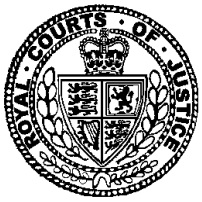

Neutral Citation Number: [2022] EWCA Civ 1068

Case No: CA-2021-000601

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Swift
C4/2021/0907

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between :

HUBERT HOWARD (deceased) **(substituted by MARESHA HOWARD ROSE)**	**Claimant/ Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**

- -
- -

Sir James Eadie QC and **David Blundell QC** (instructed by **the Treasury Solicitor**) for the **Appellant**
Phillippa Kaufmann QC and **Grace Brown** (instructed by **Deighton Pierce Glynn**) for the **Respondent**

Hearing date: 5 May 2022

- -

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The original Claimant in these proceedings, Mr Hubert Howard, was born in Jamaica, then a British colony, on 17 December 1956. He came to this country, at the age of three, with his mother in November 1960. He lived here until his death on 12 November 2019. Throughout that period he was, by virtue of the statutory provisions to which I refer below, entitled to reside in the UK, latterly on the basis that he had indefinite leave to remain ("ILR"); and he did not require any individual grant of permission to do so. He was thus a member of the so-called "Windrush generation".

2. Like many others in the Windrush generation, Mr Howard suffered serious problems from being subject to the so-called "hostile environment"[1] as a result of being unable to obtain formal documentation of his immigration status. Most seriously, in 2012 he lost his long-term job as a caretaker for the Peabody Trust following an inspection by immigration officers: the Trust was very reluctant to let him go but felt that it had no alternative. His family have now been compensated under the Windrush Compensation Scheme for the way in which he was treated. However, the issue before us concerns the distinct and more limited question of whether he was entitled to British citizenship.

3. On 9 July 2018 Mr Howard applied for naturalisation as a British citizen. By a decision dated 5 November 2018, maintained after review in two subsequent decisions dated 3 December 2018 and 23 May 2019, the Secretary of State refused that application on the basis that he did not satisfy the statutory "good character requirement".

4. On 5 April 2019 Mr Howard brought proceedings challenging the refusal of his application. The primary basis of the challenge was that the refusal was inconsistent with promises made by the then Secretary of State, Ms Amber Rudd, in a statement to the House of Commons dated 23 April 2018 about the treatment of members of the Windrush generation ("the Windrush statement").

5. On 16 October 2019 the Secretary of State reviewed her decision again and decided, "on an exceptional basis", to grant the application; and a certificate of naturalisation was issued on 21 October. Very sadly, Mr Howard, who had been suffering from leukaemia for several years, died less than a month later. The Secretary of State has accepted that neither her eventual grant of citizenship to Mr Howard nor his death renders the proceedings academic, and they have been continued, pursuant to CPR 19.2 (4), by his daughter Maresha Howard Rose.

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[1] A summary of the measures usually grouped under this label appears at para. 81 of the judgment of this Court in *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647. Since the details are not material to this appeal I need not repeat the summary here. I should, however, note that following an enquiry from the Court both parties submitted helpful notes about terminology. It seems that the term "hostile environment" was originally used by ministers themselves but that from 2017 they have preferred to use the term "compliant environment". Both are arguably rather tendentious, but the original term is more familiar and arguably rather better English, and I will use it while emphasising that I do not intend it pejoratively.

6. By a decision handed down on 23 April 2021 Swift J held that the initial refusal of Mr Howard's application for naturalisation had been unlawful and made a declaration accordingly. This is the Secretary of State's appeal against that decision.

7. The Secretary of State has been represented before us by Sir James Eadie QC, leading Mr David Blundell QC. The Claimant has been represented by Ms Phillippa Kaufmann QC, leading Ms Grace Brown. The representation was the same before Swift J.

MR HOWARD'S NATIONALITY AND IMMIGRATION STATUS: HISTORY

8. Having been born in a British colony, Mr Howard was from birth a citizen of the United Kingdom and Colonies (a "CUKC"): see section 4 of the British Nationality Act 1948. By virtue of section 1 (1) of that Act a CUKC had the status of a British subject. That status, without more, gave him the right to enter and reside in the UK. Accordingly his residence was lawful from his first arrival in 1960. He was also, by virtue of section 1 (2), a "Commonwealth citizen", which was a term applied to both CUKCs and citizens of the independent countries within the Commonwealth (which were listed in section 1 (3)).

