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Case No: CO/20/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2018

Before :

MR CHARLES BOURNE QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

THE QUEEN (on the application of DC)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr David Chirico (instructed by **Bindmans LLP**) for the **Claimant**
Ms Julie Anderson (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 30th January 2018

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Judgment Approved

Mr Charles Bourne QC (Sitting as a Deputy High Court Judge) :

Introduction

1. This is an application for judicial review of a decision by the defendant Home Secretary on 18 June 2015 refusing the claimant's application to be registered as a British citizen, and a decision of 8 September 2015 upholding the first decision on review.

2. The claim was lodged in the Upper Tribunal on 17 September 2015 and was transferred to this Court on 21 December 2015 because it fell outside the tribunal's jurisdiction. Permission to apply for judicial review was refused on paper, but was granted at an oral hearing on 8 September 2016 by King J.

The Facts

3. The claimant is a national of Ivory Coast. He was born on 27 November 1996 and is now aged 21. He entered the UK on 10 May 2001 at the age of 4 and was granted temporary admission. It is not clear who his mother was, although he was accompanied to the UK by a woman who claimed to be his mother and by another child who may be his twin brother. The present whereabouts of the woman who claimed to be his mother are unknown. At the start of this hearing I made an anonymity order to prevent disclosure of the claimant's identity.

4. The claimant suffered neglect as a child while in the care of his father, a naturalised British citizen who also originally came from Ivory Coast. Social services became involved when the claimant was 6 years old and his local authority was granted a care order in respect of him on 21 October 2006 when he was nearly 10. He was assessed as having cognitive difficulties but remained in full-time education until he was 18, then proceeding to an apprenticeship, living at that time with foster carers.

5. He has unfortunately come to the attention of the criminal authorities. According to the printout from the police national computer, on 24 August 2011 he received a reprimand for an offence of shoplifting committed on 20 July 2011. He was then aged 14. Then, on 17 November 2011 he pleaded guilty to offences of robbery and handling stolen goods committed on 18 September 2011, for which he received a 9 month referral order. On 20 November 2012 he received a further 2 month referral order for possessing a bladed article in a public place. On 25 February 2013 he received a further reprimand for possession of cannabis. At that point he was aged 16.

6. There are also some more recent offences on the claimant's record to which I shall return below.

7. Turning to the claimant's immigration history, an application for indefinite leave to remain in the UK was made on his behalf on 6 January 2006 and a short period of leave was granted. Following a further application, on 12 October 2009 he was granted discretionary leave to remain until 12 October 2013. A further application for discretionary leave was made under cover of a letter dated 8 November 2013, and on 17 February 2014 the defendant granted the claimant indefinite leave to remain. Then, on 17 November 2014 the claimant applied for British citizenship. At that time he was 10 days short of his 18th birthday.

The Law

8. Under the British Nationality Act 1981, a minor may become a British citizen by registration. After majority, a person may become a British citizen by naturalisation.

9. In respect of registration section 3(1) of the 1981 Act provides:

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

10. Section 41A(1) of the 1981 Act provides:

> "An application for registration of an adult or young person as a British citizen under section … 3(1) … must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character."

11. The requirement of good character is also imposed on adult applicants for naturalisation by section 6 of the Act and paragraph 1(1) of schedule 1 to the Act.

12. The Home Office maintains published policies relating to applications for naturalisation and registration. At the relevant time, registration was the subject of chapter 9 of the *Nationality Instructions*, which contained this reminder of the need for guidance to be exercised flexibly:

> "9.1.6 IT IS IMPORTANT TO REMEMBER that the guidance in this Chapter does not amount to hard and fast rules. It will enable the majority of cases to be dealt with, but because

> the law gives complete discretion each case must be considered on its merits. All the relevant factors must be taken into account, together with any representations made to us. If we do not, we are open to criticism for not exercising our discretion reasonably.
>
> 9.1.7 It is therefore possible to register a minor under circumstances that would normally lead to the refusal of an application or to refuse when normally a child might be registered if this is justified in the particular circumstances of any case."

13. Chapter 9 at the time of the decisions repeated the requirement for children and young persons over the age of 10 to be of good character in order to be registered as British citizens: see paragraph 9.17.28. The guidance told staff that in the case of an applicant for registration, they should:

> "… take into account the standards of character required for the grant of citizenship to an adult at the Secretary of State's discretion".

14. That guidance had changed between the time of the application and the time of the decisions. There were no transitional provisions and so the later version was applied. I note that the earlier version stated that "the character of a child becomes a more important consideration the nearer the child is to the age of majority" (the old paragraph 9.17.28) and that refusal would be the usual course for a minor aged 16 or over who did not meet the adult standard, whilst refusal should be considered for a minor aged under 16 "if available information suggests serious doubts about character".

