> (1) If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen."

6. The relevant guidance is set out in the SSHD's **Registration as a British citizen: Children** ("**Guidance**") v11.0 published 02 December 2022, at page 16, in relation to section 3(1)

> "This is a discretionary provision for the registration of a child. The Home Secretary may exercise their discretion to register people as British citizens under section 3(1) of the British Nationality Act 1981 if:
>
> • the applicant is under 18 at the date of the application
>
> • if aged 10 years or over on the date of application the applicant is of good character see good character requirements
>
> • they think fit to register them
>
> These are the only statutory requirements. This guidance sets out how you must normally use discretion.
>
> It is important to remember that this guidance does not amount to definitive rules. It will enable you to consider the majority of cases, but because the law gives complete discretion, you must consider each case on its merits. All the relevant factors must be taken into account, together with any representations made to us. It is possible to register a child under circumstances that would normally lead to the refusal of an application if this is justified in the particular circumstances of any case (emphasis added)."

Preliminary Issue

7. The SSHD submitted that the claim for judicial review should be refused because the claimant had failed to request a review of the SSHD's decision. The right to a review was set out in the refusal letter. Ms Brown did not have instructions on why the claimant's father did not request a review but suggested that he may have not had sufficient funds to make the application. The cost was £450. It is also not clear at what stage the claimant's father instructed solicitors, clearly he had done so by the time that the Pre-Action Protocol letter ("PAP") had been written on 27 April 2024. I also note that this claim is privately funded, which may be inconsistent with the suggestion that the review was not requested because of a lack of funds.

8. Mr Biggs stated that the application for British citizenship may have had professional input but that is mere speculation. As the ***Administrative Court Guide*** states at paragraph 6.3.3 judicial review is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review.

9. Ms Brown submits that if the claimant's father had applied for a review, then, the outcome would have been the same. She relies on the detailed response letter from the SSHD rebutting the allegations made in the PAP letter.

10. In my view, Ms Brown's submissions on this point are probably correct. The SSHD's letter acknowledges that the information contained in the refusal letter is bare and contains a detailed consideration of the grounds put forward as to why the decision letter was unlawful. In these circumstances, whilst I consider that the claimant's father should have exercised the right to request a review, I do not consider that I should refuse the claim on the grounds that he failed to do so.

Grounds

11. The principal submission made on behalf of the claimant is that the discretion under section 3(1) of the BNA 1981 is wide and does not require either the claimant or his mother to be settled in the UK or free of immigration time limits. She relies upon the decision of Helen Mountfield KC (Sitting as Deputy High Court Judge) in ***R (on the application of K (A Child)) v Secretary of State for the Home Department*** [2018] 1 WLR 6000, where she observed [§§42-43]:

> "Those not entitled to citizenship as of right may, however, invite the Secretary of State to exercise a discretion under section 3(1) of the BNA 1981 to consider whether (or not) to exercise his discretion so as to confer British nationality upon them. The Secretary of State need only register him or her as a British citizen 'if he sees fit', subject to ordinary principles of administrative law. [Counsel for the SSHD] accepted that the Defendant's power under section 3(1) of the BNA 1981 did not impose a duty to confer citizenship upon proof of paternity. The Secretary of State's discretion under that section is an open ended one which may take into account any matter which the Secretary of State rationally considers relevant. …"

12. Ms Brown further points to the reference in the **Guidance** that the discretion may be exercised where: (i) an applicant is under the age of 18 at the date of application and (ii) the SSHD considers it fit to register them. She maintains that to the extent that the SSHD relies on an 'expectation that registration should normally only take place where an applicant satisfies the criteria set out elsewhere in the guidance', the SSHD materially misdirected herself. Although this expectation is stated in the **Guidance**, it is qualified by reference to the same wide discretion that the SSHD has to register a person under the age of 18 where they see fit to do so.

13. The other part of her case is that the refusal letter fails to demonstrate that the duty under s.55 of the ***Borders, Citizenship and Immigration Act 2009*** (the "BCIA 2009") is discharged. She submits that under s.55 of the BCIA 2009 the SSHD must have regard to the need to safeguard and promote the claimant's welfare. The refusal letter relies on a uniform resource locator ("URL") to demonstrate discharge of her duty under s.55 of the BCIA 2009. She submits that a reference to an URL in the decision under challenge however is insufficient to discharge the SSHD's statutory duty. The main point is that the decision must demonstrate, on its face, that the duty has been discharged.