9. When Jamaica became independent, on 5 August 1962, Mr Howard automatically acquired Jamaican nationality under the terms of the Jamaican Constitution. He thereupon ceased to be a CUKC: see section 2 (2) of the Jamaican Independence Act 1962. But section 2 (1) of that Act added Jamaica to the list of countries in section 1 (3) of the 1948 Act, so that he remained a Commonwealth citizen. His right to reside in the UK was unaffected: see section 2 (2) of the Commonwealth Immigration Act 1962.

10. The Immigration Act 1971 put the right to reside in the UK on a new footing, but people in Mr Howard's position were formally protected by section 1 (2) of the Act, which provided that they should be treated as having ILR.

11. As regards citizenship, the position can be summarised as follows. Under section 6 (1) of the 1948 Act Commonwealth citizens who were nationals of other Commonwealth countries were entitled to register for CUKC citizenship following a period of twelve months' residence in the UK: that period was subsequently extended to five years. This right was preserved by paragraph 2 of Schedule 1 to the 1971 Act. However, the position was changed by the British Nationality Act 1981. This abolished CUKC citizenship and created the new status of British citizen. It also assimilated the position of Commonwealth citizens to that of other foreign nationals, by requiring them to naturalise, rather than register, in order to acquire British citizenship. Section 7 (1) provided for a transitional period, expiring on 31 January 1988, during which persons who would have been entitled to acquire CUKC citizenship under the previous regime could register for British citizenship. Neither Mr Howard nor anyone on his behalf applied for registration under any of these provisions. Accordingly, at the dates with which we are concerned he could only acquire British citizenship by naturalisation.

NATURALISATION: THE APPLICABLE LAW AND GUIDANCE

Statutory Provisions

12. Section 6 of the 1981 Act governs the right to acquire British citizenship by naturalisation. Subsection (1) reads:

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

13. Paragraph 1 of Schedule 1 to the Act (to which I will refer in this judgment simply as "paragraph 1") reads, as it stood at the time relevant for our purposes, and so far as material:

> "(1) Subject to paragraph 2, the requirements for naturalisation as a British citizen under section 6 (1) are, in the case of any person who applies for it –
>
> (a) the requirements specified in sub-paragraph (2) of this paragraph, or the alternative requirement specified in sub-paragraph (3) of this paragraph; and
>
> (b) that he is of good character; and
>
> (c) that he has sufficient knowledge of the English … language; and
>
> (ca) that he has sufficient knowledge about life in the United Kingdom; and
>
> (d) that either –
>
> (i) his intentions are such that, in the event of a certificate of naturalisation as a British citizen being granted to him, his home or (if he has more than one) his principal home will be in the United Kingdom; or
>
> (ii) …"

I need not set out the provisions of sub-paragraphs (2) and (3), which are concerned with periods of absence from the UK. The requirement with which we are concerned in this appeal is (b) ("the good character requirement").

14. Paragraph 2 of Schedule 1 gives the Secretary of State power "in the special circumstances of any particular case" to waive, or treat an applicant as satisfying, certain specified requirements under paragraph 1. The good character requirement is not among the requirements specified.

15. Section 41 of the Act gives the Secretary of State 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"). Regulation 5A includes provisions governing the proof by an applicant that they satisfy the requirements in paragraph 1 (c) and (ca) (knowledge of the English language and knowledge about life in the UK): in the typical case knowledge about life in the UK has to be demonstrated by passing a "Life in the UK test".

Guidance on the Good Character Requirement

16. At the time of the impugned decision the Home Office's published guidance about the application of the good character requirement appeared as Annex D to chapter 18 of the Home Office's Nationality Policy Guidance ("the Guidance"). The essential provisions of the Guidance for our purposes are as follows:

(1) Section 1 – "Introduction" – notes that there is no statutory definition of "good character", but paragraph 1.3 identifies four situations in which "the decision maker will not normally consider a person to be of good character". The first of these – (a) – is where "they have not respected and or are not prepared to abide by the law", for example where they have criminal convictions.

