Neutral Citation Number: [2021] EWHC 3415 (Admin)

Case No: CO/1784/2021
CO/2941/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2021

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE QUEEN
On the application of

(1) VERNON VANRIEL **Claimants**
(2) EUNICE TUMI

- and -

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

- -

Chris Buttler QC, Eleanor Mitchell and Grace Brown (instructed by **Duncan Lewis**) for the **Claimants**
Sir James Eadie QC and Edward Brown (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: Wednesday 1 - Thursday 2 December 2021

- -

Approved Judgment

The Hon. Mr Justice Bourne:

Introduction

1. These two claims for judicial review have been directed to be heard together. Mr Vanriel was granted permission by Cavanagh J on 27 July 2021. Ms Tumi was granted permission by Lane J on 13 October 2020.

2. The context for the claims is what has become known as the Windrush scandal. It is summarised in a report by the House of Commons Committee of Public Accounts which was published on 6 March 2019, in these terms:

> *"Between 1948 and 1973, nearly 600,000 Commonwealth citizens came to live and work in the UK with the right to remain indefinitely. But many were not given any documentation to confirm their immigration status, and the Home Office kept no records. In the last ten years, successive governments have introduced the "compliant environment" where the right to live, work and access services including benefits and bank accounts in the UK is only available to people who can demonstrate their eligibility to do so. Towards the end of 2017 the media began to report stories of members of the Windrush generation being denied access to public services, being detained in the UK or at the border, or being removed from, or refused re-entry to, the UK. This has been referred to as the Windrush scandal."*

3. On 30 May 2018 the Government brought into effect the Windrush Scheme. It was described in these terms in a Home Office press release:

> *"The Home Secretary has today announced that legislation has been introduced to bring into force a package of measures under a Windrush scheme.*
>
> *The legislation will enable the government to begin processing citizenship applications for the Windrush generation – Commonwealth nationals who settled in the UK before 1973 – free of charge. Free citizenship applications for children of the Windrush generation who joined their parents before they turned 18 and free confirmation of the existing British citizenship for children born to the Windrush generation in the UK where needed – will also be able to commence.*
>
> *People applying for citizenship under the scheme will need to meet the good character requirements in place for all citizenship applications but will not need to take the knowledge of language and life in the UK test or attend a citizenship ceremony.*
>
> *The scheme also covers the government's commitment to help members of the Windrush generation who are looking to return to the UK having spent recent years back in their home countries. These people will also be able to*

apply for the relevant documentation free of charge. In addition, Mr Javid confirmed that non-Commonwealth citizens who settled in the UK before 1973 and people who arrived between 1973 to 1988 who have an existing right to be in the UK are not expected to pay for the documentation they need to prove their indefinite leave to remain.

Home Secretary, Sajid Javid said:

'I am clear that we need to make the process for people to confirm their right to be in the UK or put their British citizenship on a legal footing as easy as possible. That is why I have launched a dedicated scheme which brings together our rights, obligations and offers to these people into one place.

I want to swiftly put right the wrongs that have been done to this generation and am committed to doing whatever it takes to make this happen.' "

4. Both Claimants claim to be victims of the type of injustice which gave rise to the Windrush Scheme, in that they were wrongfully prevented from entering the UK at a time when they had or were entitled to indefinite leave to remain in the UK ("ILR"). Both Claimants successfully applied under the Windrush Scheme and were granted ILR. Both subsequently applied for British citizenship. In both cases the Defendant refused the citizenship applications, considering that she was bound to do so by a provision of primary legislation (Sch 1, para 1(2)(a) of the British Nationality Act 1981, "BNA") which requires that a citizenship applicant has been physically present in the UK five years prior to the application ("the 5 year rule").

5. It is common ground that, on the face of it, the 5 year rule did indeed mean that citizenship could not be granted. The central question for this Court is whether the Human Rights Act 1998 ("HRA") nevertheless mandates a different outcome – and/or whether there should be a declaration of incompatibility in respect of the provision containing the 5 year rule.

Factual background

6. Mr Vanriel was born in Jamaica in 1956. In 1962 he came to the UK with his mother to join his father who was already working here. He was and is a Commonwealth citizen settled in the UK before 1 January 1973 and is therefore a member of the first of four categories of person to whom the Windrush Scheme applies.

7. Mr Vanriel lived in the UK from 1962 until 2005, working, establishing family life and having two children here. After his mother died, his father returned to Jamaica in the 1990s. Mr Vanriel visited him there in 1998 and, while in Jamaica, had a brief relationship which resulted in the birth of a third child, a son, in December 1998. Thereafter he regularly visited his father and son in Jamaica, travelling on his Jamaican passport which contained a stamp showing that he

had ILR. When he renewed his passport in 2003, the stamp was not reproduced but he thought nothing of it.

8. His father died in 2004 and he went to Jamaica to arrange the burial. When he sought to return, his application for leave to enter as a returning resident was refused. That decision was overturned on appeal in January 2005, and Mr Vanriel thought it had just been a "hiccup in the system". He returned to Jamaica in July 2005 to spend an extended period with his third child. In early 2007 he wished to return to the UK and applied for leave as a returning resident, but was refused. He applied again, and was refused again on 8 December 2008, for reasons which are not now material.

9. Mr Vanriel found himself stranded in Jamaica for over 13 years. Thanks to health problems, he endured considerable hardship. But in 2018 the Windrush scandal occurred, and this prompted him to make a new application. On 22 August 2018 he was granted a visa as a returning resident under the Windrush Scheme, and he returned to the UK on 6 September 2018.

10. He applied for ILR on 11 October 2018 and a few days later, his representatives confirmed to the Defendant that he wished to become a British citizen.

11. On 21 November 2018 the Defendant confirmed that he had been granted ILR. He then waited until February 2020 to hear more about his citizenship application, when a data subject access request uncovered Home Office documents such as a note on 30 July 2019 stating that the application "will be unsuccessful".

12. Further delays ensued and Mr Vanriel threatened to apply for judicial review. On 18 February 2021, the Defendant refused the citizenship application. In short, the decision was that the 5 year rule was not satisfied and there was no discretion to waive it.

