



Neutral Citation Number: [2024] EWHC 2012 [Admin]

Case No: AC-2023-LON-003376

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st July 2024

Before :

MR JUSTICE SWEETING

Between :

The King (On The Application Of Jackson)

Claimant

- and -

Secretary Of State For The Home Department

Defendant

ADRIAN BERRY (instructed by **PROJECT FOR THE REGISTRATION OF CHILDREN AS BRITISH CITIZENS (PRCBC)**) for the **CLAIMANT**
JULIE ANDERSON (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **DEFENDANT**

Hearing dates: 16th May 2024

Approved Judgment

This judgment was handed down remotely at 14.00pm on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

THE HONOURABLE MR JUSTICE SWEETING :

Introduction

1. The Claimant seeks permission to challenge the Defendant's decision dated 22 March 2022 to refuse to register the Claimant as a British citizen. This was an internal review decision following an earlier refusal to register him because he did not meet the good character requirement.
2. The Claimant was born in the United Kingdom on 16 January 2003 and has lived here all his life. He is now 21 years of age. At age 10, he became eligible, for British citizenship under section 1(4) of the British Nationality Act 1981 ("the BNA 1981") which provides:

"A person born in the United Kingdom after commencement who is not a British citizen by virtue of subsection (1), (1A) or (2) shall be entitled, on an application for his registration as a British citizen made at any time after he has attained the age of ten years, to be registered as such a citizen if, as regards each of the first ten years of that person's life, the number of days on which he was absent from the United Kingdom in that year does not exceed 90."

3. An entitlement to citizenship by registration under the BNA 1981, on the basis of an applicant's connection with the UK, is determined in accordance with statute and subordinate legislation. It requires compliance with the statutory procedures and conditions. These include the good character requirement contained within section 41A.
4. Aside from the sense of belonging and confirmation of nationality that citizenship confers there are obvious practical benefits, as Jay J. observed in R (PRCBC) v Home Secretary (QBD) [2020] 1 WLR [16]:

"The advantages of British citizenship cannot be considered in abstract. The position of British citizens falls to be contrasted with those who have limited or indefinite leave to remain (there are also important practical differences between these species of leave), into which categories the majority but not all of the children entitled to be registered will no doubt fall. A person with leave to remain as opposed to the right of abode cannot enter and/or remain in the UK without let or hindrance: by definition, she requires leave, and this permission may require examination by immigration officers at a port of entry or at Lunar House. The status may lapse; it may be cancelled; and individuals holding such leave are liable to be deported on conducive grounds under section 3(5)(a) of the Immigration Act 1971."

5. The Defendant's decision to refuse to register turned upon the fact that the Claimant had committed criminal offences.
6. The Claimant pleaded guilty to an offence of robbery on 26 March 2019. He was sentenced to a youth rehabilitation order with supervision, required to pay compensation of £200, and made subject to 20 days activity requirement, 6 days programme requirement and 3 months electronic tagging and curfew.
7. On 26 January 2021 he pleaded guilty to a further offence of robbery. This offence involved the victim being pushed to the ground and assaulted whilst his mobile phone and wallet were taken. For this offence he was sentenced to a youth rehabilitation order with supervision (18 months), unpaid work (100 hours), a 20 day activity

requirement, a 20 day programme requirement and 2 months of electronic tagging and curfew.

8. He had also been convicted of an offence of theft from a person on 5 June 2018, when he had received a 12 month referral order and was ordered to pay compensation of £700.