(2) Section 2 contains guidance on the relevance of criminal convictions. Paragraph 2.1 contains a table identifying four categories of criminal conviction, by reference to the nature of the sentence. The first three categories concern custodial sentences. The fourth covers, broadly, non-custodial sentences (including suspended sentences – see paragraph 2.2 (x)): in such a case the guidance is that "applications will normally be refused if the conviction occurred in the last 3 years". Paragraph 2.2 (xv) reads (so far as relevant):

> "Where this section states an application will normally be refused if a person has been convicted, exceptions should only be made in exceptional circumstances … For further information on this, see section 10 – Exceptional Grants."

(3) Section 10 reads, so far as relevant:

> "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."

The Guidance is not issued pursuant to any statutory provision.

17. Fresh guidance, headed "Nationality: good character requirement", was issued by the Home Office on 14 January 2019, but it applied only to applications made after that date, and we were not referred to its provisions.

18. It is perhaps worth spelling out the point, though it is well understood by lawyers, that "character" in this context has a rather particular meaning. I will not venture a definition, but it is essentially concerned with a propensity to criminal or other antisocial conduct (including associations that give rise to national security risks), typically though not necessarily evidenced by a record of criminal convictions.

THE WINDRUSH STATEMENT

19. I need not recapitulate the circumstances which led to the making of the Windrush statement, which are well-known. For our purposes the content of the statement can be summarised as follows.

20. In the first section of the statement the Secretary of State summarised the nature of the difficulties which members of the Windrush generation, who she described as "British in all but legal status", had encountered. She referred to successive governments having failed to ensure that "these individuals have the documentation they need". She continued:

> "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."

21. She then proceeded to announce the steps that she proposed to take, as follows:

> "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."

(I have inserted the underlinings for ease of reference.)

22. She then announced that she had set up a taskforce "to make immediate arrangements to help those who [need] it". She went on to explain a number of more detailed points about process which I need not summarise and to announce the establishment of a compensation scheme. She concluded:

> "I have set out urgent measures to help the Windrush generation document their rights, how this Government intends to offer them greater rights than they currently enjoy, how we will compensate people for the hardship they have endured and the steps I will take to ensure this never happens again. None of that can undo the pain already endured, but I hope that it demonstrates the Government's commitment to put these wrongs right going forward."

23. Following the Secretary of State's statement the Home Office published a "Windrush Scheme". This constituted a special procedure, administered by the specialist taskforce to which the Secretary of State had referred, whereby members of the Windrush generation could apply to obtain the documentation or status to which they were entitled and would receive "proactive assistance". As regards British citizenship the Scheme said (so far as relevant):

> "If the applicant is not British and has said on the application that they want British Citizenship they will be considered for naturalisation under the British Nationality Act 1981.
>
> Applicants who were settled in the UK before 1 January 1973 ... will be taken to have sufficient knowledge of English and of life in the UK and so the requirement to pass the Life in the UK test will not apply to them. …
>
> The applicant will have to meet the residence requirements for citizenship and the *good character requirement*.
>
> If the applicant qualifies for British citizenship, they will be given a certificate of naturalisation."

The italicisation indicates that the requirements in question are the subject of separate guidance, to which hyperlinks are provided later in the document: as regards the good character requirement, the link is to the Guidance referred to at para. 16 above.

24. The Scheme thus explicitly preserves the good character requirement. There was before the Judge a witness statement from Philippa Rouse, the responsible civil servant, giving evidence about the process by which the contents of the Windrush Scheme, in the relevant respects, were decided by the Secretary of State. Swift J summarised the effect of that evidence, as regards the good character requirement, at paras. 30-31 of his judgment:

> "30. … 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."

25. I should say for completeness that the "waiver" of the requirement to pay fees and pass a knowledge of language and life in the UK test announced in the Windrush statement (Ms Rudd's second point) was achieved by amendment of the 2003 Regulations and the Immigration and Nationality (Fees) Regulations 2018: see the Immigration and Nationality (Requirements for Naturalisation and Fees) (Amendment) Regulations 2018, which came into effect on 30 May 2018.

