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Case No: CO/979/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

Before:

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

Claimant

HUBERT HOWARD
(deceased, substituted by MARESHA HOWARD ROSE pursuant to CPR 19.2(4) and PD19A)

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

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- -

PHILLIPPA KAUFMANN QC & GRACE BROWN (instructed by Deighton Pierce Glynn) **for the Claimant**
SIR JAMES EADIE QC & DAVID BLUNDELL QC (instructed by Government Legal Department) **for the Defendant**

Hearing dates: 10 and 17 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 23 April 2021.

MR. JUSTICE SWIFT

A. Introduction

1. Hubert Howard was born in Jamaica in December 1956. In November 1960 he arrived in the United Kingdom. He lived here until his death in November 2019. By virtue of provisions in the British Nationality Act 1948, when Mr Howard was born he was a citizen of the United Kingdom and Colonies. With effect from 5 August 1962 when Jamaica gained independence, he became a Jamaican national. This was in consequence of section 3 of the 1962 Jamaica Constitution[1]. At the same time, and by virtue of section 2 of the Jamaica Independence Act 1962, Mr Howard ceased to be a citizen of the United Kingdom and Colonies and became instead a "Commonwealth citizen". (Under section 1 of the British Nationality Act 1948 the terms "Commonwealth citizen" and "British subject" had the same meaning). By virtue of being a Commonwealth citizen, Mr Howard came within the scope of section 6 of the British Nationality Act 1948. This permitted him to apply to be registered as a citizen of the United Kingdom and Colonies. Such an application would succeed if the Home Secretary was satisfied that the applicant was ordinarily resident in the United Kingdom and had been ordinarily resident continually for twelve months. No such application was made either by Mr Howard or on his behalf.

2. The next relevant piece of legislation is the Immigration Act 1971 ("the 1971 Act"). Section 1(1) of the 1971Act distinguishes between persons who have a right of abode in the United Kingdom and those who do not. Persons having the right of abode:

> "…shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as maybe otherwise lawfully imposed on any person."

Persons without the right of abode are allowed to "live, work and settle in the United Kingdom" only with permission and always subject to regulation and control imposed under 1971 Act. Two further parts of section 1 of the 1971 Act are material. Section 1(2) refers to indefinite leave to remain stating

> "(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain)."

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[1] Mr Howard retained his Jamaican nationality at all times after August 1962.

Section 1(5) (in force until repealed by the Immigration Act 1988) required rules to be made specifically for Commonwealth citizens

> "(5) The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed."

Thus, although Mr Howard did not have a right of abode in the United Kingdom he had a right to remain in the United Kingdom.

3. The 1971 Act modified the right for Commonwealth citizens to apply to be registered as citizens of the United Kingdom and Colonies. Following the 1971 Act, the Home Secretary had to be satisfied that such an applicant had been ordinarily resident in the United Kingdom at the date of his application "…throughout the last five years or, if it is more than five years, throughout the period since the coming into force of [the 1971 Act] without being subject, by virtue of any law relating to immigration or any restriction on the period for which [the applicant] might remain": see paragraph 2 of Schedule 1 to the 1971 Act. Mr Howard did not make an application for registration as a citizen of the United Kingdom and Colonies under the provisions of the 1971 Act.

4. The legislative arrangements for registration changed again with the British Nationality Act 1981. Paragraph 2 of Schedule 1 to the 1971 Act was repealed. However, by section 7(1) of the 1981 Act applications that met the paragraph 2 Schedule 1 requirements could still be made within 5 years of 1 January 1983. If such an application succeeded the person would be registered as a British citizen. Mr Howard did not make an application during the permitted period.

5. With effect from 1 January 1988 when this right of application lapsed, Mr Howard and others whose circumstances were similar lost the opportunity to gain British citizenship by application. From this time the route to British citizenship was by application for naturalisation as a British citizen under section 6 of the 1981 Act.

6. The focus of these proceedings is the Home Secretary's decision in November 2018 to refuse Mr Howard's application for naturalisation as a British citizen. That application post-dated the statement by the Home Secretary (Ms Amber Rudd) in the House of Commons on 23 April 2018 ("the Windrush statement"). In that statement the Home Secretary accepted that some of the ways in which the Home Office had applied immigration rules aimed at combating illegal immigration had disadvantaged the "Windrush generation", the generation of Commonwealth immigrants who had come to the United Kingdom from the late 1940's to the early 1970's, many of whom had not thought it necessary to obtain formal documentation to record the right to remain in the United Kingdom they had under section 1(2) of the 1971 Act.