The Citizenship Application

9. The Claimant did not make an application for citizenship as soon as he became eligible because his family could not afford to do so. The Defendant subsequently reviewed and reduced children's registration fees so that this impediment was removed.
10. On 7 February 2020, while still a minor, the Claimant made an application for British citizenship accompanied by detailed representations from those advising him. These representations highlighted the Claimant's unsettled life, dysmorphic features (diagnosed at age 2), youth justice record, and the distinction drawn between adults and children within the criminal justice system.
11. In a decision of 25 March 2021 the Defendant refused the application for registration as a British citizen. The reasons for refusal began with consideration of the Defendant's policy where an applicant has been convicted of criminal offences and the specific facts of the offences committed by the Claimant. Consideration was then given to whether any exceptions applied and whether there were mitigating factors which might allow the Defendant to exercise discretion in the Claimant's favour on an exceptional basis. Matters which were noted by the decision maker included the Claimant's potential disabilities, unsettled upbringing and the incentive that citizenship might give him to improve his behaviour.
12. On 22 November 2021, the Claimant sought an internal reconsideration/review and made further detailed representations. In support of those representations he supplied:
 - i. a second statement from his mother;
 - ii. a report of 18 December 2020, from an intermediary, on the Claimant's communication skills in relation to his participation in court proceedings and
 - iii. a psychiatric report of 10 October 2021 from Dr Attard, Consultant Psychiatrist.
13. Dr Attard acknowledged that consideration of the good character requirement was outside the scope of his role as an expert but gave his opinion that refusal of the application might have a significant negative impact on the Claimant.
14. On 3 May 2023, while chasing a decision, the Claimant made further representations. On 4 August 2023, believing that no review decision had yet been made, the Claimant's representatives sent a pre-action protocol letter before claim. On 11 August 2023 the Defendant served a response enclosing a copy of a review decision, dated 22 March 2022. It appears the decision had initially been sent to the wrong address. It is accepted that the first time the Claimant could have become aware of the review decision was on 11 August 2023.
15. The review decision concluded that there was no basis on which to re-open the application, essentially repeating the earlier grounds for the refusal decision although indicating that the additional material relied on by the Claimant had been considered.
16. On 17 August 2023 the Claimant sent a pre-action protocol letter to the Defendant challenging the substance of the reconsideration decision. The Defendant responded on 5 October 2023.

The Procedural Chronology

17. The Claim was issued on 14 November 2023. The Detailed Grounds set out five grounds for judicial review. The Summary Defence, filed on 6 December 2023, resisted the application on all of these grounds.
18. On 20 December 2023, permission to proceed was refused by Dan Squires KC sitting as a Deputy Judge of the High Court. The Claimant lodged grounds for reconsideration on 22 December 2023. The test for granting permission at an oral renewal hearing is the same as that applied by the judge considering permission on the papers; whether there is an arguable ground for judicial review which has a realistic prospect of success. It is incumbent on the Claimant to identify why the refusing judge was in error.
19. On 26 February 2024, the Claimant submitted a Reply to the Summary Defence with an application for permission to rely on it. I have taken into account the matters set out in the Reply in reaching a decision on the renewal application.

The Grounds for Judicial Review

20. The grounds are:
 1. *“In evaluating the question of whether the Claimant is of ‘good character’, the Defendant has approached the question from criteria applicable to adults seeking naturalisation at discretion on the basis of lawful residence, rather than applying criteria applicable to UK-born and UK-resident applicants who have an entitlement to registration. In so doing she has frustrated the statutory purpose of s 1(4) of the 1981 Act (providing for registration by entitlement); a ‘good character’ test is attached to distinct categories of citizenship acquisition (naturalisation, specified registrations, etc.) and the statutory purpose for each category of acquisition (of which the test where any such test is attached forms part) requires specific consideration and respect.*
 2. *The Defendant has unlawfully fettered her evaluation of ‘good character’ under a 41A of the 1981 Act by Guidance to her decision-makers that is mechanistic and formulaic, and which fails to acknowledge still less address critical distinctions of fact and law relevant that are relevant to the Decision.*
 3. *The Defendant has failed to give adequate and sufficient consideration to the facts and evidence, including the forensic psychiatric evidence, supplied by the Claimant; she pays only lip-service to the same.*
 4. *The Decision is incompatible with the Claimant’s right to respect for his private life (Article 8, ECHR) and accordingly unlawful by reason of section 6 of the Human Rights Act 1998.*
 5. *The Defendant has (1) failed to give effect to her obligations under the Equality Act 2010 and/or (2) her Decision is incompatible with Article 8/14 ECHR by reason of discrimination (and accordingly unlawful by reason of section 6 of the Human Rights Act 1998).”*
21. Taking these grounds together the Claimant’s central contention is that his application has not been considered against the category of applicant to which he belongs but against the criteria applicable to migrant adults and that inadequate attention was paid to:

