

CO/13027/2013

Neutral Citation Number: [2014] EWHC 3697 (Admin)

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 16th October 2014

B e f o r e :

MR JUSTICE WILKIE

Between:

THE QUEEN ON THE APPLICATION OF HETTIARACHCHI **Claimant**

v

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

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Mr H Kannaangara (instructed by Direct Access) appeared on behalf of the **Claimant**
Mr C Thomann (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

1. MR JUSTICE WILKIE: This is the hearing of a judicial review claim, commenced on 13th September 2013 by Anoma Hettiarachchi and two dependents, namely her husband and her son who was not born in the United Kingdom.
2. The decision sought to be reviewed is of the Secretary of State for the Home Department, dated 13th June 2013, not to grant her or her two dependents naturalisation as British citizens.
3. It is common ground that the decision of the Secretary of State in respect of the two dependents stands or falls with the fate of the application made on behalf of Anoma Hettiarachchi. Permission was granted by the single judge on 17th February 2014 following which on 5th September detailed grounds of resistance were filed.
4. The issue can be shortly stated, namely: was the defendant entitled to be satisfied that the claimant failed to meet the good character requirement for grant of citizenship in paragraph 1(1)(b) of Schedule 1 of the British Nationality Act 1981 by reason of deception practised in this and/or previous immigration applications?
5. There is similarly no dispute as to the relevant legal framework. Section 6(1) of the 1981 Act states that:

"If on an application for naturalisation as a British citizen made by a person of full age 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."

6. By Schedule 1(1)(b) the requirements for naturalisation as a British citizen include "that the applicant is of good character". There is no statutory definition of "good character" under the 1981 Act. It is essentially an exercise in judgment and evaluation.
7. The burden of proof is on the applicant to satisfy the Secretary of State on the balance of probabilities. The role of the court has been said to be not to discourage Ministers from adopting a high standard in matters which have been assigned for their judgment by Parliament, provided that the standard is one which can reasonably be adopted in the circumstances. I take that principle from R v (on the application of) Al Fayed v Secretary of State for the Home Department (No 2) [2001] Immigration Appeal Reports 134, in the judgment of Nourse LJ at paragraph 41, Kennedy LJ at paragraph 93 and Rix LJ at paragraph 97.
8. Guidance has been issued to Home Office officials engaged in exercising the judgment on behalf of the Secretary of State. I have been shown the relevant guidance which was in place in June 2013, when this decision was taken. In particular, at paragraph 1.2 in the introduction it says:

"The Secretary of State must be satisfied that the applicant is of good character on the balance of probabilities. To facilitate this applicants must answer all questions asked of them during the application process honestly and in full."

9. Paragraph 2 sets out certain aspects of the requirement of good character in the form of tabulated guidance. 2.1 says:

"Case workers should not normally consider applicants to be of good character if, for example, there is information to suggest...

(e) they had been deliberately dishonest or deceptive in their dealings with the UK government (see section 10)."

10. Section 10 of that document is entitled "Deception". The introductory paragraph reads:

"Case workers should count heavily against an applicant any attempt to lie or conceal the truth about an aspect of a previous UKBA immigration application as well as the current application for naturalisation whether on the application form or in the course of enquiries. Concealment of information or lack of frankness in any matter must raise doubt about the applicant's truthfulness in other matters."

11. Paragraph 10.4 is headed "Evidence of deception in the immigration and nationality process". At 10.4.1 provides:

"Case workers should refuse the application where there is evidence to suggest that an applicant has employed deception either (a) during the citizenship application process or (b) in previous immigration applications processes."

10.4.2:

"It is irrelevant whether the deception was material to the grant of leave or not. The fact that deception was engaged in during the current or any previous application is sufficient to warrant refusal on the basis of good character. In such cases the applicant should be advised that an application for citizenship made within 10 years from the date of refusal on these grounds would be unlikely to be successful."

12. Finally, in relation to the interrelationship between applications for a protective order on grounds either of refugee status or fears of breach of Articles in the European Convention on Human Rights, as opposed to the question whether the claimant should have been granted naturalisation, my attention has been drawn to certain passages in the judgment of Stanley Burnton LJ in the case of Secretary of State for the Home Department v SK Sri Lanka [2012] EWCA Civ 16. In particular, at paragraphs 30, 31, and 33, which read as follows:

"30. Furthermore, the questions that arise for decision in the two contexts are different, although similar. In relation to asylum, it is whether 'there are serious reasons for considering' that the respondent has committed 'a crime against peace, a war crime' and so on...

The test is objective, and the onus of establishing the serious reasons is on

the Secretary of State...