7. That being so, this case is directed to the legality of arrangements put in place following the Windrush statement. Nevertheless, the evidence advanced for Mr Howard in this case includes evidence that he too had difficulty when prior to 2018, he sought obtain to obtain formal documentation that evidenced his right to remain and right to work in the United Kingdom, and had suffered disadvantage in consequence. In 2007 and 2010 Mr Howard made applications to obtain a United Kingdom passport. Each application

failed because Mr Howard was not a British citizen. In February 2012 he was told that if he wished to obtain British citizenship he would first need to apply for indefinite leave to remain in the United Kingdom and if successful in that application could then apply under section 6 of the 1981 Act once he could demonstrate the required period of lawful residence in the United Kingdom. In 2012 Mr Howard lost his job as a caretaker with the Peabody Trust. He had been employed by the Trust since 2003. In a letter dated 28 November 2018 the Trust's Director of Human Resources, Alison Henderson described Mr Howard as "reliable, hardworking and diligent in carrying out his duties" but explained that "following an inspection by the Immigration Services in 2012 … [he] was unable to produce a passport and we had to let him go".

8. In June 2014 solicitors acting for Mr Howard made what is referred to as a "No Time Limit Application". This is an application by which persons who already have indefinite leave to remain can obtain a biometric resident permit. The application was supported by copies of various documents going back to 1965 which evidenced Mr Howard's presence in the United Kingdom. In August 2014 Mr Howard was asked to provide the original versions of the documents submitted with the application and to provide additional information. The letter explained that for each year of residence in the United Kingdom he had to provide at least one piece of evidence demonstrating that residence. Thus, for Mr Howard, this meant that he had to have documentary evidence of his residence in the United Kingdom in each year since 1960. He was asked to provide the information within 14 days. On 26 October 2014 the Home Office wrote noting it had not received the evidence requested. The letter continued as follows:

> "As we have not received this evidence from you, your client's application has been considered on the evidence provided with the original application.
>
> Your client is unable to demonstrate that they have been continuously resident in the UK, since being granted settled status and as a result, the Secretary of State is not satisfied that your client is entitled to NTL endorsement and therefore their application has been refused.
>
> As fully explained on page 2 of the guidance notes for the NTL form your client's application fee has been retained by UKVI as we do not refund the fee paid for a refused NTL application.
>
> Your client should note that a fresh application can be made at any time but an application received without the above evidence is unlikely to be successful."

9. Following the Windrush statement in the House of Commons in April 2018, Mr Howard applied again to establish his right to remain in the United Kingdom. By letter dated 10 May 2018 he was informed that his application had been successful and that the Home Office now accepted that he had obtained indefinite leave to remain on 1 January 1973 (i.e. the date the 1971 Act came into force).

10. Mr Howard then applied under section 6 of the 1981 Act to acquire British citizenship by naturalisation. That application has been the subject of four separate decisions. The first decision is in a letter dated 5 November 2018. This refused his application for naturalisation on the ground he did not meet the good character requirement. The letter explained as follows:

> "You have been convicted of a number of criminal offences. In particular, on June 2018 East London Magistrates Court you were convicted of common assault for which you received a 12-month suspended sentence.
>
> Citizenship would not normally be granted where an individual had received non-custodial sentence or other out of court disposal which is recorded on their criminal record in their last three years.
>
> We would normally only exercise discretion in exceptional circumstance where there was strong positive evidence of good character which would outweigh criminal convictions, and the person had not been convicted of an offence in the last 12 months. We have reviewed your application and no evidence has been submitted in support of your good character. We do not consider there to be any such exceptional circumstances in your case, and because of the seriousness of the offences, discretion has not been exercised.
>
> In light of your criminal conviction, an application for citizenship made before 15 June 2021 is unlikely to succeed. It is open to you to re-apply for citizenship for free under the Windrush Scheme at any time, but before you submit a further application you should ensure that you meet all of their requirements."

The letter did make clear that this decision did not affect the grant of indefinite leave to remain in the United Kingdom.

11. With the help of his MP, Mr Howard requested the decision be reviewed. The review decision, which upheld the November 2018 decision, was set out in a letter dated 3 December 2018. The material part of the letter said this.

> "In your MP's email of 27 November 2018, Diane Abbott made representations that you were "taken aback" by the Windrush Task Force decision to refuse your naturalisation because of the rhetoric used by the Home Secretary and the members of the Government referring to the Windrush generation as "British Citizens". She went on to express your concern that if the Windrush generation are British citizens, you were British at the point you committed the crimes referred to in your response and citizenship would not normally be revoked on these grounds. Furthermore, you instructed your MP you are a reformed character.

