Neutral Citation Number: [2019] EWCA Civ 2024

Case No: C4/2018/1671

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Rhodri Price Lewis QC sitting as a Deputy Judge of the High Court
[2018] EWHC 1615 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2019

Before :

LORD JUSTICE FLAUX
LORD JUSTICE SINGH
and
LORD JUSTICE HADDON-CAVE

- -

Between :

THE QUEEN **on the application of MOHAMMAD AL-ENEIN**	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Philip Nathan (instructed by **Oak Solicitors**) for the **Appellant**
Nicholas Chapman (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 29 October 2019

- -

Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal against the decision of Mr Rhodri Price Lewis QC, sitting as a Deputy Judge of the High Court, given on 26 June 2018, in which he dismissed the Appellant's claim for judicial review of the Respondent's decision not to reconsider her refusal of his application for naturalisation as a British citizen.

2. Permission to appeal was granted by Asplin LJ on 25 February 2019.

Factual Background

3. The Appellant was born on 11 November 1977 and is of Palestinian origin. At the hearing before this Court we were informed by counsel on his behalf that the Appellant is stateless but has a Lebanese refugee travel document.

4. The Appellant arrived in the United Kingdom ("UK") on 13 January 2001 on a student visa. He claimed asylum two days later. He was granted permission to work in the UK, and in 2005 he was given an Asylum Registration Card which was endorsed with permission to work. On 5 March 2007 his asylum claim was refused. He appealed against that decision and his appeal was dismissed on 14 May 2007. Following unsuccessful applications for reconsideration of that decision, his appeal rights were exhausted on 20 November 2007. On 18 November 2008 the Respondent set directions for his removal from the UK and he was detained pending removal. He applied unsuccessfully for judicial review but he was not in fact removed from the UK.

5. On 23 February 2009 the Respondent authorised the Appellant's temporary admission to the UK with a restriction that he was not allowed to work. He applied to remain as a Tier 2 worker but that application was refused in September 2009. Following the rejection of his submissions in support of a fresh asylum claim on 18 December 2009, the Appellant accepts that he continued to work despite knowing that he was prohibited from doing so.

6. On 27 January 2010 the Appellant was removed to Lebanon.

7. The Appellant returned to the UK in 2012, with the Respondent's leave, as the fiancé of a British citizen. He then got married. On 10 September 2014 the Respondent granted the Appellant indefinite leave to remain in the UK as the spouse of a British citizen, and on 15 June 2015 the Appellant applied for naturalisation. This was refused by the Respondent on 20 January 2016 on the basis that the Appellant did not meet the requirement of "good character", as he had not complied with UK immigration laws in the 10 year period prior to the date of application. This was because he had remained in the UK without valid leave between 20 November 2007 and 27 January 2010, and had worked without permission during that time.

8. On 18 April 2016 the Appellant's advisers at the time, Good Advice UK, wrote to the Respondent requesting reconsideration of the decision to refuse

naturalisation. On 13 December 2016 the Respondent wrote to them maintaining the original decision.

Material Legislation

9. Section 6 of the British Nationality Act 1981 ("the 1981 Act") provides:

> " (1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.
>
> (2) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen or is the civil partner of a British citizen, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."

10. It is section 6(2) which is of direct relevance in the present case, as the Appellant's application for naturalisation was made on the basis of his marriage to a British citizen.

11. Schedule 1 to the 1981 Act, so far as material, provides:

> "1. Subject to paragraph 2, the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it –
>
> (a) the requirements specified in sub-paragraph (2) of this paragraph, or the alternative requirement specified in sub-paragraph (3) of this paragraph; and
>
> (b) that he is of good character; and
>
> (c) that he has a sufficient knowledge of the English, Welsh or Scottish Gaelic language; and
>
> (ca) that he has sufficient knowledge about life in the United Kingdom.
>
> …

> 3. Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it –
>
> (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and
>
> (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and
>
> (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and
>
> (d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and
>
> (e) the requirements specified in paragraph 1(1)(b), (c) and (ca)."

12. The reference back to paragraph 1(1)(b) means that an applicant must be of "good character."

13. By paragraph 4 the Secretary of State is given discretion to waive certain of these requirements. However, she does not have that discretion in relation to the requirement that an applicant must be of good character.