31. In relation to naturalisation, on the other hand, the test is whether the Secretary of State is satisfied that the applicant is of good character. It is for the applicant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation. For these reasons too a decision in one context is not binding in the other.

...

33. Despite the importance of citizenship, I do not find it surprising that the test for exclusion from the Refugee Convention is more stringent than the test for exclusion from naturalisation. By definition, a refugee has a well-founded fear of persecution, and persecution in the extreme includes murder, but may also involve torture: fates far worse than statelessness. An unjustified refusal of asylum may therefore lead to the death or ill treatment of the asylum seeker."

13. The underlying facts can be briefly summarised. The claimant and her husband were officers in the Sri Lankan military. The claimant alleged that she deserted and fled to the UK arriving on 9th February 2002. She claimed asylum three days later. That claim was refused on 9th April 2002 but, on appeal, on 3rd October 2003 her appeal was allowed on human rights grounds. She was subsequently granted leave to remain on 2nd December 2003, to expire on 2nd December 2006, but on 28th January 2008 she was granted indefinite leave to remain.
14. She applied for naturalisation as part of a family application on 23rd April 2009. She was re-interviewed in connection with that application. An issue which arose at that stage was whether there were grounds for refusal of naturalisation on the basis of her involvement with war crimes. During the course of that interview the Secretary of State was satisfied that that ground did not arise.
15. However, the Secretary of State concluded that her replies in the course of her naturalisation interview revealed a number of inconsistencies with earlier responses in connection with her application for asylum and/or human rights relief and/or in her appeal against the Secretary of State's refusal of such relief. In the light of those inconsistencies, as well as the fact that there had been a judicial finding that she had lied in connection with certain matters raised during her asylum and human rights appeals, the Secretary of State concluded that the claimant had either been deceptive in the naturalisation interview or had been deceptive in her earlier applications.
16. The judicial finding of deception in relation to the previous immigration proceedings was made, not in her own appeal, but when acting as a sponsor and witness for her husband in relation to his immigration appeal.

17. The Secretary of State identified a series of issues in the Decision Letter, dated 13th June 2013. The first matter raised in that letter was the finding in 2006 by the Immigration Judge presiding over her husband's asylum appeal in the following terms:

"There are serious credibility issues relating to the sponsor's evidence. She admitted at the hearing that she had lied in the evidence put forward in support of her own claim in several material factors."
18. The judge had described one of her statements as "a deliberate untruth" and that Immigration Judge concluded "there is a real likelihood that the appellant deliberately misled the authorities and the court."
19. Turning to the issue of what the Secretary of State perceived as contradictory accounts, she set out in a series of subparagraphs her assessment of statements made by the claimant in the course of her earlier asylum proceedings in various forms and sources, compared with the answers which she had given in the course of the citizenship interview.
20. The ones which have been particularly highlighted in the course of oral submissions by the Secretary of State are what she had said about her having killed people in battle following orders of General Ratwatte, she being a member of a special unit under his direct command, as well as the active operational role which she played in that unit's activities in attacking LTTE villages.
21. The Secretary of State identified a clear discrepancy between her previous accounts, identifying an active role in operational terms, including killing people, and what she was saying in the context of her citizenship interview which was to deny any active or operational role, deny any killing, but limiting her role effectively to an administrative and a pastoral role.
22. In addition a focus was placed on whether General Ratwatte had, to her knowledge, been arrested and charged with very serious offences including mass murder. Those were matters about which she had given her accounts in the course of her asylum applications in which, on the face of it, she was asserting that she was aware that the General had been arrested facing charges of that order; indeed had produced newspaper accounts to support her contention. Again, the Secretary of State was of the view that that contradicted the account which she was giving in the course of her application for citizenship, in which she denied ever having had any awareness of what General Ratwatte had been arrested for and denying that it had anything to do with unlawful killing.
23. Included in the matters which the Secretary of State viewed as amounting to contradictory accounts, there was the question whether the claimant was facing charges of a criminal nature in Sri Lanka which had not been completed and to which she would be liable if she were returned at the time she was claiming asylum status or protection under the human rights legislation.