MR HOWARD'S APPLICATION FOR NATURALISATION

26. Although Mr Howard had made earlier applications for naturalisation, the application with which we are concerned was made on 9 July 2018 under the Windrush Scheme.

It was initially refused on 5 November 2018. The reason for the refusal was that he did not meet the good character requirement. The passage from the decision letter reads:

> "You have been convicted of a number of criminal offences. In particular, on 15 June 2018 at 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 has received a non-custodial sentence or other out of court disposal which is recorded on their criminal record in the last 3 years.
>
> We would normally only exercise discretion in exceptional circumstances 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."

27. Although the letter refers to Mr Howard having been convicted of "a number of criminal offences", all but one of the offences in question were minor and occurred many years previously (the last was in 2000) and would have been disregarded for the purpose of section 2 of the Guidance. It appears that in practice the only reason why he was found not to satisfy the good character requirement was the offence for which he had been convicted in June 2018 and to which specific reference is made. I should say something about the circumstances of that offence. In April 2018 Mr Howard, who was already seriously ill, attended his doctor's surgery. He became angry with the receptionist about some difficulty and attempted to snatch from her the paperwork which she was holding: in the course of doing so he grabbed her finger. Viewed purely as an assault that might be regarded as trivial, but no doubt the reason why it was prosecuted, and attracted a custodial sentence (albeit suspended), was the importance rightly attached to the protection of public servants from being assaulted in the course of their work.

28. Following an intervention by Mr Howard's MP, Ms Diane Abbott, that decision was reviewed. The relevant part of the letter reads:

> "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."

29. The decision was again reviewed by the Home Office following the issue of these proceedings, but by a letter dated 23 May 2019 the original decision was maintained. The letter again refers to Mr Howard's criminal record. Oddly, it gives more details of his old offending, but it is clear that the decision-maker focuses on the conviction in June 2018. The reasoning broadly tracks that of the earlier decisions but it addresses some particular points made in Mr Howard's pre-action letter and claim form and is accordingly somewhat fuller. I should quote one passage:

> "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 attached 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 are 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 your 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."

30. As I have said, the Secretary of State eventually reversed her decision. The Home Office's letter of 16 October 2019 reads (so far as material):

> "Mr Howard's application for citizenship was refused on 05 November 2018.
>
> Mr Howard's application has now been reviewed in the light of all the additional information and evidence provided, including that provided in Mr Howard's current judicial review proceedings. The review has considered his immigration history and his current circumstances, in particular noting his long residence in the UK, the time that has now elapsed since his criminal conviction in June 2018, and his current ill health. I am pleased to say that, in view of the circumstances of his case, the Secretary of State is satisfied that discretion should now be exercised in his favour on an exceptional basis and Mr Howard's application for British Citizenship has been approved."

SWIFT J's DECISION

31. I need not summarise the basis of Mr Howard's challenge as originally advanced, since, as Swift J noted, it underwent some modification before and at the hearing. We are concerned only with the basis on which it succeeded before him.

32. Swift J held that the three successive decisions to refuse Mr Howard's application for naturalisation were irrational. His reasoning appears at paras. 33-37, which I should set out in full:

> "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."

33. The relevant part of Swift J's order reads:

> "1. The application for judicial review is allowed.
>
> 2. The Defendant's decision of 5 November 2018, 3 December 2018 and 23 May 2019 were unlawful: to the extent that (a) the decisions of 5 November 2018 and 3 December 2018 were taken in reliance on the generally applicable good character guidance in Annex D to Chapter 18 of the Nationality Instructions; and (b) the decision of 23 May 2019 was taken in reliance on the generally applicable good character requirement in '*Nationality: good character requirement*' published on 14 January 2019."

(It was common ground before us that the reference in para. 2 (b) to the 2019 guidance was strictly wrong, for the reason given at para. 17 above.)