> I have looked at this carefully, however, this does not change the original decision because.
>
> - Although you have objected to your disqualification from British citizenship for three years due to your conviction on 15 June 2018 for common assault, and the accompanying 12 months suspended sentence, it is highlighted that you were still convicted of the offence detailed above. Published Home Office guidance (Annex D, Chapter 18) explains that those convicted and given a non-custodial sentence of 12 months (in your case suspended, however, that makes no difference) will not be considered as rehabilitated for three years and that they will, therefore, not usually be granted British citizenship. It is open to you to reapply for British citizenship when that period of rehabilitation has expired on 15 June 2021
>
> - It was outlined in the refusal letter that discretion can be exercised in relation to the good character requirement in exceptional circumstances, where evidence demonstrates that strong positive evidence of good character outweighs any criminal convictions and where there have been no further criminal convictions in the last year. It is the case that your conviction was in June of this year which means you cannot be considered for discretion as this is too recent. Furthermore, although you have stated that you are a reformed character you have not supplied any strong positive evidence of this which could be considered exceptional or sufficient to deviate from the published guidance. It is open to you to reapply for British Citizenship when that period of rehabilitation has expired.
>
> - Your belief that, at the point of committing your crime, you were British because of the referral to Windrush citizens as having such status, and that in those circumstance this would not normally be deprived is mistaken. British citizenship cannot be applied retrospectively, and you had not applied for this status prior to your conviction."

12. On 23 May 2019 the Home Office wrote again. This letter followed the Claim Form in these proceedings which had been filed on 5 April 2019. The Home Office withdrew its decision of 3 December 2018 and replaced it with a fresh decision which also refused Mr Howard's application for naturalisation. This time more extensive reasons were provided

> "It was detailed in the decision of 5 November 2018 that you do not meet the requirements for naturalisation as a British Citizen as you do not meet the good character requirement. This is because you have been convicted of a number of criminal offences, and in particular because you were convicted on 15

June 2018 at East London Magistrates Court of common assault. You received a 12-month prison sentence that was wholly suspended for 12 months. Your previous criminal convictions include:

- Three convictions for burglary and theft between 23 April 1974 and 14 September 1977 which resulted in Probation Orders being issued against you.

- Three convictions of possession of class B drug between 9 October 1984 and 5 December 1988 which resulted in fines being issued against you.

- A conviction for using threatening, abuse and insulting language on 2 May 2000 which resulted in a Probation Order being issued against you.

I am satisfied that this decision was made correctly. The Home Office policy guidance document at the time of the decision dated 5 November 2018, *Nationality Policy: Good Character Requirement*, published on 23 April 2018, detailed how Home Office staff should apply the Good Character requirement to naturalisation applications. The document detailed that having a criminal record does not necessarily mean that an application will be refused. However, a person who has not shown respect for or is not prepared to abide by the law, is unlikely to be considered of good character. The document further details that a suspended prison sentence must be treated as a non-custodial sentence.

As detailed in the letter dated 3 November 2018, Citizenship would not normally be granted where an individual has received a non-custodial sentence or other out of court disposal which is recorded on their criminal record in the last three years.

I have carefully considered whether it is appropriate to exercise discretion in your case. Discretion would normally be only exercised in exceptional circumstances where there are strong factors which suggest the person is of good character in all other regards so the decision to refuse would be disproportionate. I have taken in account and attach significant weight to the fact that you came to the UK in 1960 when you are 3 years old have lived here for around 59 years. You have always lived in the UK lawfully and entitled to remain here pursuant to your indefinite leave to remain. I also note you have previously attempted to obtain confirmation of your indefinite leave to remain and have faced difficulties because of the uncertainty as to the evidence of your immigration status. However, despite all these matters, I have come to the conclusion that your application for British citizenship should be refused on account of your criminal record. I do not consider that there are sufficient mitigating

circumstances which means it would be appropriate to exercise discretion and grant you citizenship. I appreciate that you may have faced significant difficulties during the time when you were seeking to evidence to entitlement to indefinite leave to remain in the UK. In this respect, I have carefully considered your experiences that were reported and are quoted at paragraphs 5.1.36 to 38 of the letter written on your behalf by your solicitors on 25 February 2019. Your disappointment is understandable. However, in all the circumstances, those matters do not justify an exercise of discretion in your favour.

I understand your concern that you considered yourself to be British at the point at which you committed the crimes referred above and British citizenship would not normally be revoked on these grounds. However, although you had indefinite leave to remain when you committed these crimes and were lawfully residing in the UK you were not a British citizen. British citizenship cannot be applied or granted retrospectively. Although your belief and concern is understandable, it is not a sufficient reason to exercise discretion in your favour and disregard your criminal convictions for the purpose of granting citizenship.

The decision to refuse citizenship is based on the consideration of your criminal convictions. There is no other adverse reason. You are not being treated differently from any other person who is in your position and who has similar criminal convictions. In making this decision, I have not had regard to your race or current citizenship. Those matters are to no relevance to my assessment. It is not discriminatory to refuse you citizenship because of your criminal convictions.

I recognise the need to have due regard to the elimination of discrimination, harassment, victimisation and any other prohibited conduct. I also take account of the need to advance equality of opportunity between persons that share a relevant protected characteristic and persons who do not share it and foster good relationship between such persons. However, despite having due regards to these matters, for the reasons given in this letter, the refusal of your citizenship application on the grounds of your criminal convictions is justified, appropriate and proportionate. Looking at everything at in the round this is not case where criminal convictions should be disregarded in the exercise of discretion.