24. The Secretary of State in her Decision Letter indicated that her view was that there was a contradiction between what the claimant had said in the initial immigration proceedings and what she was saying in her citizenship interview. Mr Thomann, on behalf of the Secretary of State, whilst not abandoning the argument that the Secretary of State was entitled to form that view, accepts that the evidence in support of that having been a contradictory position is, upon detailed examination, not as persuasive as in relation to the other aspects. It appears that there is a line, a fine line, which the evidence reveals between her having asserted that she was the subject of an arrest warrant, which the authorities had unsuccessfully sought to execute at a relative's address because she was no longer there, upon the one hand, and, on the other, that charges had already been brought in Sri Lanka.
25. The Secretary of State also relied on a contradiction between the position she found the claimant had adopted in her earlier immigration proceedings, in relation to whether she knew that suspected LTTE sympathisers had generally suffered ill treatment and torture, as opposed to her position in the citizenship interview where she disclaimed any such knowledge. Once again Mr Thomann, on behalf of the Secretary of State, accepts that the evidence in support of that as a contradictory position is not particularly strong. He accepts the contention made by Mr Kannangara, on behalf of the claimant, that the assertion that it was generally known that LTTE sympathisers suffered ill treatment and torture was a suggestion which came from the mouth of the claimants then advocate rather than from the claimant herself.
26. In relation to the previous lies and the discrepancies principally relied upon by the Secretary of State, Mr Kannangara accepts that the claimant did exercise deception, in the sense that, in her witness statement in support of her asylum appeal, she made statements about her knowledge of her husband's whereabouts at the relevant time which were deliberately untrue. His contention is that those lies, were not germane to the asylum application as they concerned matters away from Sri Lanka, did not affect the claim which was based on events having happened in Sri Lanka and fears as to what would happen in Sri Lanka were she to be returned. He acknowledges that the guidance to which I have referred indicates that the Secretary of State may still have regard to such deceptions, even though they were irrelevant to the issue of the protection then sought. In relation to the discrepancy between the claimant's initial accounts, which appeared to show her in an operational role up to and including killing people, on the one hand, and her accounts of non involvement in such a role and denial of having committed any such acts, on the other, he says that the context of the questions which gave rise to the answers relied on by the Secretary of State is that the issue was not what she was claiming to have done but rather her perception of what the Sri Lankan authorities might accuse her of having done, as a member of General Ratwatte's Special Unit. She was fearful that she would be accused of participation in the actions of that Unit which were suspected to be of that very serious nature.
27. In my judgment, having been taken through the context of the questioning which gave rise to those answers and having regard to the terms of the answers themselves, which is not said to have been recorded inaccurately, that is an incredible explanation. So too is the contention that the contradiction between her claiming, in the earlier proceedings, that she well knew that General Ratwatte had been charged with mass murder and, on

the other hand, her contention in the citizenship interview that she was not aware that he had been charged with any such offences. The explanation that this arose simply because of the passage of time and a failure of memory in respect of matters which she might wish to forget is similarly incredible. These were matters which were central to her asylum claim. She had obtained evidence in relation to General Ratwatte's charges in the form of newspapers which she presented to the Immigration Judge who decided in her favour on her human rights application. In my judgment, the Secretary of State was entitled to conclude that, in addition to her accepted deception in her earlier dealings with the government concerning her immigration status, she had been deceptive in at least two serious respects in connection with those earlier proceedings. In the light of those findings made by the Secretary of State which, in my judgment, were open to her as a matter of exercising her judgment, it follows that it was within the bounds of rationality for the Secretary of State to have concluded that those acts of deception were such that her application for naturalisation should be refused on the basis identified in paragraph 10.4.1 and 2 of the guidance.

28. In those circumstances the Secretary of State was entitled, as a matter of judgment, on the basis of material before her, to conclude that the claimant had not discharged the burden upon her to demonstrate on the balance of probabilities that she is a person of good character. In the light of that conclusion the Secretary of State had no option but to refuse the claim for naturalisation as the claimant did not satisfy the requirements of Schedule 1 of the 1981 Act. In my judgment, it follows that this application for a review of the Secretary of State's decision in respect of the main claimant of her decision of 13th June 2013 must fail.
29. It similarly follows that the linked applications for judicial review in respect of the claimant's husband and child must similarly fail and accordingly I dismiss all three of these judicial review applications.
30. MR THOMANN: My Lord, there is an application for costs on behalf of the Secretary of State. It will not have escaped you that you do not have a schedule of costs in that respect. What you do have is a costs outcome of £320 inserted with the summary grounds.
31. The pragmatic suggestion made by my instructing solicitor, and I adopt, is you simply be invited to order costs of my (inaudible) preparation. Those, my estimate is, 2 hours for attendance today, 8 hours for the preparation of the skeleton and preparation for the hearing and 4 hours for the detailed grounds. That would make, given I am on a Treasury rate of £100 per hour, £1,400.
32. MR JUSTICE WILKIE: That is £1400 plus the £320 in respect of the acknowledgement of service. That is £1,720. You are inviting me to assess costs at £1,720.
33. MR KANNANGARA: I cannot argue.
34. MR JUSTICE WILKIE: I do not think you can. Very well. The Secretary of State shall have her costs which I assess at £1,720. Thank you both.