14. Section 50A of the 1981 Act, as amended by the Borders, Citizenship and Immigration Act 2009, section 48, provides as follows:

> "(1) This section applies for the construction of a reference to being in the United Kingdom 'in breach of the immigration laws' in – …
>
> (c) Schedule 1.
>
> (2) It applies only for the purpose of determining on or after the relevant day – …
>
> (c) whether, on an application under section 6(1) or (2) made on or after the relevant day, the applicant fulfils the requirements of Schedule 1 for naturalisation as a British citizen under section 6(1) or (2).
>
> …

> (4) A person is in the United Kingdom in breach of the immigration laws if (and only if) the person –
>
> (a) is in the United Kingdom;
>
> (b) does not have the right of abode in the United Kingdom within the meaning of section 2 of the Immigration Act 1971;
>
> (c) does not have leave to enter or remain in the United Kingdom (whether or not the person previously had leave);
>
> (d) does not have a qualifying CTA (common travel area) entitlement;
>
> (e) is not entitled to reside in the United Kingdom by virtue of any provision made under section 2(2) of the European Communities Act 1972 …"

15. There was a similar provision which was first introduced in section 11 of the Nationality, Immigration and Asylum Act 2002.

The policy under challenge

16. The Appellant's challenge is to the following paragraph at Annex D to the Nationality Instructions issued by the Secretary of State to her officials:

> "9.7 Evasion of immigration control
>
> The decision maker will normally refuse an application if within the 10 years preceding the application the person has not been compliant with immigration requirements, including but not limited to having:
>
> a. failed to report
>
> b. failed to comply with any conditions imposed under the Immigration Acts
>
> c. been detected working in the UK without permission."

The Decision of the High Court

17. The claim for judicial review was dismissed by Mr Rhodri Price Lewis QC, sitting as a Deputy Judge of the High Court. He held that the Secretary of State

has a wide discretion to decide whether an applicant is of good character before granting a certificate of naturalisation. Consequently, she was lawfully entitled to adopt the policy in paragraph 9.7 of Annex D to the Nationality Instructions, and to apply it to the Appellant's circumstances.

18. The Deputy Judge considered that the statutory regime established by the 1981 Act contemplates two separate requirements: (i) that the applicant should have lawfully resided in the UK for the requisite periods, and (ii) that he should be of good character. The requirement in Schedule 1, paragraph 3(d), that an applicant should not have been in breach of the immigration laws during the three years before his application is part of the lawful residence requirement found in paragraphs 3(a) to (d). The requirement that he should be of good character is a separate requirement to be found in paragraph 3(e), referring back to paragraph 1(1)(b).

19. Relying on *R v Secretary of State for the Home Department, ex parte Fayed* [2001] Imm AR 134, the Deputy Judge held that the Respondent has a broad discretion in that matter. It was within that broad discretion to decide that, as a matter of policy, she will normally consider an applicant who has not complied with immigration requirements in the 10 years before his application to be not of good character. The Deputy Judge noted that this did not render the part of the lawful residence requirement in Schedule 1, paragraph 3(d), otiose, as it is a separate and different requirement.

Grounds of Appeal

20. The Appellant has submitted three grounds of appeal. However, the first is an introductory paragraph which does not contain a ground, and the second and third grounds address the same issue of whether the Secretary of State's policy in relation to "good character" conflicts with the requirements of the 1981 Act. In essence, the Appellant submits that the policy goes beyond what is permitted by the 1981 Act in defining "good character" and as a result is *ultra vires*.

Submissions of the Parties

21. On behalf of the Appellant Mr Nathan submits that the Deputy Judge erred in refusing the application for judicial review, as he should have found that the Respondent's policy is *ultra vires* the 1981 Act. The Act states at paragraph 3(d) of Schedule 1 that for an individual to qualify for naturalisation he or she must not have been "in breach of the immigration laws" for the three years preceding the date of application. The Respondent's "good character policy" outlined in paragraph 9.7 of Annex D to the Nationality Instructions, extends the qualifying period to 10 years. In doing so, the Respondent has rendered otiose the specific provisions of the enabling Act and as a result paragraph 9.7 is *ultra vires*.

22. On behalf of the Respondent Mr Chapman submits that the policy is not *ultra vires* the 1981 Act as the policy concerns the statutory "good character" requirement, which is distinct from the three-year lawful residence requirement. The Respondent retains a broad discretion to determine what good character should mean in this context.

23. Mr Chapman further submits that the statutory regime permits but does not mandate the grant of naturalisation where the eligibility requirements are fulfilled. The Secretary of State always has a discretion. A policy which imposes more onerous standards than the minimum eligibility requirements of the Act itself cannot be *ultra vires* for that reason.

Analysis

24. At the hearing before this Court Mr Nathan accepted that the Secretary of State has a broad discretion to define the concept of "good character". In *R v Secretary of State for the Home Department, ex parte Fayed* [2001] Imm AR 134 Nourse LJ observed, at para. 41:

> "In *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, 773F-G, Lord Woolf MR referred in passing to the requirement of good character as being rather a nebulous one. By that he meant that good character is a concept that cannot be defined as a single standard to which all rational beings would subscribe. He did not mean that it was incapable of definition by a reasonable decision-maker in relation to the circumstances of a particular case. Nor is it an objection that a decision may be based on a higher standard of good character than other reasonable decision-makers might have adopted. Certainly, it is no part of the function of the court to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances."

