



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 8

P797/21

OPINION OF LADY CARMICHAEL

in Petition of

WAYNE LINDSEY

Petitioner

for

Judicial Review

**Petitioner: Way, Drummond Miller (for Katani and Co)**

**Respondent: Massaro, OAG**

9 February 2023

**Introduction**

[1] Mr Lindsey seeks judicial review of a decision of the Secretary of State for the Home Department to refuse him limited leave to remain in the United Kingdom as a stateless person.

[2] The matter has a long history. Mr Lindsey arrived in the United Kingdom in 1996. He claims to have done so on a Barbadian passport which he obtained by irregular means. His visa expired in 1997 and he has not held further leave to remain since then. In 2007 he was found to be using a false document. He was convicted of doing that and sentenced to 8 months' imprisonment. He was removed to Barbados on 29 January 2008. Barbados

refused him entry because he did not have an EU Letter, and returned him to the United Kingdom. On arrival in the United Kingdom on 30 January 2008, he was given an EU Letter and was again removed to Barbados on the same day. He was again returned to the United Kingdom. There is no dispute that he was interviewed by officials in Barbados before he was returned. He applied unsuccessfully for asylum in 2012.

### **History**

[3] Mr Lindsey's representatives made a subject access request in respect of the records about him held by the Secretary of State. The information that follows derives in part from those records.

[4] Shortly after the second return from Barbados, Home Department officials contacted the Barbados High Commission and arranged for a face to face interview with Mr Lindsey on 11 February 2008 for the High Commission to confirm his nationality. The High Commission cancelled the interview and informed the officials that immigration officers in Barbados conducted a thorough interview; that Mr Lindsey was unable to provide details of his parents; and that the Barbadian officers thought that Mr Lindsey might be Jamaican because of the spelling of his surname.

[5] In July, August and October 2008 there are references in the records to Mr Lindsey's application to the authorities of Barbados for a birth certificate. He provided a recorded delivery number. In April 2009 he told the UK officials that he had made inquiries in February or March and that his solicitors had made inquiries on his behalf. In August 2009 the named solicitors told the officials that they no longer acted and had not heard from Mr Lindsey for months. On 20 August 2009 there is reference to a copy of a letter to the Barbados Supreme Court asking for a copy of his birth certificate. On 20 October 2009 there

is a note that Mr Lindsey handed in photocopies of an envelope and letter from the Barbados Supreme Court.

[6] This is the letter produced, along with the application form to which it relates, as 6/9 from the Registration Department in Bridgetown, Barbados, addressed to Mr Lindsey and dated 5 November 2009. It reads:

“Reference is made to your correspondence dated 8 September, 2009.

Please be informed that correspondence was previously sent to you, indicating that no birth records were found for you.

You are required to submit any other information that would assist us in locating your certificate such as your mother’s name before Drakes or yours before Lindsey and/or a middle name.”

It is signed by an individual “for the Registrar of the Supreme Court”. The application form has the surname “Gene” and the Christian name “Drakes” in the field for mother. Those names relate on Mr Lindsey’s account in these proceedings and to the Secretary of State in 2020 to his adoptive mother, and the order of the names is reversed on the application form. The petitioner’s handwritten letter dated 8 September 2009 requesting his birth certificate refers to his having made a request for it on 28 October 2008, but having received no response (7/1).

[7] A file note dated 15 December 2009 reads, “As unable to confirm Nationality advised by KC to place on Blocked DOR at this time”.

[8] The next entry that parties highlighted is dated 26 February 2014. It relates that an application for a Barbados passport has been quality checked and sent to the High Commission via recorded delivery. On 4 March 2015 officials sent a cheque to the High Commission in respect of an application for a birth certificate. There is a note that there is to

be a discussion with officials from Barbados of outstanding Emergency Travel Document (ETD) applications, including Mr Lindsey's.

[9] Relevant to this period is a letter dated 15 November 2014 from UK Immigration Enforcement to the Barbados High Commission enclosing a travel document application in respect of Mr Lindsey (6/10). The application form and a form with a Home Office heading recording bio-data (7/2) contain the following information. In the Home Office form the field "Mother's name" is "Gina (surname n/k)". Her date of birth is recorded as "N/K would be 80 yrs old approx." What is intended as further information about Mr Lindsey's adoptive mother extends into other fields so that the field for "Mothers maiden name" reads "Adopted Wayne before 5 years old", and "address" reads "deceased in 1999 in St George". Beside "Fathers name" is "Possibly called Lindsay". There is reference to one school: "Primary School (Catholic) in St Michaels from 1977 (approx) to 1984 (approx)". The passport application form contains supplementary information: "Adopted in preschool years in St Michaels by female called Gina from Macaroni Village in Parish of St George".

[10] The next file entry of significance is dated 6 March 2017. It relates that there is to be an ETD interview with Mr Lindsey. It also relates that officials had learned from their counterparts at the Barbados High Commission that "the application form" was only valid for 6 months. The note includes instructions for completing a new form.

[11] The ETD interview took place on 27 July 2017. The entry contains this note:

"Family in Barbados-None, was adopted (NOT OFFICIALLY) when he was young by FRANCIS (DRAKES or watts). Unsure of surname and Adoptive mother is deceased. Biological Mother is also deceased, surname is Lindsey but dont know christian name. Never met any other family members."