15. The Court in *R (SA) v SSHD* [2015] EWHC 1611 (Admin) held that this "bright line" distinction at the age of 16 was irrational and contrary to domestic and international provisions which treated as minors those who were under 18, and the policy was changed as a result. Nevertheless, the earlier version is of interest by revealing the defendant's recognition that less weight might be attached to criminal behaviour which had occurred in childhood and at a lower age.

16. In this case, then, the policy relating to adults was to be applied "at the Secretary of State's discretion". That policy is found in Annex D to chapter 18 of the *Nationality Instructions*. Paragraph 1.3 states that the decision maker "will not normally consider a person to be of good character if there is information to suggest … they have been convicted of a crime …". Section 2 states:

> "Having a criminal record does not necessarily mean that an application will be refused. However, a person who has not respected and/or is not prepared to abide by the law is unlikely to be considered of good character."

17. Under paragraph 2.1 an application "will normally be refused" in the case of a "non-custodial sentence or other out of court disposal that is recorded on a person's criminal record" if it occurred in the last three years, whether or not the matter is spent. The last words reflect a policy change which occurred in 2012 whereby the provisions of the Rehabilitation of Offenders Act 1974 no longer applied to immigration and nationality decisions including the grant or refusal of citizenship (see

section 56A of the UK Borders Act 2007). This is significant in the present case because, for all other purposes, a reprimand (which is a relevant "out of court disposal") becomes spent immediately.

18. Sub-paragraph 2.2 of paragraph 2.1 states:

> "Where this section states an application will normally be refused if a person has been convicted, exceptions should only be made in exceptional circumstances."

19. Those sections of the policy do not direct a different approach for offences committed when the applicant was a child or young person. However, paragraph 3.8 refers to a discretion to refuse an application where there is a non-custodial sentence or other out of court disposal which is more than three years old, where the circumstances call the person's character into question. It indicates that relevant circumstances may include the number of such sentences/disposals, the period over which they occurred and whether this indicates a pattern of behaviour which could justify refusal, the nature of the behaviour, any other historical or recent convictions and any other factors including the circumstances of the person's life and any positive evidence of good character and, under the heading "Age":

> "Decision makers should take into account a person's age at the time older non-custodial sentences were imposed or other out of court disposals took place. Isolated youthful indiscretions will not generally indicate a person is of bad character if that individual has clearly been of good character since that time."

The passage concludes by reminding decision makers that "each case will depend on its individual circumstances and must be determined on its own merits".

20. Section 10 of Annex D is headed "Exceptional Grants" and provides:

> "There may be exceptional cases where a person will be granted citizenship even where they ordinarily would fall to be refused.
>
> Exceptions will generally fall into one of the following categories:
>
> a. the person's conviction is for an offence which is not recognised in the UK and there is no comparable offence …; or
>
> b. the person has one single non-custodial sentence, it occurred within the first 2 years of the 3 (i.e. the person has had no offences within the last 12 months), there are strong countervailing factors which suggest the person is of good character in all other regards and the decision to refuse would be disproportionate."

21. The Court of Appeal in *R v SSHD ex p Al Fayed (No 2)* [2001] Imm AR 134 stated that decisions on applications for citizenship are reviewable only on the basis that the decision maker misdirected himself or, having correctly directed himself, arrived at a decision which no reasonable decision maker could have made in the circumstances.

22. There is no statutory definition of good character for the purpose of a registration or naturalisation application. In *R v SSHD ex p Al-Fayed (No 1)*, [1998] 1 WLR 763 at page 773, the Court of Appeal ruled that Ministers are free to adopt a high standard of

good character, "provided only that it is one which can reasonably be adopted in the circumstances".

23. It is common ground between the parties that it is for an applicant to show that he satisfies the requirement of good character. There is no burden on the defendant to show that he does not.

24. In this claim, then, it is for the claimant to show that in deciding whether the applicant had satisfied that requirements, the defendant misdirected herself or arrived at an irrational decision.

The Decisions

25. The defendant's first decision is contained in a letter dated 18 June 2015. The letter refers to one of the requirements for citizenship being that the applicant is of good character and states that, whilst the Home Office in exceptional circumstances would disregard a recent conviction for a single, minor offence,

> "… normally we would not grant citizenship to a person who has been:
>
> 1. Sentenced to a period of imprisonment of four years or more, or
>
> 2. Sentenced to between 12 months and four years imprisonment unless fifteen years have passed since the end of the sentence, or
>
> 3. Sentenced to less than 12 months imprisonment unless ten years have passed since the end of the sentence, or
>
> 4. Convicted of a non custodial offence or cautioned/reprimanded in the last three years."