13. The refusal on 18 February 2021 was contained in a personal letter from the Defendant, referring to the injustice and hardship suffered by Mr Vanriel and other members of the Windrush generation as "shameful" and apologising for his treatment. While reiterating that the 5 year rule could not be waived, the letter continued:

> "*I am pleased that you have been granted settled status in the United Kingdom and that you have full rights to live, work and access benefits here. I have no doubt that you fully deserve to become a citizen of this country and I would like to assure you that you are well on the path to doing so.*"

14. The letter expressed "*deep regret*" for the fact that "*we are constrained by the parameters of the existing legislation*", added that the Government was urgently considering the scope for changing the law for cases of this kind and concluded

that "*We will continue to work with you to ensure you can obtain citizenship at the earliest possible point, with no fees applied*".

15. Ms Tumi was born in Ghana on 3 September 1963. Her father arrived in the UK in about December 1963 and was joined by her mother in around March 1964. Ms Tumi arrived as a baby later that year. She has three siblings, one who accompanied her to the UK and two others who were born here, and all three are British citizens. On 21 October 1971, Ms Tumi's parents were registered as citizens of the United Kingdom and Colonies under section 6(1) of the British Nationality Act 1948 as amended by section 12(2) of the Commonwealth Immigrants Act 1962.

16. In 1972, Ms Tumi, her parents and her three siblings left the UK for Ghana as her parents had obtained work there. In 1980, following the breakdown of the relationship between her parents, Ms Tumi, then about 17, returned to the UK with her mother and her three siblings. She studied and worked. In 1982 she was married in the UK. On 9 October 1982, she gave birth to a daughter, who is a British citizen.

17. On 16 June 1984, Ms Tumi left the UK for the USA where her husband had been admitted to a university. Her daughter stayed in the UK under the guardianship of Ms Tumi's mother. Ms Tumi sought to return to the UK in October 1986 after her relationship with her husband had broken down. She presented to the British embassy her expired Ghanaian passport, which had an ILR stamp in it, and also her then current Ghanaian passport which did not have such a stamp.

18. The route by which Ms Tumi had acquired ILR is not entirely clear. It has been pointed out that this did not occur automatically under section 1(2) of the 1971 Act when that Act came into force on 1 January 1973 because she was not in the UK on that date. During the hearing I asked whether either side wished to make any further comment on this. I have received further comments by email, to the effect that:

    (1) There is no record of an ILR stamp being placed in Ms Tumi's passport, but that fact is not challenged as such.

    (2) ILR stamps were not put in Ghanaian passports before 1973, and therefore such a stamp could only have been placed in Ms Tumi's passport after her return to the UK in 1980.

    (3) Such ILR would have lapsed after 2 years' absence. A return before 1988 would not have automatically revived it because Ms Tumi was not settled in the UK on 1 January 1973 (see the reference to section 1(5) of the Immigration Act 1971 at [47] below).

(4) When Ms Tumi sought to enter in October 1986, her case fell for consideration under what was then paragraph 57 of the Immigration Rules, read in context of paragraph 56:

"56. A Commonwealth citizen who satisfies the immigration officer that he was settled in the United Kingdom at the coming into force of the Act, and that he has been settled here at any time during the 2 years preceding his return, is to be admitted for settlement. Any other passenger returning to the United Kingdom from overseas … is to be admitted for settlement on satisfying the immigration officer that he had indefinite leave to enter or remain in the United Kingdom when he left and that he has not been away for longer than 2 years.

57. A passenger who has been away from the United Kingdom too long to benefit from the preceding paragraph may nevertheless be admitted if, for example, he has lived here for most of his life."

19. Ms Tumi says that in October 1986 she was informed that her right to enter and remain in the UK had lapsed as she had been out of the UK for more than two years and that she did not qualify for a visa. The Defendant has no record of this, but says that any such advice was correct: see [18(3)] above. The Defendant adds that Ms Tumi also would not have been able to register as a British citizen as of right in the period 1973-1988, as others were able to: see paragraph 19 of the judgment of Swift J in the case of *Howard*, referred to at [45] and [67] below.

20. Ms Tumi therefore remained in the USA until 2002 when she moved to Ghana, where she remained for a further 16 years. On 14 March 2018 Ms Tumi applied for a visit visa from Ghana. By now she had a granddaughter, born in 2006, who was resident in the UK and British. Her granddaughter was severely disabled and sadly died in January 2020.

21. On 1 April 2018 Ms Tumi's application was refused. On 27 April 2018, she made a further application for a visit visa. Shortly after submitting the application, she telephoned the Windrush Taskforce helpline and explained her history and background. She was subsequently informed by the Taskforce that they had called the British High Commission in Ghana and told them that Ms Tumi's visit visa should be granted, though she was still required to produce a return ticket, confirming that she would return to Ghana at the end of her visit. This application was granted on 9 May 2018 and Ms Tumi returned to the UK on 15 May 2018, 32 years after she was first refused re-entry.

22. On 11 June 2018, Ms Tumi was informed by the Windrush Taskforce that her right to remain in the UK had been established and she was granted ILR.

23. However, it seems that on 12 July 2018, there was a recommendation that her citizenship application should be refused. The formal decision was not issued

until 24 March 2020. The decision letter stated that she could not satisfy the 5 year rule. Ms Tumi requested a review but the decision was maintained on 21 May 2020.

24. The Claimants have also adduced witness statements from other individuals who have had comparable experiences, finding themselves excluded from the UK for many years despite long residence here and then having citizenship refused by application of the 5 year rule.

Legal framework

25. Section 6(1) of the BNA provides:

> "*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.*"

26. The (relevant) requirements of paragraph 1 of Schedule 1 are as follows:

> *"(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;*
>
> *(b) that he is of good character; and*
>
> *(c) that he has a sufficient knowledge of the English, Welsh or Scottish Gaelic language; and*
>
> *(ca) that he has sufficient knowledge about life in the United Kingdom; 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 […]*
>
> *(2) The requirements referred to in sub-paragraph (1)(a) of this paragraph are—*
>
> *(a) that the applicant was in the United Kingdom at the beginning of the period of five years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 450; and*

(b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90;

(c) that he was not at any time in the period of twelve months so ending subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and

(d) that he was not at any time in the period of five years so ending in the United Kingdom in breach of the immigration laws.