THE APPEAL

34. The Secretary of State's grounds of appeal read:

> "The Judge's conclusion that the Home Secretary was not entitled rationally to maintain the good character guidance for members of the Windrush generation was wrong in law. In particular:
>
> (a) It failed to recognise the breadth of the margin of respect to be afforded to the relevant decision making in context.
>
> (b) It reached a conclusion that the decision was logically flawed which was unsustainable in principle and on the facts.
>
> (c) It reached a conclusion that the decision had taken no account of long residence and integration which was also unsustainable in principle and on the facts."

I need not summarise how those arguments were developed in the skeleton argument and the oral submissions.

35. The Claimant sought to support Swift J's reasoning: since I have set that out in full I need not summarise Ms Kaufmann's skeleton argument or written submissions at this stage, though I will return to the key points made in them in the course of my discussion below. She also filed a Respondent's Notice seeking to support Swift J's conclusion by reference to article 14 of the European Convention on Human Rights; but in her skeleton argument Ms Kaufmann said that that point was not being pursued.

DISCUSSION AND CONCLUSION

36. It is in my view clear that the essential reason for Swift J's decision was that because the other requirements of the naturalisation regime had been modified to reflect the peculiar circumstances of the Windrush generation it was irrational not to make some modification also to how the good character requirement was applied. He refers to this in para. 35 as "a mis-match, a lack of logical connection" (for short, "the logical mismatch point") which rendered the maintenance of the previous guidance irrational.

As he puts it at the end of para. 36, "the logic of the Windrush statement" required "some form of departure" (that is, in the direction of greater leniency) from the guidance regarding the application of the good character requirement. The extent of the required departure is not specified – indeed the Judge recognises in the preceding sentence of para. 36 that that was a matter for the Secretary of State's (reasonable) judgment – but it is implicit in his order that it would have been such as to produce a different decision in the Claimant's case. Ms Kaufmann contended that it was wrong to focus on the logical mismatch point as the core of the Judge's reasoning. I do not accept that, but I return to the point at paras. 41-42 below.

37. I have summarised the Windrush statement, quoting the key passages, at paras. 20-23 above. I note by way of preliminary that none of the four specific steps which Ms Rudd said would be taken involved modifying the guidance about the application of the good character requirement, even though she did, as her second step, commit to waiving two of the other requirements under paragraph 1, namely those relating to knowledge of language and life in the UK (sub-paragraphs (c) and (ca)). That would be fatal to the Claimant's challenge if it were based on disappointment of a legitimate expectation, but that was not the basis of Swift J's reasoning: he relied on "the logic of the Windrush statement" rather than any specific commitment. He does refer at para. 34 of his judgment to the fact that Ms Rouse's evidence showed that Ms Rudd had already decided in principle that some modification to the application of the good character requirement should be made, albeit not what form it would take. That is true as far as it goes but it does not advance the argument. The essential question is simply whether the logic of the Windrush statement did indeed require such a modification.

38. As to that, Swift J's reasoning starts with Ms Rudd's general references, quoted in para. 34 of his judgment, to members of the Windrush generation being "British in all but legal status" and "deserving" British citizenship, and to the effect of the proposed measures being that they would be able to acquire it. Those statements cannot of course reasonably have been understood as meaning that all members of the Windrush generation could acquire British citizenship whatever their record of criminal behaviour. The revised submission from her officials which Ms Rudd accepted recognised that it would be unacceptable to grant citizenship to someone "with serious criminal convictions or who has been associated with terrorism" and recommended only a more lenient approach to a history of "minor offences". It is not suggested by the Judge, nor did Ms Kaufmann submit, that it was necessary for the good character requirement to be dispensed with altogether (which would indeed have required primary legislation). That being so, I am not sure that these general statements take us very far. The real core of the "logical mismatch" is expressed in para. 35. The point which the Judge there makes is that the essential feature underlying the other announced changes was the long residence and degree of integration in British society which characterised members of the Windrush generation, and that there was no good reason for not giving weight to this factor in the application of the good character requirement also. In my view, that reasoning is fallacious, for the reasons which I give below.