26. The letter then noted that the claimant had received a reprimand from Bedfordshire Police on 25 February 2013. That is the one for possession of cannabis. The letter continued:

> "As your client's prior reprimand was issued in relation to a matter that we would not normally elect to disregard, nor can we find any grounds to disregard it exceptionally outside our published policy. Particularly having taken into account that the incident which took place on the 25 February 2013 represented the second separate occasion that your client had been issued with a reprimand. Given the prevailing circumstances this registration application has therefore been refused. "

27. The letter is poorly expressed and badly punctuated, but its essential meaning is that the requirement of good character was not satisfied by this claimant because he had received two reprimands in 2011 and 2013, one for shoplifting and one for possession of cannabis. The letter went on to explain that if the claimant still wished to become a British citizen he would have to make another application, but if this was received before 25 February 2016 it was unlikely to be successful because until that date, three years would not have elapsed since the second reprimand.

28. On 24 August 2015 the claimant requested that his application be reconsidered. This gave rise to a further decision letter dated 8 September 2015. The writer explained

that the earlier decision had been reviewed, and stated that he was satisfied that all correct procedures had been followed and a correct decision had been taken, so the first decision remained in place.

29. The claimant's solicitors then sent a letter before claim on 4 September 2015 and a further letter on 17 September 2015. This gave rise to a further review and to a third letter from one of the defendant's officials, this one dated 18 September 2015. This post-dates the commencement of proceedings as well as the decision under challenge, and I view it with caution because it could be an attempt to insulate the decision from challenge rather than shedding real light on the reasons for the decision.

30. This third letter set out a little more detail about the defendant's relevant policy, noting that although some applicants' offending is disregarded on an exceptional basis, staff instructions state that even in those cases this would not normally happen unless the person had no offences in the last 12 months, unless there were strong countervailing factors suggesting that the person was of good character in all other regards and that a refusal would be disproportionate. The writer noted the information she had received about the claimant's difficult upbringing and his roots in the UK but did not think on balance that these outweighed the police reprimands. The writer then went on to consider section 55 of the Borders, Citizenship and Immigration Act 2009 and concluded that it did not affect the decision to refuse his application. As the claimant is now an adult section 55 is not being relied on in the present case.

The Grounds

31. The scope of the grant of permission was the subject of a memorandum dated 5 October 2017 and issued by King J at the parties' request. Permission was granted on the ground of first, an inflexible application of policy, and second, a failure to have proper regard to the claimant's youth and associated disabilities, both under the umbrella of a public law rationality challenge. Permission was not granted to pursue a discrete Article 14 ground challenge to the policy itself.

The Claimant's Case

32. The claimant emphasizes that his citizenship application was supported by evidence from Haringey Social Services. A letter dated 7 October 2014 from a social worker described the circumstances which led to him being taken into care. It said that he later became a target for local gangs who bullied him into doing things for them, and suggested that this had led to his reprimand for shoplifting. The letter explained that the claimant had only belatedly been assessed by an educational psychologist and had done well following transfer into an alternative educational establishment. An educational assessment carried out when the claimant was 16 ½ assessed his verbal ability at the level of the average 10-11 year old.

33. The claimant relies on the case of *R (Hiri) v SSHD* [2014] EWHC 254 (Admin). There an application for naturalisation was rejected on character grounds because the applicant had an unspent conviction for exceeding a temporary speed limit on a motorway for which he was fined £100 and given 5 penalty points. Explaining that the defendant's policy must not be applied mechanistically and inflexibly, Lang J held that the test of good character involves looking at the whole of an applicant's character and not merely asking whether they have a criminal record. At paragraph 35 she said:

> "… 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. In the case of *Hiri* the decision to refuse citizenship was quashed because the assessment of character had been based entirely on the fact that the applicant had an unspent conviction with no reference to any other aspect of his character and background. In that case there was what the court described as "strong countervailing evidence of the Claimant's good character", in particular a very complimentary reference from his Army commanding officer. The claimant also relies on the case of SA (see paragraph 15 above). There an applicant with an unspent conviction for possession of cannabis at the age of 17 applied for citizenship just before his 18th birthday. The defendant's refusal was quashed, applying Hiri, because there had been an over-rigid adherence to policy without sufficient consideration of mitigating circumstances including the applicant's difficult background or his age at the date of conviction, and without consideration of the fact that his future "could clearly be seen as lying in the UK".