25. In similar vein, in *R (DA (Iran)) v Secretary of State for the Home Department* [2014] EWCA Civ 654, Pitchford LJ noted, at para. 4, that:

> "The parties are in agreement that the Secretary of State enjoys a significant measure of appreciation in assessing for herself the requisite standard of good character in the factual context of the application under consideration."

26. It is also common ground that in principle the court has jurisdiction to quash a governmental policy on the ground that it is *ultra vires*. In *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, at p.349, it was said by Lord Morris of Borth-y-Gest that:

> " …whereas the courts of law could not declare an Act of Parliament was *ultra vires* it might be possible for the courts to declare the making of an order (even though affirmatively approved by Parliament) was not warranted within the terms of the statutory enactments from which it purported to derive its validity. In the statutes to which I have referred Parliament gave the power to the executive to make certain orders: any order must, however, be within the mandate given by Parliament."

Mr Nathan submits that if that dictum applies to an order approved by Parliament then it must apply all the more so to a policy such as that under challenge in this case. He submits that the policy is not "within the mandate given by Parliament."

27. The Appellant invokes the doctrine of substantive *ultra vires*. Although the parties were unable to identify any previous decision which is directly on point, some assistance can be derived from principles which are to be found in authorities in related contexts.

28. In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, it was held that regulations which had been made could be held to be unlawful if they contravened "the express or implied requirements of a statute": see p. 292 (Simon Brown LJ). At p. 293, Waite LJ said that the principle was undisputed that:

> "Subsidiary legislation must not only be within the *vires* of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation."

In my view, the same principle would apply to subsidiary legislation which is in conflict with statutory rights conferred by the same primary legislation under which the subsidiary legislation is made. A fundamental point of principle is that subsidiary legislation will be *ultra vires* if it seeks to cut down or negate rights which have been created by primary legislation. The same would also apply to a governmental policy, which does not have the force of legislation. This is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament.

29. A similar principle can be seen to be at work in the decision of the Supreme Court in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208. In that case the issue was whether the Secretary of State could include in a policy or guidance matters which as a matter of law ought to have been included in immigration rules properly so called, which had to be laid before Parliament under section 3(2) of the Immigration Act 1971. Although different members of the Court expressed themselves in slightly different ways, the essential principle enunciated by the Supreme Court can be found succinctly expressed by Lord Dyson JSC at para. 94:

> "… any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2). That is what Parliament was interested in when it enacted section 3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined."

30. The structure of the legislative provisions in the 1981 Act (which have been amended subsequently but not in a material way) was considered by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763. Lord Woolf MR gave the main judgment for the majority, with Phillips LJ concurring; Kennedy LJ dissented. At p.770, after setting out the relevant legislative provisions, Lord Woolf said:

> "It will be noted that, unlike the position as to the other express requirements in paragraph 1(1) the Secretary of State has no express power to dispense with the requirement as to good character under paragraph 2."

Later on the same page he again made the point that:

> "the Secretary of State has no discretion to grant an application to a person who is not of good character".

31. In my view, and consistent with the approach taken by this Court in that case, the correct analysis of the structure of the relevant legislative provisions is as follows. First, the minimum statutory conditions must be satisfied before the Secretary of State has any power to grant naturalisation: for example, the residence requirements for the relevant period must be met. It may be possible for some of those requirements to be waived by the Secretary of State. Secondly, the Secretary of State must be satisfied that the applicant is a person of good character. This is not strictly speaking an exercise in discretion. Rather it is an exercise in assessment or evaluation. Importantly, the Secretary of State has no discretion to waive this requirement of good character. Thirdly, and only if the earlier conditions are met, there arises a true discretion, at which stage the Secretary of State "may" but is not required to grant the application for naturalisation.

32. In the present context it was submitted by Mr Nathan on behalf of the Appellant that what Parliament has done in enacting the relevant legislation is to "carve out" a subset of the larger concept of "good character" which consists of breach of the immigration laws. He submits that as a matter of law it was not open to the Secretary of State to introduce by way of a policy an additional period going beyond the three-year (or where relevant five-year) period which has been laid down by Parliament itself.