14. Ms Brown draws my attention to ***R (on the application of Project for the Registration of Children as British Citizens (a company limited by guarantee), O (a minor, by her litigation friend AO)) v The Secretary of State for the Home Department v The Speaker of the House of Commons, The Clerk of the Parliaments*** [2021] EWCA Civ 193 [§§69-70] where Richards LJ found that there was no dispute about those to be included:

> "… [the] Secretary of State must identify and consider the best interests of the child … and must weigh those interests against countervailing considerations."

15. Mr Biggs submits that the refusal letter correctly identified and correctly characterised the defendant's statutory power under section 3(1) of the BNA 1981. It referred to this provision and the SSHD's guidance in respect of it. He further submits that the criteria identified in the **Guidance** are plainly rational and reasonable, as was the SSHD's decision to treat them as 'normally' needing to be satisfied if discretion is to be exercised. The SSHD was accordingly entitled to select these criteria (and to identify what was considered relevant more generally), and to give them the weight he ascribed to them.

16. He referred to the decision of the Court of Appeal in ***R (Khatun) v. London Borough of Newham*** [2004] EWCA Civ 55; [2005] QB 37 at [35] where Laws LJ explained at [35]:

> "In my judgment … where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decisionmaker and not the court to conclude what is relevant, subject only to Wednesbury review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of enquiry to be

> undertaken into any relevant factor accepted or demonstrated as such."

17. Mr Biggs makes the point that the SSHD then considered whether there was any basis for departing from the criteria that he rationally and lawfully concluded were "normally… expected to" be met. He concluded that there were no sufficient grounds to do so. He submits that the conclusion was plainly reasonable and reflected the broad discretion provided by section 3(1) of the BNA 1981.

18. He draws particular attention to the terms of the refusal letter, which states:

> "As you are a child, I have considered your best interests in making this decision. You can find out more about why and how we consider a child's best interests at
>
> htts://www.gov.uk/government/publications/children-nationality-policy guidance. I do not consider that your best interests require a different decision because you are able to continue to enjoy family/private life without the need to be a British Citizen."

19. He submits that there was no failure to comply with the duty under section 55 of the BCIA 2009, and so there was no error of law on this basis. Nor, for the avoidance of doubt, was there anything unreasonable about the SSHD's assessment of the claimant's best interests.

20. Whilst I accept Ms Brown's submission that the SSHD's discretion under s3(1)(a) of BNA 1981 is open ended and may take into account any matter which the SSHD rationally considers relevant, the criteria in the ***Guidance*** provides a framework of matters that the SSHD should take into account, albeit they are not an exclusive list. In circumstances where the terms of the refusal letter set out that these matters have been considered, I do not find that the SSHD materially misdirected himself. I find that the passage in the judgment of ***Katun*** above where Laws LJ considered that it is for the decision-maker and not the court to conclude what is relevant, referred to by Mr Biggs, of assistance.

21. I accept the submissions made by Ms Brown that it is not for the SSHD to simply be 'aware' of his duty under s.55 of the BCIA 2009, as contended for in paragraph 31 of the Detailed Statement of Grounds but that is not what is said in the refusal letter. It specifically states that the SSHD had considered the claimant's best interests. That included that the SSHD taking into account that the claimant's father and sister are British, the claimant is attending school in the UK and that there are no factors in the claimant's case, or relating to his UK family, that indicate he is not a suitable candidate for the grant of citizenship. Albeit it is barely stated, the fact that it refers in terms in the conclusion that the SSHD did not consider that his best interests required a different decision because he had concluded that the claimant was able to enjoy family/private life without the need to be a British citizen, satisfies me that those matters were given due consideration. I am satisfied that the claimant has not made out the case that the SSHD failed to discharge his duty under s.55 of the BCIA 2009 adequately or at all.

Ground 2

22. The alternative ground was that the SSHD unlawfully fettered his discretion. Ms Brown relied on a passage in ***R (MAS Group Holdings Ltd v Secretary of State for the Environment, Food and Rural Affairs*** [2019] EWHC 158 (Admin) where Morris J held [§58]:

> "A person upon whom a discretionary power has been conferred: (1) must exercise it on each occasion in the light of the circumstances at the time; (2) cannot fetter its exercise in the future by committing himself now as to the way it will be exercised in the future, nor by ruling out of consideration factors which may then be relevant; (3) may nevertheless develop and apply a policy as to the approach which he will adopt in the generality of cases, as long as it does not preclude departure from the policy, or taking into account circumstances which are relevant to the particular case; if such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful."