(3) The alternative requirement referred to in sub-paragraph (1)(a) of this paragraph is that on the date of the application he is serving outside the United Kingdom in Crown service under the government of the United Kingdom."

27. Paragraph 2 of schedule 1 further provides:

"(1) If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 1 do all or any of the following things, namely—

(a) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(a) or paragraph 1(2)(b), or both, although the number of days on which he was absent from the United Kingdom in the period there mentioned exceeds the number there mentioned;

(b) treat the applicant as having been in the United Kingdom for the whole or any part of any period during which he would otherwise fall to be treated under paragraph 9(1) as having been absent;

(c) disregard any such restriction as is mentioned in paragraph 1(2)(c), not being a restriction to which the applicant was subject on the date of the application;

(d) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(d) although he was in the United Kingdom in breach of the immigration laws in the period there mentioned;

(e) waive the need to fulfil either or both of the requirements specified in paragraph 1(1)(c) and (ca) if he considers that because of the applicant's age or physical or mental condition it would be unreasonable to expect him to fulfil that requirement or those requirements.

(2) Sub-paragraph (3) applies in a case where, on the date of the application, the applicant is or has been a member of the armed forces.

(3) If in the special circumstances of the particular case the Secretary of State thinks fit, he may for the purposes of paragraph 1 treat the applicant as fulfilling the requirement specified in paragraph 1(2)(a) although the applicant was not in the United Kingdom at the beginning of the period there mentioned."

28. The following observations can be made about these requirements:

(1) Some are "hard-edged", meaning that the requirement (such as residence during a certain period) either is or is not objectively satisfied.

(2) Others, such as good character or the "sufficient knowledge" provisions are "soft-edged", meaning that it is for the Defendant in her discretion to decide whether or not they are satisfied.

(3) The 5 year rule is subject to an exception for those who have been in Crown service overseas, and it is made subject to a discretion when applied to members of the armed forces.

(4) Save to the extent in (3) above, the 5 year rule is a hard-edged provision and there is no discretion to disapply it.

(5) There is a discretion to disapply any of the other hard-edged requirements.

29. Section 3 HRA provides:

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted; …"

30. The "*Convention rights*" are defined in s 1(1) as "*the rights and fundamental freedoms set out in*", inter alia, Articles 2 to 12 and 14 ECHR.

31. Articles 8 and 14 provide:

"ARTICLE 8
Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 14
Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

32. Section 4 reads (as relevant):

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. …"

33. Section 6 provides (as relevant):

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

New proposed legislation

34. On 6 May 2021, the Secretary of State concluded a consultation on reform of British nationality law, including reform of the 5 year rule.

35. On 6 July 2021, the Nationality and Borders Bill was introduced in the House of Commons by the Secretary of State. Clause 8 of the Bill, read with Sch 1, proposes amendments to the BNA "*to allow the Secretary of State to waive the requirement that a person must have been present in the United Kingdom… at the start of the relevant period*", including in the context of an application for citizenship by naturalisation. In particular, Sch 1 to the Bill proposes amending para 2(1) of Sch 1 to the BNA to introduce an express power to "*treat the applicant as fulfilling the first requirement specified in paragraph 1(2)(a) although the applicant was not in the United Kingdom at the beginning of the period there mentioned.*" The Bill is presently in the Report stage before the House of Commons.

36. The solution of importing a discretion is therefore on the horizon. The Defendant does not suggest that this makes the claims academic. Nor, it seems to me, does it mean that the claims have legal merit. It lends some support to the fairly uncontroversial proposition that the present lack of a discretion can lead to injustice.

The issues

37. By these claims the Court is invited to decide:

    i. What is the natural meaning of paragraphs 1 and 2 of schedule 1 to the BNA in respect of the 5 year rule?

    ii. Were the Defendant's decisions, giving those provisions their natural meaning, incompatible with the Claimants' rights under ECHR Article 14?

    iii. Were the decisions, giving those provisions their natural meaning, incompatible with the Claimants' rights under ECHR Article 8?

    iv. If the answer to ii or iii is yes, is it possible for those provisions to be given a different meaning which is compatible with the Claimants' ECHR rights under HRA section 3?

    v. If the answer to iv is no, should there be a declaration of incompatibility under HRA section 4?

Issue i: the natural meaning of paragraphs 1 and 2 of the 5 year rule

38. This is not really an issue at all, because the parties agree that the natural and unambiguous meaning of paragraph 2(1)(a), as opposed to any different reading

which might be required under HRA section 3, is that there is no relevant discretion to disapply the 5 year rule. An applicant either was, or was not, in the UK on the relevant day, and if they were not, citizenship will be refused.

Issue ii: Were the Defendant's decisions, giving those provisions their natural meaning, incompatible with the Claimants' rights under Article 14?

39. In relation to the discrete challenges under Article 14 and under Article 8, it is necessary to begin by deciding what is the appropriate test to apply.

40. Sir James Eadie QC, representing the Defendant, argued that this is a challenge to the validity of the provisions of the BNA rather than to the exercise of the power in the individual cases. On that basis he submits that ECHR rights would not be infringed unless the relevant legislative provision is incapable of operation in a proportionate way in all, or almost all, cases. That was the test applied in *R (Joint Council for the Welfare of Immigrants) v National Residential Landlords Associations* [2021] 1 WLR 1151, a challenge under Articles 14 and 8 to provisions of the Immigration Act 2014 prohibiting private sector landlords from letting their properties to those without the necessary immigration status. The Claimants, who argue that their cases are special cases, would not be able to satisfy that test.

41. However, I accept the submission in response by Chris Buttler QC, representing the Claimants, that this is a challenge not to the legislation per se but to its application in the Claimants' individual cases. It is quite clear that a human rights challenge can be mounted to the application of a rule in an individual case. There are many examples including authorities to which I shall come later on, such as *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 and *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604. The possibility of that type of claim was also referred to by Baroness Hale in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055 at [2], a passage referred to in the judgment of Hickinbottom LJ in *JCWI* at [118].