39. The starting-point is that it is plain that there is no direct connection between good character on the one hand and long residence and integration on the other. The two concepts are concerned with different things. A person may have lived in the UK for decades and be fully integrated in British society but nevertheless have a long record of criminal or anti-social behaviour. This means that there is a fundamental distinction

between modifying the guidance as to the good character requirement and waiving, say, the tests of language or knowledge of life in the UK. In the case of the latter the particular circumstances of the Windrush generation have a direct bearing on whether the requirements are necessary: their particularly long residence and "Britishness in all but status" means that the requirements in paragraph 1 (1) (c) and (ca) will in practice be satisfied. The same cannot be said of whether they satisfy the requirement of good character.

40. In my view it follows that there was no logical mismatch. Once it is recognised that the circumstances on which the Judge relied do not relate to the good character requirement the premise for his reasoning falls away. It is not illogical to treat different situations differently.

41. That conclusion is fatal to the basis on which, as I read his judgment, Swift J decided the case. However Ms Kaufmann did not in her skeleton argument accept that my characterisation of his reasoning was correct. She did not accept that the logical mismatch point was central to it. Rather, she said, his core reasoning was that the Secretary of State's decision was irrational "in the context of the Windrush statement" more generally. In her oral submissions she put her case more broadly still. She submitted that the whole circumstances of the Windrush generation as recognised in the statement rationally required a modification of every aspect of the naturalisation regime as it was applied. Those circumstances embraced not only their peculiarly long residence and peculiar degree of integration – Britishness in all but legal status – but also the historic injustice which so many of those who had not acquired British nationality suffered from the impact of the hostile environment policy.

42. I am not sure that Ms Kaufmann's characterisation of Swift J's reasoning is in truth fundamentally different from mine, but to the extent that it is I do not accept it. In any event, however, I do not think that her broader challenge is sustainable, whether or not it corresponds to the Judge's reasoning. Shorn of the element of logical mismatch, it amounts to a straightforward contention that, given the particular circumstances of the Windrush generation as recognised in the statement, the only rational choice open to the Secretary of State was to relax the good character guidance in their favour. I cannot accept that. No doubt (subject to the point considered at para. 44 below) it was a possible course, and it evidently appealed to Ms Rudd, though we do not know what form of eventual relaxation she would eventually have approved. But it does not follow that it was the only reasonable course. The assessment of whether an applicant for naturalisation is of good character is a matter entrusted by Parliament to the discretion of the Secretary of State. Whether that question should be approached in the same way for all applicants, irrespective of whether in other respects their cases may be particularly deserving, is quintessentially a policy matter of a kind with which the Court should be very slow to interfere. I can see no basis for holding that it was irrational of the Secretary of State to decide to maintain the same approach for all applicants.

43. Once that point is reached it is unnecessary to consider some criticisms made by Sir James of other aspects of the Judge's reasoning or Ms Kaufmann's responses to them.

44. That is sufficient to dispose of the appeal. I should note, however, that there may be a more fundamental objection to the Claimant's case. Paragraph 1 (1) (b) imposes an absolute requirement of good character, albeit to be judged by the Secretary of State (see section 6 (1) of the 1981 Act), in respect of which there is no power of waiver. It

is in my view arguable that it follows that the judgment required by section 6 (1) should be confined to weighing evidence that is capable of going to character (in the relevant sense) and that it is not legitimate to introduce considerations which themselves have nothing to do with character – such as, here, the particular circumstances of the Windrush generation. This may be, though the language is rather opaque, what was meant by the reference in the revised submission to Ms Rudd to a risk of legal challenge on the basis that "logically good character should be an objective standard". However, this point was not at the centre of the Secretary of State's submissions and since it is not necessary to my conclusion I prefer not to decide the case on this basis.

DISPOSAL

45. I would allow the appeal and set aside the Judge's declaration that the impugned decisions were unlawful.

46. I wish to emphasise that this decision does not in any way undermine the recognition that Mr Howard was shamefully treated in the way summarised at para. 2 above and for which compensation has now been paid. There should never have been any question of his entitlement to live and work in this country. This appeal has been concerned only with the more limited question of whether the Secretary of State was obliged to relax the good character requirement when considering his application for British citizenship.

Lord Justice Baker:

47. I agree.

Lady Justice Elisabeth Laing:

48. I also agree.