35. Mr Chirico, representing the claimant, points out that the two decision letters simply treat the claimant's second reprimand as being fatal to his application. There is no discussion of the nature or seriousness of the offences, including the fact that they attracted only a reprimand rather than conviction, and no discussion of any other evidence about his character or whether the effect of the reprimands on an assessment of his character should be mitigated by his youth or his difficult circumstances.

36. He also points out that whilst the third, post-decision, letter refers to the claimant's difficult circumstances, it states that those circumstances do not "outweigh" the police reprimands but does not consider in terms whether they may mean that the reprimands are not a proper measure of his character. Instead the letter refers to "*compassionate*" factors, which mis-characterises this key question.

37. In short, Mr Chirico contends that these decisions have the same defects as those in *Hiri* and *SA* and reveal that the defendant fettered her discretion by treating the reprimands as determinative of the question of the claimant's character. Mr Chirico further contends that the defendant acted irrationally by failing to distinguish between children and adults for the purpose of assessing good character, pointing out that the first two decision letters make no reference to the UK's international obligations relating to children which were considered to be of relevance by the Court in SA.

38. For these reasons I am invited to quash the decision(s). The effect of that would be to leave the registration application to be re-decided rather than requiring the claimant to make a new application for naturalisation. Mr Chirico agrees that if the registration application does fall to be re-decided, the good character requirement will be applied on the facts as they are today, including the claimant's more recent criminal convictions.

The Defendant's Case

39. Ms Anderson on behalf of the defendant emphasizes that it is for an applicant for citizenship to show that he has satisfied the good character requirement, that this statutory requirement cannot be waived and that it is for the claimant to show that the defendant erred in law or acted irrationally.

40. The defendant in her detailed grounds of resistance pointed out that the citizenship application itself accepted in terms that the claimant was "unfortunately not of good character". In my view, however, when read in context that meant only that the claimant had a criminal record and it did not entitle the defendant to refuse the application without further consideration of the issue of character.

41. The defendant's detailed grounds argue that there is no legal obligation for a reasoned decision to respond to everything which is mentioned in an application, nor any obligation to give reasons for following, as opposed to not following, a policy.

42. Ms Anderson further argued that the cases of *Hiri* and *SA* do not put any gloss on the statutory requirements or state any wider principle and/or can be distinguished on their facts. In *Hiri* there was positive evidence of good character in the form of a reference and it was held that the decision maker had erred by failing to have regard to it and applying policy mechanistically, and in *SA* there was more evidence going to character than in the present case. However, Ms Anderson submitted, if *Hiri* or *SA* purport to decide any wider principle then they are wrongly decided. In particular she submitted that *SA* is incorrect in suggesting that instruments such as the UN Convention on the Rights of the Child affect the statutory test to be applied in a nationality application.

43. Meanwhile Parliament has entrusted the task of assessing character to the defendant, not the Court, and the Court cannot require the defendant to grant British nationality to a person who does not qualify for it: compare *TN (Afghanistan) v Secretary of State for the Home Department* [2015] UKSC 40, [2015] 1 WLR 3083.

44. Ms Anderson points out that criminal conduct, even if it is not the only relevant factor, must be highly material to the assessment of character. She submits that one should not look behind the findings of criminal authorities or downplay their effect on good character. Nor should the court substitute its own standard of good character for any higher standard which the defendant may rationally have used: see *DA Iran* [2014] EWCA Civ 654. It is also important for reasons of legal certainty for policy to be applied consistently.

45. In applying these principles in the case of a child offender, Ms Anderson argues that the rehabilitation policies of the criminal justice system are irrelevant. In a citizenship application the question is whether the person is of good character, not whether they should be rehabilitated.

46. Ms Anderson argued that on the evidence, there is no reason to conclude that the defendant applied the test in an insufficiently holistic way. Even if the decision letters do not recite that consideration was had to the fact that the claimant was a minor when the offences were committed, it is inconceivable that the decision maker had overlooked that fact. Again, she compares *DA Iran*. There naturalisation was refused to an Iranian national because of allegations about his conduct towards prisoners while on compulsory military service in Iran. He had argued that his conduct was explicable because he was a conscript. The judge at first instance ([2013] EWHC 279 (Admin), upheld by the Court of Appeal) found that the conscription issue had not been overlooked although the decision maker did not refer to it in terms.

47. Overall, Ms Anderson submitted that the decision letters disclose no error of law and that this is in reality a reasons challenge. Bearing in mind that the scope of a duty to give reasons varies according to the nature of the decision, the decision letters in this case were sufficient to explain to the claimant why his application did not succeed.