- a) the need for discrete consideration of the Claimant as a minor in the criminal justice system and
 - b) the benefit that citizenship would confer .
22. As he is UK-born and UK-resident, it is not in issue that the Claimant is British by identity and connection. He contends that he is, in fact, of good character for the purposes of ss 1(4) and 41A of the BNA 1981. That is because notwithstanding his youth offending, there is positive evidence of his character, and an explanation of his criminality such that it does not vitiate a finding that he is of good character. In any event, it is argued, there is no evidence of any sufficient basis on which to conclude that the Defendant should not be satisfied of the Claimant's good character for the purpose of fulfilling his statutory entitlement to be registered as a British citizen.
23. The argument proceeds on the basis that there is a significant or material difference in the statutory assessment of "good character" as between:
- a) An adult who migrates to the UK, resides here, and then applies for naturalisation at discretion.
 - b) A UK-born child or young adult (like the Claimant) who applies for registration as a British citizen.
24. The Claimant contends that the Defendant failed to recognise this difference and applied the approach applicable to adult naturalisation. Whilst the relevant Home Office guidance acknowledges the distinction between adults and children, the Claimant argues that the decision in this case did not properly apply the guidance and ignored other relevant matters, such as the psychiatric report.
25. It might be thought that the first and second ground (above) go further than the application of the guidance to the Claimant's case and look very much like a challenge to the Defendant's guidance as a matter of policy. However it was made clear at the hearing and in the Claimant's skeleton that this was not intended. It follows from this clarification that the complaint is not that the policy cannot be operated in a way which is lawful in implementing the statute but only as to its application. Absent an argument that the policy requires the decision maker to act unlawfully a challenge to the policy itself is impermissible (see *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 and *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38).
26. The Claimant also relied on the duty under s 55 of the Borders, Citizenship, and Immigration Act 2009 ("the 2009 Act") to have regard to the need to safeguard and protect the welfare of children when making a decision (the 'best interests' test). It was argued that the Defendant's refusal decision did not decide explicitly what the Claimant's best interests were before considering whether they might be overridden. The United Nations Convention on the Rights of the Child ("UNCRC") was invoked as supporting the Claimant's submissions in this respect.
27. In relation to Article 8 ECHR, although the Defendant's refusal decision considered that a refusal of citizenship would not occasion a violation of the provision, as the Claimant had leave to remain and could continue to reside in the UK with his family, it was argued that this failed to take into consideration the psychological benefits, social value and overall importance to a UK-born child, with an enduring connection to the UK, of securing British citizenship.
28. Both the argument advanced by reference to s.55 of the 2009 Act and Articles 8 and 14 ECHR were essentially founded on the same underlying submissions as to what should have been taken into account by the Defendant and what had been omitted from consideration. The same observation may be made in relation to the argument

that there was a breach of the Public Sector Equality Duty under the Equality Act 2010 where it was argued that it was the “*approach taken to whether he was of good character...that put him at a disadvantage and was one that puts disabled persons at a substantial disadvantage...*”.

29. The Defendant contends that the application is essentially a collateral challenge to primary legislation and the contents of policy. Further, it was argued that the decision did not involve a marginal case; the Claimant’s ongoing, recidivist criminal offending was relevant to demonstrating good character and a decision that he did not clear the necessary threshold is not open to any serious challenge. As Ms Anderson put it on behalf of the Secretary of State: “*No amount of nuancing of the general approach to good character by reference to age, ability or circumstances could properly require citizenship to be granted in relation to this registration application in all the circumstances*”. In any event it is said that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred so that permission ought to be refused pursuant to section 31(3D) of the Senior Courts Act 1981.

The Legal Framework

26. The BNA 1981 section 41A provides that an application for registration as a citizen by an adult or young person:

“must not be granted unless the Secretary of State is satisfied that the ... person is of good character.”

27. Paragraph 1(2)(b) of Schedule 1 of the BNA 1981 applies to naturalisation as a British Citizen by a person of full age and capacity under section 6(1) and also requires, amongst other things, that the applicant is of good character.
28. The BNA 1981 does not define good character but there is Home Office guidance (“the Guidance”) which sets out the types of conduct which must be taken into account when assessing whether a person has satisfied the requirement. Criminality is, for obvious reasons, a factor which falls to be taken into account.
29. In relation to a child over 10 years of age the Guidance provides:

“The good character requirement applies to a person who is aged 10 or over at the date of application. When assessing whether a child is of good character, you must take account of any mitigation relevant to the child’s particular circumstances. Where a child has been convicted of a criminal offence, sentencing guidelines require that any custodial or non-custodial sentence is adjusted to take into account the child’s age and particular circumstances and any mitigating factors such as their ability to understand the consequences of their actions. Therefore although the criminal sentence thresholds for refusal and non-custodial sentencing guidelines for adults will normally apply to a child who has been convicted of a criminal offence, the lesser sentence handed down to them will mean they are automatically less likely to meet the higher thresholds.

Consideration must also be given to any subsequent mitigation put forward by the applicant that was not taken into account at the time of sentencing.”