42. The question is therefore whether the decisions in the present cases were compatible with the ECHR rights of the Claimants.

43. This Article 14 challenge is of the kind identified in *Thlimmenos v Greece* (2001) 31 EHRR 411. It alleges a form of indirect discrimination consisting of a failure to treat different situations differently.

44. The parties agree that this issue is to be decided by answering four questions identified in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 at [136]. Adapted slightly for the *Thlimmenos* type of case, the questions are:

    i. Does the subject matter of the complaint "fall within the ambit" of one of the substantive Convention rights?

ii. Does the ground on which the Claimants claim to have suffered the discrimination constitute a "status"?
iii. Have they been treated in the same way as other people whose situation is relevantly different from theirs because they do not share that status?
iv. Did the Claimants' treatment have an objective and reasonable justification?

45. As to the first question, the parties agree that a refusal of citizenship is within the "ambit" of ECHR Article 8.

46. As to the second question, Mr Buttler in his skeleton argument suggests that the Claimants have a relevant status as "Windrush victims who have applied for naturalisation but cannot satisfy the 5 year rule as a result of that very status".

47. Sir James in his skeleton argument accepts that this Court in *R (Howard) v SSHD* [2021] 1 WLR 4651 recognised the following as having a relevant status for Article 14 purposes: "*all those who had a right to remain in the United Kingdom by virtue of section 1 (2) of the 1971 Act who, prior to 1 January 1988, could have obtained British nationality by registration*". That, Sir James submits, would cover Mr Vanriel but not Ms Tumi because she emigrated from the UK to Ghana before the commencement date of the 1971 Act (1 January 1973).

48. Can a relevant status be extended to a wider cohort of those to whom the Windrush Scheme is relevant?

49. In *R (Mahabir) v Home Secretary* [2021] 1 WLR 5301, the first claimant came to the UK from Trinidad as a baby in 1969. On 1 January 1973 she became entitled to ILR by operation of the 1971 Act. She returned to Trinidad with her father in 1977, thereby losing her ILR. She could have retained it if she had returned before 1 August 1988. Until its repeal on that date, section 1(5) of the 1971 Act preserved the rights of Commonwealth citizens who were settled in the UK on 1 January 1973. The second to seventh claimants were her husband whom she married in Trinidad and their children who were born there, none of whom had ever resided in the UK. She made two unsuccessful visa applications in or around 2008. The Windrush scandal was widely reported in 2018, and the first claimant fell within the description of one of the categories referred to in the Defendant's casework guidance for operation of the Windrush Scheme. In October 2018 she was granted a returning resident visa for 6 months to allow her to collect documentation confirming that her ILR had been restored. However, her claim under Article 14 arose because, when the other claimants wished to join the first claimant in the UK, the Defendant required them to make their applications out-of-country and to pay substantial application fees which they could not afford. This was said to be (among other things) a failure to treat unlike cases differently, having regard to their status as relatives of a Windrush victim. Mr Tim Smith, sitting as a Deputy High Court Judge, allowed the claim and in particular held at paragraph 174:

> *"It is accepted that Windrush victims like the first claimant are in a different position from other applicants. The question is whether family members of a Windrush victim are too. In my judgement, the answer to that question must be yes. Their ability to access the entry application process bears directly on the article 8 rights of the Windrush victim, as I have found above. The fact that the outcome of family members' applications will bear directly on the article 8 rights of a Windrush victim is sufficient reason why the family members should be accorded a status over and above those of other applicants."*

50. Mr Buttler submits that if mere family members have a "status" for the purpose of Article 14 then, a fortiori, Windrush victims do too, as the Deputy Judge indicated.

51. Sir James, who appeared for the Secretary of State in *Mahabir*, told me that no concession was made in that case, and he points out the brevity of the relevant conclusions in that case which makes it difficult to extract a principle from them.

52. It seems to me that the real issue is not whether there is a relevant status but how to define it. It is clear from *Howard* and *Mahabir* that there is no legal impediment to allowing "status" to those in a recognisable legal situation referable to the Windrush Scheme.

53. I therefore consider that a complaint under Article 14 can be raised by individuals on the ground that they (1) have been recognised (or are recognisable) as people to whom the Windrush Scheme applies because they were denied entry to the UK and (2) have been unable to satisfy the 5 year rule by reason of that denial of entry.

54. Proceeding on the basis that both Claimants fit that description (a point to which I return below), the third question is whether they have been treated in the same way as other people whose situation is relevantly different from theirs because they do not share that status.

55. The answer is plainly yes. The 5 year rule is currently applied to all applicants for citizenship, whether or not they have been prevented from satisfying it by a denial of entry which made the Windrush Scheme applicable to them.

56. Sir James points out that Windrush victims have in fact received treatment that is more favourable in some respects and is therefore not the same as the treatment given to other migrants. Under the Windrush Scheme they have, for example, been relieved of having to pay fees for certain applications and some have received financial compensation.

57. However, as Sir James himself recognised, that argument is more relevant to the next question i.e. whether the Claimants' treatment, considered as a whole,

was justified. It does not alter the threshold fact that the 5 year rule was applied indiscriminately to those with and those without the status with which we are concerned.

58. The fourth and final question for Article 14 purposes is whether the treatment of the Claimants can be justified. It is helpful to remember that the questions ultimately to be asked in the justification exercise are those identified in *Bank Mellat v. HM Treasury (No. 2)* [2014] AC 700, at §74 by Lord Reed:

> *"(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,*
> *(2) whether the measure is rationally connected to the objective,*
> *(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and*
> *(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

59. Sir James first reminded me that, in a case of the *Thlimmenos* kind, it is the measure itself, rather than its indirectly discriminatory impact, which must be justified. In a direct discrimination case, conversely, it would be the discriminatory impact which fell to be justified. See *R (DA) v Work and Pensions Secretary* [2019] UKSC 21, [2019] 1 WLR 3289 per Baroness Hale at [134].

60. That said, Sir James also accepted the proposition that regard must be had to the discriminatory impact when deciding whether the measure, i.e. a 5 year rule with no flexibility in favour those such as the Claimants, is justified.