I have also considered your right to have respect for your private and family life under Article 8 of the ECHR. As noted above, you have indefinite leave to remain in the UK and are entitled to reside and work here without any restrictions. The refusal of your citizenship application does not engage Article 8(1) of the ECHR. In any event, for the reasons given above, even if Article

> 8(1) is engaged, the refusal of your application on the ground of your criminal conviction is justified and proportionate under Article 8(2) of the ECHR.
>
> As detailed in the letter dated 3 November 2018, in light of your criminal convictions, an application your citizenship made before 15 June 2021 is unlikely to succeed. It is open to you to reapply after that date.
>
> I have reviewed the decision made on your case, and I am satisfied that your case has been considered correctly."

13. Put shortly, Mr Howard's application for naturalisation was refused on the basis of his criminal record: three convictions between 1974 and 1977 each of which had resulted in a Probation Order; three convictions relating to Class B drugs between 1984 and 1988 each of which had resulted in a fine; a conviction in 2000 for an offence under the Public Order Act which had been addressed by imposition of a further Probation Order; and the June 2018 offence which had resulted in the 12-month suspended sentence. As the letter put it, there were no "sufficient mitigating circumstances which means it would be appropriate to exercise discretion and grant … citizenship".

14. On 16 October 2019, six months later, the Home Office wrote explaining it had reviewed Mr Howard's case and had "on an exceptional basis" granted Mr Howard's application for naturalisation. Mr Howard had suffered from leukaemia since 2014. By October 2019 he was very seriously ill. He died on 12 November 2019. By an Order made on 11 February 2020 pursuant to CPR 19.2 Mr Howard's daughter was substituted as the Claimant in these proceedings.

B. Decision

15. The premise for the Claimant's challenge is the Windrush Scheme established by the Home Secretary consequent on the Windrush statement made in April 2018. The material parts of that statement were as follows

> "From the late 1940s to the early 1970s, many people came to this country from around the Commonwealth to make their lives here and to rebuild Britain after the war. All members will have seen the recent heart-breaking stories of individuals who have been in the country for decades struggling to navigate an immigration system in a way that they should never, ever have had to.
>
> These people worked here for decades. In many cases, they helped establish the national health service. They paid their taxes and enriched our culture. They are British in all but legal status, and this should never have been allowed to happen.

> … Since 1973, many of the Windrush generation would have obtained documentation confirming their status or would have applied for citizenship and then a British passport.
>
> From the 1980s, successive Governments have introduced measures to combat illegal immigration. …
>
> … But steps intended to combat illegal migration have had an unintended, and sometimes devastating, impact on people from the Windrush generation, who are here legally, but who have struggled to get the documentation to prove their status. This is a failure by successive Governments to ensure these individuals have the documentation they need.
>
> This is why we must urgently put it right, because it is abundantly clear that everyone considers people who came in the Windrush generation to be British, but under the current rules this is not the case. Some people will still just have indefinite leave to remain, which means they cannot leave the UK for more than two years and are not eligible for a British passport. That is the main reason we have seen the distressing stories of people leaving the UK more than a decade ago and not being able to re-enter.
>
> I want the Windrush generation to acquire the status they deserve – British citizenship – quickly, and at no cost and with proactive assistance through the process. First, I will waive the citizenship fee for anyone in the Windrush generation who wishes to apply for citizenship. This applies to those who have no current documentation, and also to those who have it. Secondly, I will waive the requirement to carry out a knowledge of language and life in the UK test.
>
> Thirdly, the children of the Windrush generation who are in the UK are in most cases British citizens. However, where that is not the case and they need to apply for naturalisation, I shall waive the fee. Fourthly, I will ensure that those who made their lives here but have now retired to their country of origin can come back to the UK. Again, I will waive the cost of any fees associated with the process and will work with our embassies and High Commissions to make sure such people can easily access this offer. In effect, that means anyone from the Windrush generation who now wants to become a British citizen will be able to do so, and that builds on the steps that I have already taken. …
>
> … We were too slow to realise that there was a group of people that needed to be treated differently, and the system was too bureaucratic when these people were in touch. …"

16. These parts of the statement recognised difficulties faced by members of the Windrush generation in obtaining British citizenship. The Home Secretary announced a number of measures aimed at making it easier for the Windrush generation to obtain British citizenship. The Claimant's submission is that these measures failed to go far enough in that they did not either remove or modify what is referred to as the "good character" requirement (under paragraph 1 of Schedule 1 to the 1981 Act). The Claimant contends the failure to remove the good character requirement amounts to unlawful discrimination contrary to ECHR article 14 when read together with article 8. Alternatively, she submits that the approach to the application of the good character requirement evident in the decisions of 5 November 2018, 3 December 2018 and 23 May 2019 to refuse his application for British citizenship was, in light of matters stated in the Windrush statement, unlawful at common law.