30. In the case of *R (SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin), Deputy High Court Judge Karen Monaghan QC emphasized the distinction between adults and children and criticized the way in which the Home Office's nationality policy regarding 16- or 17-year-olds who commit minor criminal offenses had been applied. She found that the SSHD had unduly fettered her discretion by rigidly adhering to the policy. She said [76]:

“there is no rational basis for the drawing of a bright line between child applicants who are 16 and above and those below even if the effect is to introduce only a presumption (“normally”) as to the outcome”

31. She quashed the refusal to register a South African national as a British citizen, considering mitigating factors such as the claimant's background and age at the time of conviction, and summarised the effect of the case law [64]:

“Drawing these threads together, in my judgment the following principles emerge from the case law and apply where the defendant is determining whether the “good character” standard is met in the case of a child:

a) The defendant may only exercise her discretion to grant citizenship under section 3 where she is satisfied that the person concerned is of “good character” (section 41A(1), British Nationality Act 1981).

b) In determining whether she is so satisfied, the defendant must make an evaluation of the applicant's character based on all of the material before her. In the case of criminal convictions she will need to take into account the seriousness of the offence, mitigating factors and the severity of any sentence. In assessing the relevance of any convictions for offences committed as a child (that is, under the age of 18), regard will need to be had to the rehabilitative objectives reflected in Article 40 of the UNCRC and the primacy given there to “reintegration.”

c) The defendant must have proper regard to the guidance in the Nationality Instructions in undertaking any assessment of character but these cannot and should not fetter the exercise of the defendant's discretion in any particular case. The policy reflected in the Instructions must not be applied mechanistically and inflexibly. There must be a comprehensive assessment of character in each case which involves an exercise of judgment. It seems to me too that since it is axiomatic that the opportunities for a child or young person to establish “good” character are likely to be more limited than in the case of an adult (who may refer to patterns of employment, contributions to community or public life and the like) account must be taken of that in weighing the matters relied upon to establish good character as against those pointing the opposite way.

d) Article 8 may be engaged by a decision not to grant citizenship where the necessary threshold for an interference is reached but in any event where that decision is arbitrary or discriminatory. Further, in assessing whether there is justification for any interference with Article 8 in the case of a child (that is a person under the age of 18), regard will need to be had to the material provisions of the UNCRC. There may be little room for justifying an

interference with Article 8 where reliance is placed on (at least) non-violent offences committed when a minor, that is under the age of 18, having regard to the terms of Article 40 of the UNCRC.

e) Whilst section 55 of the 2009 Act may be material to the exercising of a relevant discretion in the case of an adult where there has been an historic failure to comply with section 55 which has led to a present injustice, it does not otherwise apply to the exercising of functions at a time when a person has reached the age of majority.”

32. Mr Berry, on behalf of the Claimant drew attention to the well-known observation of the Court of Appeal in *R v ZA* [2023] 2 Cr. App. R. (S.) 45 in relation to the neural development of young people and its implications for questions of culpability and the assessment of maturity [52]:

“It has been recognised for some time that the brains of young people are still developing up to the age of 25, particularly in the areas of the frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by, and the hallmark of, mature and responsible adults. It is also known that adverse childhood experiences, educational difficulties and mental health issues negatively affect the development of those adult thought processes. Accordingly very particular considerations apply to sentencing children and young people who commit offences. It is categorically wrong to set about the sentencing of children and young people as if they are "mini-adults". An entirely different approach is required.”

33. In *Poloko Hiri v SSHD*: [2014] EWHC 254 (Admin) Lang J. observed that the good character test was multi-faceted and not merely whether an applicant had criminal convictions [35]:

“...In my judgment, in deciding whether an applicant for naturalisation meets the requirement that “he is of good character”, for the purposes of the British Nationality Act 1981, the Defendant must consider all aspects of the applicant's character. The statutory test is not whether applicants have previous criminal convictions – it is much wider in scope than that. In principle, an applicant may be assessed as a person “of good character”, for the purposes of the 1981 Act, even if he has a criminal conviction. Equally, he may not be assessed as a person “of good character” even if he does not have a criminal conviction. Plainly, criminal convictions are relevant to the assessment of character, but they are likely to vary greatly in significance, depending upon the nature of the offence and the length of time which has elapsed since its commission, as well as any pattern of repeat offending. So, in order to conduct a proper assessment, the Defendant ought to have regard to the outline facts of any offence and any mitigating factors. She ought also to have regard to the severity of the sentence, within the sentencing range, as this may be a valuable indicator of the gravity of the offending behaviour in the eyes of the sentencing court...”

34. Put more shortly, a criminal conviction is not in itself determinative, one way or the other, of the question of “good character”. Its significance will vary from case to case and requires individual and contextual assessment.