61. Sir James contended, and I accept, that the 5 year rule clearly has the legitimate aim of ensuring that an applicant for citizenship has a clear, strong connection with the UK evidenced by presence here. That can be seen from the Defendant's published document *Nationality policy: Naturalisation as a British citizen by discretion* which states:

> "*In order to qualify for naturalisation as a British citizen, an individual is required to demonstrate close links with, and a commitment to the UK. As part of this the expectation is that applicants should meet the residence requirements*".

62. For present purposes I am also prepared to assume that it is unnecessary to show that some further aim is served by making the 5 year rule mandatory rather than discretionary. I also accept that the measure is rationally connected to the objective.

63. The questions of whether a less intrusive measure could have been used and of whether the discriminatory effects of the measure outweigh the importance of the objective are more complex.

64. In relation to those questions and to justification generally, Sir James emphasised the respect, or the margin of appreciation, which must be allowed to judgments made by Parliament in primary legislation in areas of social policy such as immigration.

65. This can be seen from the judgment of Lord Reed P, in his judgment in *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, [2021] 3 WLR 428. Lord Reed first considered the approach of the European Court. He noted that the scope of the margin of appreciation "*will vary according to the circumstances, the subject matter and the background*" ([98], quoting from *Carson* 51 EHRR 13). He considered it "*doubtful whether the nuanced nature of the approach … can be comprehensively described by any general rule*", regarding it as "*more useful to think of there being a range of factors which tend to heighten, or lower, the intensity of review*" [99]. He referred to some "*suspect*" grounds of discrimination which should receive closer scrutiny, including sex, sexual orientation, race or ethnic origin, religious belief and others, and continued:

> *"115. In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from 'the circumstances, the subject matter and its background'. Notwithstanding that complexity, some general points can be identified.*
>
> *(1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100—113 above, which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.*
>
> *(2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that 'very weighty reasons' must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. … In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court 'will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" ' …*
>
> *(3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states …*

> *(4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes …*
>
> *(5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. …*
>
> *116. As the cases demonstrate, more than one of those points may be relevant in the circumstances of a particular case, and, unless one factor is of overriding significance, it is then necessary for the court to make a balanced overall assessment."*

66. Lord Reed then reviewed the cases in which the European Court had said that when general measures of economic or social strategy were under scrutiny, it would generally respect the legislature's policy choice unless it was "*manifestly without reasonable foundation*", noting that this approach was sometimes displaced by other factors, so that (at [142]):

> *"… there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is 'manifestly without reasonable foundation'. The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case."*

67. Lord Reed then explained that domestic courts generally apply an approach analogous to that of the European Court. This respects Strasbourg jurisprudence and the domestic doctrine of the separation of powers. Having reviewed domestic case law, he concluded:

> *"158. … it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified … But other factors can sometimes lower the intensity of review even where a suspect ground is in issue … Equally, even where there is no*

'suspect' ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.

159. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in Ghaidan v Godin-Mendoza [2004] 2 AC 557 and R (RJM) v Secretary of State for Work and Pensions [2009] AC 311, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.

160. It may also be helpful to observe that the phrase 'manifestly without reasonable foundation', as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues.

161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the 'manifestly without reasonable foundation' formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening) [2021] 1 WLR 1151 and R (Delve) v Secretary of State for Work and Pensions [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the 'manifestly without reasonable foundation' formulation in circumstances where a particularly wide margin is appropriate.

162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in JD [2020] HLR 5, para 11:

> *'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation.*

> *Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts.'*
>
> *In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:*
>
> *'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.' "*

68. Sir James submitted that, applying these principles, courts should (and in practice do) allow a wide margin of appreciation in considering whether primary legislation in the field of immigration and nationality is justified. That approach, he said, is all the more appropriate in a case such as this where the discrimination is not on any "suspect" ground. There is, he submitted, nothing inherently objectionable about the 5 year rule. The question of what if any discretion could or should be added to it is a matter for the careful consideration of Parliament – as indeed will happen in response to the Bill which has now been presented. The rule should not be effectively rewritten by the Court in response to a *Thlimmenos* discrimination claim.

69. Sir James pointed out that in *Howard*, a Thlimmenos-type Article 14 challenge was rejected. The challenge in that case, as in these claims, was to a decision to refuse an application for naturalisation as a British citizen by a member of the Windrush generation. The refusal was on the basis that the claimant had not satisfied the good character requirement. That was in view of the applicant having 8 criminal convictions (3 in the 1970s, 3 in the 1980s, 1 in 2000 and 1 in 2018), 7 of which resulted in non-custodial sentences and the last of which resulted in a suspended prison sentence. Swift J held that the refusal did not infringe HRA section 6(1) because, applying section 6(2), the Secretary of State was bound by primary legislation to apply the good character requirement. He also held that a *Thlimmenos* challenge to the lawfulness of the good character requirement itself must fail because the requirement was justified. It plainly pursued a legitimate objective (of ensuring that citizenship is given only to

those who are deserving of it) and, because it was for the Secretary of State to identify the specifics of the requirement by adopting a policy setting out when it would and would not be satisfied, the requirement was capable of being used to pursue the objective in a proportionate way.

70. However, Swift J went on to rule that the decision was unlawful at common law because it was irrational. The irrationality consisted of applying the good character requirement, unmodified, to a member of the Windrush generation with only minor convictions, after a previous Secretary of State had issued a statement about the Windrush Scheme, which said (among other things): "*I want the Windrush generation to acquire the status they deserve – British citizenship – quickly, and at no cost and with proactive assistance throughout the process*." I have been told that permission to appeal has been granted.

71. Sir James emphasises that any indirect discrimination was justified in *Howard*, despite the finding of irrationality, without the Court (which did not have the benefit of the Supreme Court's decision in SC) resorting to the application of a wide margin of appreciation.