17. The measures announced in the Windrush statement should be considered in the context of the provisions of the 1981 Act which set the rules by which a person may obtain a certificate of naturalisation as a British citizen. By section 6(1) of the 1981 Act the Home Secretary may grant an application for naturalisation as a British citizen if the applicant meets the requirements in Schedule 1 to the 1981 Act. Five criteria must be met. The applicant must: (a) meet a requirement of residence in the United Kingdom or service in the Crown service outside the United Kingdom; (b) be "of good character"; (c) have "sufficient knowledge of English, Welsh or Scottish Gaelic Language"; (d) have "sufficient knowledge of life in the United Kingdom": and (e) intend if the application succeeds to make the United Kingdom his home or principal home or continue in Crown service. See generally, paragraph 1 of Schedule 1 of the 1981 Act.

18. By section 41 of the 1981 Act the Home Secretary has the power to make regulations "generally for carrying into effect the purposes of this Act", including for a range of stated purposes which include determining whether a person meets the requirement for sufficient knowledge of language and of life in the United Kingdom. The relevant regulations are the British Nationality (General) Regulations 2003 ("the 2003 Regulations"). With effect from 30 May 2018, the 2003 Regulations were amended to provide that "relevant pre-1973 entrants" were to be regarded as meeting the requirements for the sufficient knowledge of language and of life in the United Kingdom. "Relevant pre-1973 entrant" is defined at regulation 5A(4) to (6) of the 2003 Regulations; put generally, the definition includes persons such as Mr Howard who were nationals of listed Commonwealth countries who had permission to remain in the United Kingdom under section 1(2) of the 1971 Act.

(1) The Convention rights discrimination claim

19. The Claimant's submission is directed to the failure to dis-apply the good character requirement when deciding Mr Howard's application for naturalisation as a British citizen. The Claimant submits that this amounts to unlawful discrimination contrary to article 14 in respect of of Mr Howard's article 8 rights on the basis of a relevant "other status" – i.e., that Mr Howard was one of the Windrush generation. For the purposes of submissions in this case the shorthand "Windrush generation" is used to capture all those who had a right to remain in the United Kingdom by virtue of section 1(2) of the 1971 Act who, prior to 1 January 1988, could have obtained British nationality by registration. I accept that this class identified by those statutory provisions is a group that has a relevant article 14 "other status".

20. In the alternative, the Claimant sought to put the article 14 discrimination claim as a claim of discrimination on grounds of race. I do not consider this formulation of the claim fits the circumstances of this case. The complaint is directed to the treatment of the Windrush generation. Analysis of the complaint as a claim of race discrimination is not a good fit with the error alleged to have occurred. The good character requirement is applied to all non-United Kingdom nationals who apply to obtain British citizenship by naturalisation. Moreover, as applied to that class, the good character requirement is one that is justifiable and justified. Possible problems with its application only emerge in the specific context to its application to the Windrush generation, the group that prior to 1 January 1988 could have obtained British citizenship by registration and without consideration of a good character requirement. For these reasons, I will consider the article 14 claim by reference to Mr Howard's other status as a member of the Windrush generation rather than on the basis of race.

21. The Claimant submits that the Windrush group was in a materially different position than other non-United Kingdom nationals applying for British citizenship, such that the failure to disapply the good character requirement amounted to unlawful indirect discrimination contrary to the principles stated by the European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 15 at paragraph 44 (failure without objective and reasonable justification to treat differently persons whose situations are significantly different).

22. I do not consider this claim to be viable in law. It is important to recognise that the Claimant's case is directed to the decision to refuse Mr Howard's application for naturalisation as a British citizen, not to the legality of the requirement at paragraph 1(1)(b) of Schedule 1 to the 1981 Act that applicants for naturalisation as British citizens be of good character. Section 6(2) of the Human Rights Act 1998 provides a complete answer to that claim. When deciding Mr Howard's application, the Home Secretary had no option but to make the decision by applying section 6 of and Schedule 1 to the 1981 Act. The Home Secretary had to apply a good character requirement.

23. The Claimant seeks to escape this conclusion by contending that the interpretive power at section 3 of the 1998 Act could be applied to paragraph 1(1)(b) of Schedule 1 to the 1981 Act so as to disapply the good character requirement to any person who could prior to 1 January 1988 have taken advantage of the opportunity to acquire British nationality by registration. The section 3 power of interpretation is strong but not unlimited; its limit has been identified by asking whether the interpretation contended for is consistent with the grain or underlying thrust of the legislation. The proviso the Claimant says could and should be read-in to paragraph 1(1)(b) of Schedule 1 to the 1981 Act is squarely at odds with the purpose of the 1981 Act. When originally enacted the 1981 Act included section 7. That retained the right to obtain British nationality by registration for the group that included Mr Howard, but only for a period of 5 years from the date of the commencement of the Act. That period expired on 1 January 1988. Section 7 of the 1981 was formally removed from the Act by amendment made by the Nationality, Immigration and Asylum Act 2002 with effect from 7 November 2002. The Claimant's proposed construction would for all practical purposes revive section 7 of the Act. Revival of that section even if only for the purpose of identifying an exception to the requirement that applicants for naturalisation be of good character, runs counter to one clear purpose of legislation namely that the different treatment afforded to persons within the scope of section 7 of the 1981 was to last only for a limited period;