Discussion and Conclusions

35. Mr Berry argued that the test for good character should align with the category of citizenship grant being sought and the unique circumstances of the applicant. Thus, it was argued, although the legal test in different categories was ostensibly the same, the substance of the evidence necessary to satisfy the test would vary in accordance with the attributes of the applicant. Mr Berry gave the following as examples of different categories and approaches that might be required:
- a. For a UK-born 10-year-old child seeking registration, the evaluation of good character should consider age-appropriate behaviour. Stealing sweets or minor misdeeds would be assessed differently from serious offences.
 - b. A middle-aged professional man applying for naturalisation faces a different and distinct assessment. His actions, such as white-collar fraud, are evaluated in the context of his maturity, responsibility, and professional conduct.
 - c. A UK-born young man who committed offences during brain development (youth offending) requires a nuanced evaluation. Understanding the impact of brain development on decision-making is crucial.
36. Mr Berry argued that the statutory language, properly interpreted, led to the conclusion that a different approach was required to each. Thus section 1(4) of the BNA 1981 gave rise to an entitlement for which good character was not a precondition; section 41A operating merely to bar the Defendant from acting on the entitlement. In contrast schedule 1 to the BNA 1981 set out a series of preconditions for the Defendant's exercise of the discretion whether or not to naturalise a person which included whether they were of good character. It followed, it was argued, that the questions of whether the Defendant should be satisfied of good character for the purpose of a statutory entitlement to be registered as a British citizen was manifestly of a different order to the question that arises in the case of a discretion to naturalise a person.
37. However the three scenarios, which all involve offending, are very obviously distinct and it is not immediately apparent why the application of a multi-faceted statutory character test and the Guidance would result in them being treated as equivalent or not being the subject of a case specific, evaluative distinction as far as a citizenship decision was concerned. In other words these examples would inevitably be assessed differently because they are factually different; it is not necessary to construe the statutory language as setting out a different approach. The Claimant could only conceivably fall into the third category where the type and nature of offending would be a basis for distinguishing between individuals even where their maturity and neurological development also had to be factored in.
38. The age of an offender will have been taken into account in the sentencing process. The Sentencing Council's overarching principles for sentencing offenders under 18 emphasize the significance of age and maturity as mitigating factors. The guidelines also acknowledge the unique challenges faced by young adults (aged 18-25) due to ongoing brain development and increased susceptibility to impulsive behaviour and peer pressure.
39. In *R(O) and R(Project for the Registration of Children as British Citizens (PRCBC)) v SSHD* [2023] AC 255 the Supreme Court held that statutory

registration did not involve fundamental constitutional rights [43]:

“In this appeal the court is not dealing with a vested right at common law or under statute but with a statutory procedure for registration by which a person can acquire British citizenship and the important rights which it confers by making an application which is subject to conditions specified by Parliament.”

40. The entitlement under section 1(4) BNA 1981 is an entitlement to be registered under the statutory scheme. Mr Berry’s submission that, in contrast to naturalisation, there is no good character “precondition” does not seem to me to lead anywhere. The requirement that an applicant is of good character applies to adults and young persons and has been imposed by Parliament in mandatory terms so that registration *“must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character.”* That requirement cannot be overridden or outweighed by an assessment that it would be in the interests of the applicant to acquire citizenship simply because of its psychological or social benefits; either the requirement is satisfied or it is not.
41. In the case of a young offender a proper consideration will of course take into account that maturity may bring to an end established patterns of offending and that the purpose of sentencing is slanted towards rehabilitation and positive interventions; but that is part of an overall and multifaceted enquiry into whether an applicant is of good character. It does not involve a different legal test.
42. The Secretary of State is entitled to apply a high standard (see *R v SSHD ex p Al Fayed (No 2)* [2001] Imm AR 134 at [41-42]) subject to review by the courts *“... only if the decision-maker in some way misdirected himself or, having correctly directed himself, gave a decision which no reasonable decision-maker could have given in the circumstances “* (Ex p Al Fayed No2 at [40]).
43. The factors identified by the Claimant, including the psychiatric opinion and the applicant’s age at the time of his offending were considered by the Defendant. The Claimant’s argument that these factors should have been given more weight rather than being considered under an exceptional circumstances analysis is not supported by any legal obligation to consider them in a specific manner. What matters is that they were taken into account and that the decision is not otherwise open to challenge on the basis of public law unreasonableness or misdirection.
44. I agree with Ms Anderson’s concluding submission that the claimant is essentially seeking to challenge the outcome of the decision rather than the decision-making process itself; assuming that certain materials were not properly considered because the decision was unfavourable. The claimant is, in effect, seeking to impose a lower standard of good character than the one applied by the SSHD, which is beyond the scope of judicial review.
45. For these reasons the refusing judge was not in error and I conclude that there is no arguable ground for judicial review which has a realistic prospect of success and so refuse permission.