33. There are two fundamental difficulties with that submission.

34. The first arises from the terms of section 50A of the 1981 Act. It will be apparent that section 50A provides an exhaustive definition of the phrase "in breach of the immigration laws" for the purpose of Schedule 1 to the 1981 Act. It will also be seen that the definition of that phrase is a relatively narrow one. For present purposes it would cover a person who is in the UK but does not have leave to enter or remain. That narrow definition would not therefore include a person who has leave but does something in contravention of a condition attached to that leave such as working in the UK without permission.

35. It follows that the only way in which the Secretary of State could have regard to the fact that somebody had contravened a condition attached to his leave to enter or remain, for example by working in the UK when he had no permission to do so, would be under the rubric of "good character" and not by reference to the concept of being "in breach of the immigration laws."

36. It is for that reason that Mr Nathan now accepts (in written submissions filed after the hearing before this Court) that this appeal cannot succeed.

37. Nevertheless, since we heard full argument on the issue raised by the appeal, I would reject the submissions advanced by Mr Nathan at the hearing before us in any event. I turn therefore to the second fundamental difficulty with Mr Nathan's submission. If he were correct it would mean that the Secretary of State would not be entitled to have any regard to a fact which would, on any reasonable view, be relevant to her assessment of whether a person is indeed of good character. This would be so irrespective of whether or not she has a policy in place.

38. In this context, it is worth bearing in mind that many if not all breaches of immigration controls will constitute criminal offences. This is the effect of section 24 of the Immigration Act 1971, which, so far as material, provides:

> "(1) A person who is not a British citizen shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5 on the standard scale or with imprisonment for not more than 6 months, or with both, in any of the following cases: –
>
> > (a) if contrary to this Act he knowingly enters the United Kingdom in breach of a deportation order or without leave; …
> >
> > (b) if, having only a limited leave to enter or remain in the United Kingdom, he knowingly either –
> >
> > > (i) remains beyond the time limited by the leave; or
> > >
> > > (ii) fails to observe a condition of the leave; …"

39. As Mr Nathan accepted during the course of the hearing before this Court, the Secretary of State would not be entitled, on his submission, to have any regard to the fact that a person had been in breach of the immigration rules (for example) seven years before the application for naturalisation. That would be so, he submits, even in a case where serious criminal conduct had taken place at that time, for example engagement by the applicant in a large-scale conspiracy to evade immigration controls, for example by facilitating sham marriages.

40. In my view, there is no warrant in the relevant legislation for that interpretation to be adopted. The correct analysis of the legislation is as follows. First, there are certain minimum statutory criteria which must be satisfied before a valid application for naturalisation can be considered at all. Some of these requirements laid down by Parliament can be modified or waived by the Secretary of State but the requirement of good character cannot be, as Lord Woolf made clear in *ex parte Fayed*. Although those requirements laid down by Parliament are statutory minimum requirements, there is no reason in law why the Secretary of State cannot impose an additional or extended requirement relating to breach of immigration laws as properly being a matter which is relevant to the more general question of good character. As I have already mentioned, that requires an assessment or evaluation by the Secretary of State of all the relevant circumstances going to that issue.

41. This is not to cut down or negate any rights which have been conferred by primary legislation. As I have already noted, the legislative provisions do not create a right to naturalisation even where the statutory requirements are met. There is always still a discretion vested in the Secretary of State.

Post-hearing developments

42. At the end of the hearing before this Court, Mr Nathan was granted permission to file brief written submissions in response to a question from Haddon-Cave LJ. Permission was also given to the Respondent to file a brief written reply. In due course short extensions for such submissions were requested and granted.

43. In the meantime Mr Nathan and his instructing solicitors came to the view that the provisions of section 50A of the 1981 Act were fatal to the ground of appeal which they had advanced. Mr Nathan wrote to the Court on 4 November 2019 to inform it that he considered his submissions to be "untenable". He was right to do so.

44. In the next few days the Appellant dispensed with the services of his legal representatives and purported to act in person. Initially his solicitors remained on the record. The Appellant then filed an appropriate form, Form N434, and his solicitors came off the record. He also filed written representations in relation to the meaning of "breach of the immigration laws" in paragraph 2(1) of Schedule 1 to the 1981 Act; a request that Mr Nathan's written submissions of 4 November 2019 should be taken into consideration by this Court (which

they have been); further submissions in relation to his work in the UK and why he should not be treated as having breached the immigration laws; and documents relating to his mother's ill-health.

45. I have taken into consideration only such matters in those further submissions as are relevant to the legal issues before this Court on this appeal. They do not lead me to reach a different conclusion from the one which I would have reached in any event on the basis of the oral argument and the brief written submissions filed by Mr Nathan and by Mr Chapman on behalf of the Respondent.

Conclusion

46. For the reasons I have given I would dismiss this appeal.

Lord Justice Haddon-Cave:

47. I agree.

Lord Justice Flaux:

48. I also agree.