23. She submits that the SSHD failed to take into account factors in the **Guidance** when considering exercising the power under s.3(1) of the BNA 1981 including, the child's future intentions, the child's parents' circumstances, residence in the UK, the child's immigration status, and any compelling compassionate circumstances raised as part of the application. She submits that the SSHD's decision failed to demonstrate that any or any adequate consideration was given to any or all of these factors. She relies upon the facts that the family are residing lawfully in the UK, ASM and the claimant's sister are British citizens, the claimant's intentions are to make the UK his home, ASM is in full-time employment, and the application did not indicate that any issues as to character arise.

24. She accepts that, as asserted on behalf of the SSHD, it was for the decision-maker to determine what factors were relevant. Subject to the SSHD acting reasonably and in accordance with public law principles, this is not a disputed matter. She submits that the SSHD is however, required as a matter of public law, to address relevant factors and indicate in his decision why those factors do not (if that be the case) weigh in favour of grant of citizenship.

25. Mr Biggs submits that it is apparent from his analysis above in respect of ground (1) that the SSHD was well aware of the wide discretion under section 3(1) of the BNA 1981, and properly applied that discretion when making his decision. He reiterates that the SSHD correctly followed the defendant's ***Guidance*** and, consistent with the ***Guidance***, did not rigidly insist on the criteria there set out. The process, as explained in the decision letter was to decide whether the requirements in the ***Guidance*** had been met, and where they had not, consider whether there are grounds to exercise discretion to register the claimant as a British Citizen. He concluded that the SSHD was not satisfied there were sufficient grounds to do so. It was for the SSHD to determine what factors were relevant, and to determine what if any weight to give to those factors.

26. I accept Mr Bigg's submissions there is nothing in the refusal letter to indicate that the SSHD fettered his discretion unlawfully. The terms of the refusal letter, albeit couched

in bare terms, as accepted on behalf of the SSHD, satisfies me that due consideration was given to the ***Guidance*** and s55(1)(a) of the BCIA 2009.

Ground 3

27. The claim form alleged that there had also been a breach of the claimant's rights under Article 8 ECHR to respect for private and family life. Ms Brown submitted that the refusal of citizenship engaged Article 8 of the ECHR and cited authorities in support of this proposition, in particular the decision of Bourne J in ***Vanriel and Tumi v Secretary of State for the Home Department*** [2021] EWHC 3415 (Admin) in which he held that the denial of citizenship can engage Article 8 of the ECHR. She, however, conceded in submissions that even if it was engaged in this case, she could not point to anything that indicated that the SSHD's decision was arbitrary.

28. I accept Mr Biggs' submission that Article 8 of the ECHR is not engaged in this particular case. He submits that whilst British citizenship confers substantial advantages, refusal to confer it as a matter of discretion did not significantly interfere with any of the claimant's interests protected by Article 8 of the ECHR. The claimant is living with his family in London attending school. Further I accept, as conceded by Ms Brown, that there is nothing to indicate that the decision was arbitrary.

Ground 4

29. I have considered Ms Brown's submissions which repeat what she has said in relation to the other grounds set out above. In my view there is nothing to indicate that the SSHD's decision was unreasonable, in the ***Wednesbury*** sense, as to be unlawful: ***R (SC v Secretary of State for Work and Pensions*** [2019] 1 WLR 5687; [2019] EWCA Civ 615 [§90].

30. Mr Biggs relies upon the decision ***In South Buckinghamshire District Council v Porter (No.2)*** [2004] UKHL 34 where Lord Brown set out the standard of reasoning in cases where a duty, as in this case, arises to give reasons, stating at [§36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or important matter or by failing to reach a rational decision on relevant grounds."

31. Whilst I accept that a flawed decision cannot be remedied by reliance on the SSHD's response to the PAP letter, I am satisfied that the reasons leading to the refusal to grant the claimant British citizenship is adequately, if somewhat barely, set out in the of refusal letter. There is sufficient information contained in the refusal letter for those

acting on behalf of the claimant to understand why he did not satisfy the criteria in the ***Guidance***, and why after consideration of his best interests, the SSHD did not exercise his discretion to permit his registration as a British citizen.

32. Further Mr Biggs relies upon the passage in ***South Buck DC v. Porter*** (above) at [36] where it is said:

> "A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".

33. Even if I am not correct on the reasons challenge, I am not satisfied the claimant has suffered substantial prejudice as a result of an inadequately reasoned decision letter in this case. I have reached the view that a more fully reasoned decision letter would have reached the same decision.

34. It follows that I have concluded that the claim is dismissed.