the proposed construction would prolong that period indefinitely (again, at least for the purposes of dis-applying a good character requirement). The Claimant submits that the answer to these problems is provided by the removal of section 7 of the 1981 Act; that I should consider the 1981 Act without reference to the original presence of section 7. Looked at on that basis – so the submission goes – there is no obstacle to the proposed section 3 interpretation. For all its ingenuity, this is not a submission I can accept. Following such a course would be an exercise in boot strapping; it requires section 7 of the 1981 Act both to exist and not exist at the same time. For these reasons, the Convention rights claim cannot succeed.

24. However, even if the Convention rights claim were considered on the basis that it is a challenge to the legality of the requirement at paragraph 1(1)(b) of Schedule 1 to the 1981 Act to be of good character, it would still fail. The essence of a *Thlimmenos*-type discrimination claim is that application of a general rule has a disproportionate impact on a particular group of persons (in this case the other status, Windrush generation group), that is disproportionate in the Convention sense, namely either because the general rule fails to pursue a legitimate objective, or because even though it pursues such an objective it does so in a way that lacks reasonable justification. In this instance, the relevant rule is the requirement at paragraph 1 (1)(b) of Schedule 1 to the 1981 Act. This quite plainly pursues a legitimate objective; requirements of this type are commonplace in legislation governing acquisition of nationality. They reflect one of the general interests of any state to regulate the circumstances in which nationals of other states may acquire the advantage of their nationality. Further, as enacted, paragraph 1(1)(b) of Schedule 1 to the 1981 Act is capable of pursuing that purpose in a reasonable and proportionate way. The paragraph requires the Home Secretary to apply a good character requirement but leaves it open to the Home Secretary to identify the specifics of that requirement either in Regulations made in exercise of the power under section 41 of the 1981 Act or (as has in fact been the case) through a policy adopted for that purpose.

25. Overall, therefore, whether directed to the specific decision to apply a good character requirement when determining Mr Howard's application for naturalisation as a British citizen or generally to the existence of a good character requirement applicable to Windrush generation applicants by Schedule 1 to the 1981 Act, the challenge on Convention rights grounds fails. I do not consider this outcome surprising. The case directed towards the existence of a good character requirement *per se* comes to little-short of an attempt to wind back the clock to the period prior to January 1988, an objective not capable of being secured by resort to any measurable legal standard available to the court. Moreover, looking at the case in these terms fails to capture the true nature of the Claimant's case which concerns the way in which the good character requirement was formulated and then applied to Mr Howard and other members of the Windrush generation (as I have defined that term in this judgment).

(2) The common law challenge

26. The way in which the common law challenge is put has evolved in the course of the hearing.

27. This part of the claim has always been directed to the Home Secretary's guidance on the good character requirement. At the time of the Home Secretary's first two decisions on Mr Howard's application, guidance to the approach on the good character requirement was at Annex D to Chapter 18 of the Home Secretary's Nationality Instructions. By the time of the decision dated 23 May 2019, the guidance was contained in a document published by the Home Secretary on 14 January 2019 *"Nationality: good character requirement"*. There is no material difference between the earlier and later versions of the guidance on any matter that is relevant to this claim. The material parts of the January 2019 document can be summarised as follows. *First*, if an applicant has a criminal record that does not of itself mean the applicant will fail the good character requirement, although "… a person who has not shown respect for, or is not prepared to abide by, the law is unlikely to be considered of good character". *Second*, applicants will "normally" be refused on good character grounds if they "have a criminal conviction which falls within the sentence-based thresholds" or are "persistent offenders". However, the guidance also says that when assessing criminal convictions, the decision-maker "must carefully consider all the relevant factors raised by the applicant and carefully weigh any countervailing evidence of good character". *Third*, the sentence-based threshold for a non-custodial sentence (defined to include a suspended sentence) is that any such sentence within three years prior to the date of the application will normally result in the refusal of the application. *Fourth*, a "persistent offender" is described as "a repeat offender who shows a pattern of offending over a period of time. This can mean a series of offences committed in a fairly short timeframe or offences which escalate in seriousness over time, or a long history of minor offences".

28. As originally formulated the Claimant's submission was that the Home Secretary had applied the good character guidance either without consideration of a relevant matter, that Mr Howard was a member of the Windrush generation, or without attaching sufficient weight to that matter. In the course of her submissions Miss Kaufmann QC modified the submission in light of information in a witness statement dated 7 December 2020 made by Philippa Rouse, a Director in the Border, Immigration, Citizenship Policy and International Directorate of the Home Office, who between March 2017 and December 2018 was responsible for border, immigration and citizenship policy. That statement was served very shortly before the hearing of this claim; the Claimant did not object to its late arrival.