72. As to proportionality in the present case, Sir James submitted that it is logical to have a clear rule which applies to everyone. He pointed out that the requirement of presence in the UK is softened to the extent that some absences from the UK during the 5 years leading up to an application are permitted, as set out above. The existence of some hard cases does not mean that the rule does not have a reasonable foundation. Any injustice to members of the Windrush generation is tempered by the more favourable treatment which they have been granted in other respects, such as compensation (including a substantial sum in Mr Vanriel's case). In cases such as these, injustice is limited because the Claimants will be able to satisfy the 5 year rule in due course and, in the meantime, their ILR gives them all the benefits of residence in the UK. The impact will vary from case to case, and there will be no impact in some cases where the inability to satisfy the rule has nothing to do with Windrush status.

73. Meanwhile, the rule has represented the will of Parliament for 40 years, and that will was reaffirmed as recently as 2014 when an amendment allowed a waiver for members of the armed forces but the opportunity was not taken to introduce a more general discretion. The scope of any discretion, Sir James argues, is quintessentially a choice for Parliament to make, and an adjustment in favour of the Windrush generation could create unfairness for other groups.

74. Sir James contends that it is therefore impossible for the Claimants to surmount the high hurdle of the margin of appreciation, whether that is expressed as showing that the Defendant's decisions are manifestly without reasonable foundation or otherwise.

75. Mr Buttler QC, for the Claimants, contends that the rigid application of the 5 year rule cannot be justified. He accepts that there is a legitimate rule and policy which requires citizenship applicants to show a sufficiently strong connection with and commitment to the UK, but argues that the rigid 5 year rule is an arbitrary way of pursuing that aim.

76. Mr Buttler points out that the 5 year rule is the only one of the criteria for citizenship in which there is neither discretion nor discretionary judgment. For example, it is for the Defendant to judge whether an applicant satisfies the requirement of "good character", and there is a discretion to disapply the other "hard-edged" requirements such as the requirement not to have been absent from the UK for more than 450 days in the last 5 years or for more than 90 days in the last year.

77. Moreover, Mr Buttler submits, any suggestion that there is some inherent importance in an applicant having been present in the UK on the relevant day (i.e. the day 5 years before the date of the application) is undermined by the fact that in 2014 Parliament decided to relax that requirement for members of the armed forces.

78. On the other hand, says Mr Buttler, there is clear evidence that the application of the rule has unfairly interfered with the rights of those with the relevant status, and that it runs contrary to the Government's stated policy of remedying injustices suffered by the Windrush generation. That policy has been apparent since at least 24 May 2018 when the Government issued the press announcement about the launch of the Windrush scheme which I quoted above.

79. To that must be added the Defendant's letter to Mr Vanriel on 18 February 2021 expressing her "*deep regret*" that the "*strict and immovable requirement*" compelled refusal despite her having "*no doubt that you fully deserve to become a citizen of this country*". Essentially this acknowledged, Mr Buttler submits, that he was being prevented from having the remedy which the Government had decided that Windrush victims in his position should have.

80. It is noticeable that the Defendant has not sought to argue that there is any identifiable value in the rigidity of the 5 year rule, but instead relies on (1) the underlying policy of requiring citizenship applicants to prove their commitment and connection to the UK and (2) the wide margin of appreciation which should be given to immigration and nationality policy decisions taken by Parliament.

81. It seems to me that even when the appropriate considerable weight is given to the judgment of Parliament, the interference with the Claimants' Article 14 rights (assuming those rights to arise in the case of Ms Tumi as well as Mr Vanriel) by the application of the 5 year rule in its unmodified form cannot be justified.

82. As Lord Reed said in *SC* at [159], it is necessary to take account of such other factors as are present. In this case, the Windrush scandal was a development which Parliament cannot have anticipated. It led to the recognition that a group of people should be given preferential treatment in the field of immigration and nationality. The treatment complained of is a refusal to afford preferential treatment by making the 5 year rule discretionary.

83. Admittedly the preferential treatment anticipated by the Government when introducing the Windrush Scheme was to be of a procedural kind, enabling the recognition of existing rights rather than creating new substantive rights. In these cases, however, what was sought by the Claimants was not a relaxation of the substantive requirement that they prove a sufficient connection with the UK. Rather it was a relaxation of the requirement to prove that connection in a way which was impossible for them, by presence in the UK on a day when, through no fault of their own, they were prevented from being in the UK.

84. It is clear that in cases such as these, the Government's aim of requiring citizenship applicants to prove commitment and connection to the UK could equally as well have been achieved by a less intrusive means, i.e. by applying a discretionary requirement rather than a rigid one. That is all the more apparent in light of the fact that the detailed requirements other than the 5 year rule all contain some discretion or possibility of exception.

85. In these circumstances I conclude that the severity of the effects of the treatment outweighed the importance of the Government's objective, even when regard is had to positive measures for Windrush victims such as the payment of compensation.

86. For these reasons, making the decisions in the Claimants' cases by application of the 5 year rule with no discretion or flexibility was incompatible with their rights under Article 14 in conjunction with Article 8.

Issue iii: Were the decisions, giving those provisions their natural meaning, incompatible with the Claimants' rights under ECHR Article 8?

87. In view of my conclusion on Article 14 it is not strictly necessary to decide whether there was also incompatibility with Article 8 rights. However, having heard full argument on the question, it is right for me to reach a conclusion.

88. It is common ground that citizenship is of intrinsic importance to individuals, so that denial of it can engage Article 8. See, for example, *ZH (Tanzania) v Secretary of State* [2011] UKSC 4, [2011] 2 AC 166 per Baroness Hale at [32].