48. In the alternative Ms Anderson submits that relief should be refused, either under section 31(2A)(a) of the Senior Courts Act 1981 because it is highly likely that the outcome would not have been substantially different if any errors of approach had not occurred, or in the Court's overall discretion as to relief, particularly in the light of the claimant having committed further offences since these decisions. She further contended that whilst the third decision letter could not effectively cure any legal defect in the first two letters, its contents were highly relevant to the question of discretionary relief.

Discussion

49. In my judgment the decision letters are not sufficient to show that the question of character was assessed correctly.

50. The letter of 18 June 2015 refers only to the two reprimands and the absence of any grounds "to disregard it exceptionally". It notes the clearly relevant fact that there had been not one but two reprimands, but then continues with the opaque phrase "Given the prevailing circumstances this registration application has therefore been refused".

51. The letter of 8 September 2015 expressly did not re-decide the application and instead just sought to answer the question of whether the previous decision was not in accordance with law and policy.

52. Neither letter identifies any potential mitigating factor or any information which might have led to a different conclusion as to the claimant's character. Both letters state that the defendant "would not normally disregard" a reprimand received in the last three years.

53. Whilst criminal behaviour may in some cases make the outcome of the good character test inevitable, the decision in *Hiri* was right, in my judgment, to state that the test involves looking at the whole of an applicant's character and not merely asking whether they have a criminal record.

54. In some cases there may nevertheless be no relevant information other than the applicant's criminal record. In *Hiri* there was the positive evidence of good character and Lang J ruled that reference needed to be made to it. In the present case there was evidence from social services of the claimant's extremely difficult start in life and in particular of coercion by gang members which may have caused the incident leading to his first reprimand. In addition there was the fact that both reprimands arose while he was a minor. In my judgment these were all reasons why a decision maker could have ruled that the reprimands did not prove bad character.

55. Ms Anderson points out that there was not the sort of compelling evidence of good character as was found in *Hiri*. One answer to that submission is to refer to the personal praise for the claimant which was contained in the social services evidence. Another is to note that, as Karon Monaghan QC (sitting as a Deputy High Court Judge) said in *SA* at paragraph 64(c):

> "… 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."

56. It is common ground that the letter of 18 September 2015 could not have remedied any unlawfulness in the first two decision letters. Even if that had been possible, I doubt that the third letter would have been sufficient. It refers expressly to the discretion to disregard a criminal matter in an exceptional case but emphasizes the very narrow circumstances in which this will "normally" be possible. It refers to the claimant's "difficult upbringing and his now established roots in the UK" but says that these do not "outweigh the police reprimands he has received". Whilst the reference to these matters is an improvement over the first two decision letters, there is some force in Mr Chirico's point that the reference to outweighing suggests that those matters were treated as potential compassionate circumstances rather than as matters impacting directly on the assessment of character.

57. The overall impression left by the decision letters is of an over-rigid reading of the policy. It is possible that this is no more than an impression and that the decision makers did ask themselves whether the claimant's youth and other extenuating circumstances made this case the exception to the rule. In my judgment, however, although not much more was required by way of reasons, the absence of anything more means that the letters do not fulfil the need, identified in *Hiri*, to show that regard has been had to all relevant facts and not just to a criminal record.

Relief

58. The question of relief in this case is not affected by section 31(2A)(a) of the Senior Courts Act 1981. Whilst it is entirely possible that the defendant could have considered all relevant matters, given sufficient reasons and reached the same decision, the potential for that outcome is not so clear that I can describe it as "highly likely".

59. Nevertheless, I do not think it appropriate to quash the decision(s). As I have said, the lack of reasoning may not in fact have changed the outcome. Moreover, it is common ground that if the decision is re-taken today, it will be taken in the light of up-to-date facts. Unfortunately these facts include further offending by the claimant. Convictions in May, June and August 2017 led to custodial sentences for wasting police time and possession of an article for use in fraud and to a suspended sentence for burglary of a dwelling. In my judgment it is not appropriate to require the defendant to re-take a decision which fell to be taken in 2015 now that the facts are so different in 2018. The claimant will have to decide whether to make a new application for naturalisation, in which case it will be decided on its merits.

60. Instead I will make a declaration that the decisions of 18 June and 8 September 2015 were unlawful because the reasons given were insufficient to show that there had been a proper exercise of the defendant's discretion. In my judgment it is just and convenient to make that declaration because of the importance of nationality decisions and the public interest in the correct application of the relevant policy. The claim succeeds to that extent.