29. The statement was prepared in response to the part of the case put in the Claim Form that the decisions on Mr Howard's application for naturalisation as a British citizen up to and including the May 2019 decision had not taken account that he was a member of the Windrush generation. Miss Rouse's witness statement explains a sequence of events in April and May 2018 when successive Home Secretaries, Miss Rudd then Mr Sajid Javid, considered whether to modify the general policy on the substance of the good character requirement for those within the scope of the Windrush scheme announced by Miss Rudd on 23 April 2018. The information in Miss Rouse's statement is that Miss Rudd favoured change, but that Mr Javid concluded the existing good character guidance should be applied uniformly to the Windrush generation as to all other applicants. Based on this, Miss Kaufmann submitted that the decision not to make special allowance in the good character guidance for the Windrush generation was unlawful with the consequence that the decisions taken on Mr Howard's application successively on 5 November 2018, 3 December 2018 and 23 May 2019 were unlawful.

Sir James Eadie QC for the Home Secretary did not object to Miss Kaufmann putting the Claimant's case in this way.

30. Miss Rouse's statement sets out the following sequence of events. A ministerial submission dated 18 April 2018 recommended that applications for naturalisation from Windrush generation members should be refused only on grounds of "criminality or good character" – i.e., the existing policy on good character. Miss Rudd did not accept this recommendation but asked instead that the content of the good character requirement as applied to the Windrush generation be reconsidered. On 24 April 2018 (the day after Miss Rudd's Windrush statement in the House of Commons) a further submission was prepared. This recommended that for Windrush generation applications a different, more generous, approach should be taken where the applicant had minor convictions. The submission summarised the general policy and then said this:

> "10. We assume that you will still want to maintain some elements of this – it could be presentationally difficult to offer free citizenship to someone with serious criminal convictions or who has been associated with terrorism – but that you will want to adopt a generally lenient approach – in particular perhaps reducing the amount of time before more minor convictions are considered "spent" for citizenship purposes. Having different definitions of good character for different groups is vulnerable to challenge, however, as logically good character should be an objective standard.
>
> 11. If you wish to take a more lenient approach to criminality, we would propose, therefore, that we amend the good character guidance to lower the threshold in respect of more minor convictions for anyone resident before 1973 (not just those within scope of this policy), recognising long residence and long-standing ties to the UK, but otherwise leave the guidance in place. Any case where a person is liable to be refused citizenship will be put to Ministers for final decision."

On 25 April 2018 Miss Rudd agreed this recommendation. Civil servants then started work revising the guidance to reflect this approach.

31. Mr Javid became Home Secretary on 30 April 2018. The good character issue was put in a submission to him the same day. In early May 2018 Mr Javid decided that the existing good character guidance should continue to be applied to all applicants, including those from the Windrush generation.

32. The submission for the Home Secretary is that this sequence of events does not demonstrate that continuing to apply the existing good character guidance and applying it when deciding Mr Howard's application was beyond the power of the Home Secretary. The evidence simply shows successive Home Secretaries taking different decisions, which is no evidence at all that one decision was lawful and the other not. I do not agree this is the correct approach. Legality does not depend on simple comparison of the merits of either position; the legality of Mr Javid's decision is to be

judged on its own terms, the issue being whether that decision was reasonable in the *Wednesbury* sense.

33. A conclusion that a decision is *Wednesbury* unreasonable will not be reached lightly, in particular on a matter such as that in issue here which involves judgement on a matter of social policy. As recognised by the Court of Appeal in *R(Johnson) v Secretary of State for Work and Pensions* [2020] PTSR 1872, the threshold for establishing irrationality is very high. A decision that results in hard cases, such as the decisions on Mr Howard's application for naturalisation as a British citizen, is not by that reason alone, *Wednesbury* unreasonable. Nevertheless, a boundary must and does exist. My conclusion is that the decision to maintain the existing good character guidance for applicants who were members of the Windrush generation was on the wrong side of that boundary and was unlawful.

34. The decision on the content of the good character guidance fell to be taken in the context of the Windrush statement. In her statement, the Home Secretary (Ms Rudd) recognised this group of people who had come to the United Kingdom from Commonwealth countries prior to 1973 as fully integrated into British society, and described them as "… British in all but legal status". Members of the Windrush generation had been wrong-footed by a policy that equated lack of formal documentation with want of immigration status. I have set out the material parts of the statement above. Ms Rudd made it clear that all members of this group should be able "… to acquire the status they deserve – British citizenship – quickly, at no cost and with proactive assistance throughout the process". She identified the consequence of the measures she announced as being that "… anyone from the Windrush generation who now wants to become a British national will be able to do so". The Windrush statement made no mention of the good character requirement, but nothing of any significance turns on that because this was no more than a consequence of timing. The sequence of events set out in Ms Rouse's statement makes clear that as at 23 April 2018 when the statement was made, the approach to the good character guidance was to be changed albeit the final form of the new guidance had not been settled.