89. It is also agreed that the ECHR does not guarantee a right to acquire citizenship. Article 8 is engaged only in cases of arbitrary denial of citizenship. See *Genovese v Malta* (2011) 58 EHRR 25 where the ECtHR held at §30 that:

> *"The provisions of Article 8 do not … guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual".*

90. The ECtHR found a violation of Article 8 in *Usmanov v Russia* (App. No. 43936/18, 22 December 2020). There the applicant was deprived of citizenship when it was found that in his successful citizenship application, some years previously, he had failed to provide information about his siblings. The State argued that it was compelled to take the decision by legislation which provided for that consequence in all cases where false information had knowingly been given. The Court applied the test of arbitrariness identified in *Genovese*, and held at [70-71]:

> *"… the legal framework … fostered excessively formalistic approach to the annulment of Russian citizenship and failed to give the individual adequate protection against arbitrary interference …*
>
> *The Government did not demonstrate why the applicant's failure to submit information about some of his siblings was of such gravity to justify deprivation of Russian citizenship several years after the applicant had obtained it. In the absence of balancing exercise which domestic authorities were expected to perform, the impugned measure appears to be grossly disproportionate to the applicant's omission. The Court therefore concludes that there has been a violation of Article 8 …"*

91. So far as domestic case law is concerned, in *R (Williams) v SSHD* [2017] 1 WLR 3283, the Court of Appeal, having reviewed relevant authorities, accepted that it was possible in principle for the rejection of a citizenship application to engage Article 8, but held that in the case before it there were no particular circumstances capable of doing so.

92. Relying on *Usmanov* by way of example, Mr Buttler argues that the refusal of the applications in the present cases by the rigid application of the 5 year rule was arbitrary. His submission in summary is that the Defendant cannot show any valid purpose being served by the inflexible rule and that the rule prevented the Defendant from doing justice in these cases because, as in *Usmanov*, it did not allow any balancing factors to be taken into consideration.

93. Mr Buttler further contends that the impact of refusal on the Claimants' lives has been sufficient to engage Article 8. Mr Vanriel made the UK his home nearly 50 years ago and states that it is the only country that he has ever called home. The Defendant in her letter agreed that the UK is his "*own country*". All of his siblings and their families are British citizens. He was excluded from the country through no fault of his own, being reduced to poverty and hardship

and experiencing isolation. Ms Tumi's parents were naturalised as British citizens, and her brother, her sisters, her daughter and her granddaughter are British citizens. It was through no fault of her own that she was excluded from the UK in 1986. She states that the refusal of citizenship has caused her to suffer depression and to experience deep sadness and a sense of loss, also affecting her personal identity within her family.

94. Sir James has not sought to persuade me that the impact on the Claimants is not sufficient to engage Article 8. Instead he concentrated on the question of whether refusal of citizenship was arbitrary so as to infringe Article 8 and, if it was, on justification.

95. Sir James submits that the decisions in these cases were not arbitrary. In support of that proposition, he essentially invited me to take a step backwards from the individual facts and to consider the rules on citizenship more generally. A carefully considered set of rules has been assembled by Parliament. Far from acting arbitrarily in these cases, the Defendant applied those rules as she would to any other applicant.

96. That submission effectively overlapped with Sir James' case on justification, as to which he relied on the same arguments as he had made in response to the Article 14 claim, in particular that it is necessary to give a wide margin of appreciation to legislative decisions taken by Parliament in the field of immigration and nationality.

97. I have come to the conclusion that in the unusual circumstances of the Windrush scandal, decision making was rendered arbitrary by the inflexible nature of the 5 year rule.

98. That is not to say that national authorities cannot apply bright-line rules when granting or refusing citizenship, even though bright-line rules may lead to unfairness in individual cases. Whilst such rules will need to be justified, it will not necessarily be difficult to justify them in this field, not least because of the wide margin of appreciation to be given to national authorities in deciding how and when individuals may acquire citizenship.

99. The problem in this case is the discord between, on the one hand, requiring an individual to have been present in the UK on a particular date and, on the other, having wrongfully excluded the individual from the UK with the effect of preventing him or her from satisfying the requirement. It seems to me that respect for the legislative competence of Parliament is not a sufficient answer to that problem.

100. That does not mean that the Defendant is necessarily disabled from refusing citizenship to a member of the Windrush generation who cannot satisfy the rule. But in my judgment, it does mean that it was arbitrary to make the

decision in these particular cases depend absolutely on the rule being satisfied, with no discretion to have regard to any other facts or factors.

101. I have therefore concluded that making the decisions in the Claimants' cases by application of the 5 year rule with no discretion or flexibility was incompatible with their Article 8 rights.

Issue iv: is it possible for paragraphs 1 and 2 of schedule 1 to the BNA to be given a different meaning which is compatible with the Claimants' ECHR rights under HRA section 3?

102. Section 3 of the HRA requires legislation to be "*read and given effect in a way which is compatible with the Convention rights*", but only "so *far as it is possible to do so*".

103. Mr Buttler submits that it is possible to read paragraph 2(1)(a) as empowering the Defendant to waive the whole of the compendious requirement in paragraph 1(2)(a) including the 5 year rule. If that reading is possible, then section 3 HRA obliges the Defendant and the Court to read those provisions in that way. It would follow that the decisions in the present case were unlawful because the Defendant wrongly directed herself that she had no discretion to disapply the 5 year rule.

104. As Sir James reminded me, the boundaries of the interpretive technique under section 3 are both linguistic and constitutional. I agree that the relevant principles can be derived from the following authorities:

(1) In *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, Lord Hope said at [79]:

> "*The obligation [at s.3 HRA 1998], powerful though it is, is not to be performed without regard to its limitations. Resort to it will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible. … It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator".*

(2) In *Re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 Lord Nicholls said at [40]:

> *"… a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate".*

(3) In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, Lord Nicholls said at [33]:

> *"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must … 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."*

(4) In *R (Wilkinson) v Commissioners of Inland Revenue* [2005] UKHL 30, [2005] 1 WLR 1718, Lord Hoffmann said at [17]:

> *"I do not believe that section 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes acontextual meanings. … There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But, with the addition of the Convention as background, the question is still one of interpretation, i.e. the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute".*

105. It is therefore necessary to identify the "grain" of the legislation, i.e. the essential meaning or principle which Parliament intended. The case law shows that that must be respected. So long as it is, a section 3 interpretation may change the unambiguous meaning of the words in the legislation.

106. Mr Buttler submitted, and I accept, that the fundamental principle expressed in schedule 1 to the BNA is that citizenship will be granted only to those of good character who have shown a sufficient commitment and connection to the UK. Whilst the 5 year rule is used as a means to put that principle into effect, the rule is not, in its own right, a fundamental principle of the BNA. In my view that is clear in any event, but it is made even clearer by the fact that the rule is already relaxed in favour of Crown servants working overseas and in favour of members of the armed forces.

107. That being so, the statement of the rule in mandatory terms does not prevent the implication of a discretion by application of HRA section 3. This can be seen

from the example of *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604. There the Supreme Court held that statutory provisions setting absolute time limits for appeals against extradition must be read subject to an implied discretion for the Court to extend time where a failure to do so would result in a breach of ECHR Article 6(1).

108. See also *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, where the House of Lords ruled that the reference in section 11 of the Coroners Act 1981 to "how" a person came by their death should be interpreted, in cases to which ECHR Article 2 applied, as entailing an inquiry not only as to "by what means" they died (the ordinary meaning) but also, pursuant to section 3 HRA, as to "in what circumstances", thereby extending the scope of an inquest.

109. *Middleton* also demonstrates that a section 3 interpretation can be applied to a limited sub-category of cases while not applying to others. The extended type of inquest is available only in a case which engages Article 2 – and therefore only to such a case which arises from a death occurring after commencement of the HRA: see also *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

110. Sir James sought to distinguish *Pomiechowski*, pointing out that Lord Mance said at [39]:

> "*In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time*."

111. Thus, Sir James submits, Lord Mance's approach was consistent with the intention of Parliament, in that while Parliament may not have foreseen or intended the application of the Act to the particular situation in question, it was possible to discern a general intention to enable a fair appeal process by way of the measure in question.

112. In my judgment, the answer to that point is that whilst Parliament may have foreseen that a hard-edged rule might give rise to some hard cases, it cannot be taken to have foreseen that the Windrush scandal would give rise to cases, perhaps in significant numbers, in which applicants would be unable to comply with the 5 year rule because they had been wrongly refused entry to the UK.

113. I therefore conclude that, under HRA section 3, it is possible to read and interpret schedule 1 to the BNA as if it contained a discretion to dis-apply the 5 year rule in cases where, because the Defendant's default was (or may have been) the reason why the rule could not be satisfied, that reading is necessary to avoid an infringement of ECHR Article 14 and/or Article 8.

114. The method by which the provisions are read down is less important than the principle, but in a case where this ruling applies, the simplest compliant reading may simply involve omitting the final clause of paragraph 2(1)(a), so that provision would read:

> *"2 (1) If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 1 do all or any of the following things, namely—*
>
> *(a) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(a) or paragraph 1(2)(b), or both; "*

115. I would finally emphasise that this reading would not compel any particular outcome to any particular individual's citizenship application. Sir James suggested that the Claimants are seeking an interpretation by which all such applications by members of the Windrush generation are assured of success. However, that is not what I understand the Claimants to be seeking, and it is not the effect of my ruling. What I have decided is that in cases such as these, which I believe will be readily recognisable, the Secretary of State has a discretion. That respects another fundamental principle of the BNA 1981, which is that decisions as to citizenship are always for the Secretary of State. The Court has no power to grant citizenship.

Issue v: If the answer to iv is no, should there be a declaration of incompatibility under HRA section 6?

116. In view of my decision on the section 3 issue, there will be no declaration of incompatibility and it is not necessary to decide whether one would have been made if I had decided that a section 3 interpretation was not possible. I shall therefore comment only briefly.

117. Sir James reminded me that section 4 provides a discretionary remedy. He submitted that its main function is to trigger the power to introduce remedial secondary legislation, and pointed out that where the new Bill is presently before Parliament, that step appears unnecessary.

118. That said, as Mr Buttler pointed out, making a declaration of incompatibility ensures, first, that a claimant has a remedy under the HRA even where a section 3 reading is unavailable and there is a defence to liability under section 6(2), and second, that Parliament is alerted to any situation in which incompatibility arises.

119. If a compatible reading had not been possible under section 3, then there would clearly have been a strong case for making a declaration of incompatibility, not least because it is impossible to predict the future passage of the Bill.

Conclusion

120. Mr Vanriel's claim clearly succeeds. The application of paragraphs 1 and 2 of schedule 1 to the BNA in their unmodified form infringed his rights under Article 14 and/or Article 8, and therefore infringed section 6(1) of the HRA 1998. Section 3 of the HRA enabled, and therefore required, the legislation to be read and interpreted as if it conferred the necessary discretion to avoid that infringement. There is therefore no defence under section 6(2), and the Defendant erred in law when deciding that she had no discretion.

121. The effect of applying a discretion will be for the Defendant to decide, though she has already signed a letter stating that Mr Vanriel deserves citizenship and expressing regret for (as she believed) not being able to grant it.

122. Although Ms Tumi's case is less clear, I have decided on balance that she too was entitled to have her application considered with reference to a discretion arising pursuant to the interpretive obligation under HRA section 3.

123. The factual background of Ms Tumi's case has not been the real focus of this claim and the judicial review procedure is not well fitted to exploring the facts. As a consequence of that, but also of the lack of records which has been a theme of the Windrush scandal generally, and also of the unsurprising lack of documents going back several decades, there is an unhelpful lack of certainty about when and how Ms Tumi originally acquired ILR.

124. Meanwhile the witness statement of Kristian Armstrong, a Deputy Director of the Home Office, tells me that in 2018, "*because of the assistance of the Windrush taskforce*" Ms Tumi was granted ILR outside the rules and that such a grant is made "*where an individual is considered to have a sufficiently strong connection with the UK*". I do not know much more than that.

125. It seems to me that if Ms Tumi was properly granted ILR in 2018 (and Mr Armstrong's witness statement tells me that her "*status was correctly established*"), then she probably had an equally strong (if not stronger) case for ILR in 1986, e.g. by application of paragraph 57 of the Immigration Rules as they then stood (see [18(4)] above), and at the very least she should have been granted a visa then.

126. I therefore consider that if the Defendant had adopted a section 3-compliant reading of schedule 1 as affording her a discretion in the category of cases identified in this judgment, she would at least have given consideration to the question whether that discretion covered Ms Tumi's case (and, if it did, how to exercise it). Instead, she proceeded on the incorrect basis that the 5 year rule was immovable.

127. The claims therefore succeed. I shall invite submissions on the terms of the appropriate order.