35. All this being so, the decision taken by Mr Javid in early May 2018 that the existing good character guidance should continue to apply without modification to Windrush generation applications, fell outside the range of options available to him acting reasonably. There is a mis-match, a lack of logical connection, between that decision and the approach to Windrush generation applications announced in the Windrush statement, and then made good on every other matter relevant to a naturalisation application (for example, by the amendment to the 2003 Regulations referred to above, at paragraph 18). On all other matters, it was clear from the Windrush statement that particular importance would now be attached to the long-residence and integration of the Windrush generation. Even allowing for the significant margin that the *Wednesbury* reasonableness standard permits any decision-maker, there is no sufficient reason to explain why, when it came to the good character requirement, no significance was attached at all to the long-residence and integration of a group all of whom had arrived in the United Kingdom prior to 1973, at least 45 years earlier. While the Home Secretary may not disapply the good character requirement in Schedule 1 to the 1981 Act, the content of that requirement is a matter for the Home Secretary. Nothing in the 1981 Act compelled the decision taken in early May 2018. The reason referred to in the Ministerial submission that a particular approach to applications by members of the

Windrush generation would have a "vulnerability to legal challenge" does not come close to being a compelling reason. The Windrush generation was already being treated differently on a range of other matters (fees, the language and British knowledge tests). The Windrush statement had set out very clearly why, generally put, the position of the group was distinct and required a different approach. Differences of approach are not, *per se*, "vulnerable to legal challenge", and the writer of the Ministerial submission specifically identified the explanation for a difference of approach in this instance – that the long residence of the Windrush generation could warrant an approach to the good character guidance that treated minor convictions differently.

36. The reasoning applied on Mr Howard's application provides a striking example of the extreme consequences of the May 2018 decision. The last of the three refusal letters (dated 23 May 2019) went to some lengths to establish Mr Howard's "criminal history" of minor offending: 3 offences between 1974 and 1977; 3 further offences between 1984 and 1988; and an offence under the Public Order Act in 2000. The letter made it clear that consideration had been given to these convictions, not just to the conviction for common assault in June 2018 which had resulted in the suspended sentence. In the context of what had been said in the Windrush statement this reliance on minor offences committed some 40 years, 30 years and 18 years, respectively before Mr Howard's application for naturalisation as a British citizen was irrational. An approach based on the premise that such matters are relevant is in flat contradiction of any notion that long-residence and integration into British society demanded a different approach to applications coming from the Windrush generation, the notion which had been the central feature of the Windrush statement. Apart from these matters was the June 2018 conviction for common assault. Under the January 2019 guidance a suspended sentence passed within 3 years of the date of a naturalisation application would "normally" mean the application would be refused. That is an approach that could not properly be maintained by the Home Secretary consistent with the Windrush statement. It is precisely the significance of matters such as minor offending that can be affected by circumstances such as long-residence. It is not for me to prescribe what that different approach in the good character guidance should be; however, proceeding to determine applications by members of the Windrush generation on the basis of the general approach applied to all applicants, was not an option properly available to the Home Secretary. The logic of the Windrush statement required some form of departure.

37. For these reasons the decision in early May 2018 to continue to apply the existing good character guidance to applications for naturalisation as British citizens made by members of the Windrush generation was unlawful. It follows that the determination of Mr Howard's application on that basis was also unlawful.

38. In reaching this conclusion I have not considered it necessary to address the submission made by Ms Kaufmann QC by reference to the "Windrush Lessons Learned Review" report prepared by Wendy Williams at the request of the Home Secretary and published in March 2020. Ms Kaufmann relied on this report for the proposition that one objective underlying the Home Secretary's Windrush statement had been to correct a failure prior to January 1988 to properly inform those who had a right to obtain British nationality by registration that that right was soon to be removed. On its own terms I do not accept this submission is made good by Ms Williams' report. While the report does refer to criticisms that different steps could have been taken prior to January 1988 to publicise that ability to obtain British nationality by registration was about to lapse, I do not

consider the report identifies this as something that went to the heart of the matter (which instead concerned the lack of documentation available to the Windrush generation to evidence their immigration status). Thus, evidentially, the report does not assist the Claimant's case. This part of the submission falls away for that reason, and it has not been necessary for me to consider the Home Secretary's submission (set out in her Skeleton Argument, though not developed orally) that the Review report formed part of proceedings in Parliament and was for that reason, inadmissible as evidence in court proceedings.

39. Given the Home Secretary's subsequent decision of 16 October 2019 to grant Mr Howard's application for naturalisation as a British citizen on compassionate grounds. In these circumstances, appropriate relief will take the form of a declaration that the Home Secretary's earlier decisions (of 5 November 2018, 3 December 2018 and 23 May 2019) were unlawful to the extent that each was taken in reliance on the generally applicable good character guidance.