[12] In September 2017 UK officials used a courier service to deliver an application for a travel permit to the Barbados High Commission. That may relate to the letter dated

9 August 2017 from Immigration Enforcement to the Barbados High Commission enclosing a travel document application. The bio-data information with that application represented that Mr Lindsey's mother's name was Francis Drakes or Watts. It accompanies a form headed "Application form "A"". Beside "Place and country of mother's birth" is the word "Francis". It is not clear why that field has been completed at all. It appears in a section headed "To be completed by persons born abroad", which in the context of the form means outside Barbados. It is Mr Lindsey's understanding that he was born in Barbados.

Elsewhere in the form a box is checked indicating that he is a citizen of Barbados by birth.

[13] There are some later file entries reflecting unsuccessful attempts to follow up the matter with various immigration service teams. The file entries end on 20 December 2019.

#### **Mr Lindsey's application for limited leave**

[14] On 28 October 2020 Mr Lindsey made an application for limited leave to remain in the United Kingdom. That was refused on 27 May 2021. He applied, unsuccessfully, for administrative review.

[15] His application included a statement. He gave this account of his upbringing:

"I grew up in Macaroni Village in Barbados, which is in the Parish of St George. I was raised by my adopted mother from a very young age because my parents gave me away. I don't have any memories of my parents and I have never met them. I think that my adopted mother's name was Gene Drakes, but I also have heard her being called Frances before. In Barbados the culture is different and we were brought up not to ask questions of our parents so I can't be 100% sure what her real name is. I called her nana because she was quite old."

In relation to his travel to the United Kingdom he said:

"I didn't know how to go about getting myself a passport to come to the UK, so one of Bigga's friends who was in the police agreed to help me in return for some money. He managed to get me a Barbados passport with a UK visit visa that I then used to fly to London. I arrived in London in September 1996 on a 6-month visit visa."

At paragraph 16 he gave an account of his interview with officials in Barbados in January 2008:

“I was told that no record of my passport or any of my details could be found because they did not keep records dating back to 1996, the year that I obtained my passport and travelled to the UK. They asked me whether I had a copy of my birth certificate but I told them that I had never seen it because my parents gave me away at a young age and I had no paperwork. I also explained to them how I obtained the passport through a local police officer when I was in Barbados in 1996.”

### **The decision**

[16] The Secretary of State concluded that Mr Lindsey had provided insufficient evidence to demonstrate that he was not a Barbadian national. On his own account he was a Barbadian citizen at birth. He had provided “no evidence” that he had made an attempt to clarify his nationality with the Barbadian authorities. He had failed to obtain and submit all reasonably available evidence to enable the Secretary of State to determine whether he was stateless. He had failed to satisfy the requirements of paragraph 403(b), (c) and (d) of the Immigration Rules.

[17] The Secretary of State had regard to the Barbados Citizenship Act, Cap 186, section 4. On Mr Lindsey’s own account he would be entitled to be recognised as a citizen of Barbados.

### **The Immigration Rules**

[18] Paragraphs 401 and 403 of the Immigration Rules provide so far as material in this case:

“401. For the purposes of this Part a stateless person is a person who:

- (a) satisfies the requirements of Article 1(1) of the 1954 United Nations convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law;
- (b) is in the United Kingdom; and
- (c) is not excluded from recognition as a Stateless person under paragraph 402.

403. The requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:

- (a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
- (b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;
- (c) has taken reasonable steps to facilitate admission to their country of former habitual residence or any other country but has been unable to secure the right of admission; and
- (d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless or whether they are admissible to another country under the meaning of paragraph 403(c);
- (e) has sought and failed to obtain or re-establish their nationality with the appropriate authorities of the relevant country.”

### **Home Office Stateless Leave Guidance**

[19] The *Home Office Stateless Leave Guidance* (version 3.0 dated 30 October 2019) contains this, at page 14:

“Paragraph 403(d) of the Immigration Rules requires applicants to obtain and submit all reasonably available evidence to enable the Secretary of State to determine that they are stateless and are not admissible to another country under the meaning of paragraph 403(c). It is not enough, for example, for the applicant to rely on an unsupported assertion of statelessness or provide no explanation or evidence to support their application, particularly where this runs contrary to previously available information. Paragraphs 403 (e) and (f) require applicants to evidence that

they have sought and failed to obtain or re-establish their nationality with the appropriate authorities of the relevant country. This includes parents taking the required steps to register their child's birth with the relevant authorities. Applicants are expected to make enquiries with relevant national authorities unless there is a very good reason not to, or with friends or relatives who may be able to assist and should provide information about their endeavours in their application, subsequent correspondence or during the interview.

However, you must make a distinction between applicants who show no interest in genuinely co-operating or providing supporting information, such as evidence of their attempts to obtain or re-establish their nationality with the relevant authorities, and those who may be unable to submit much evidence or information because, for example, they do not have the resources or knowledge to obtain information about the nationality laws of a given state. In such circumstances, where the available information is lacking or inconclusive, you must assist the applicant by interviewing them to elicit further evidence, undertaking relevant research and, if necessary, making enquiries directly with the relevant authorities and organisations. See gathering and assessing evidence below."

[20] The guidance indicates that apparently genuine, unexpired passports will usually raise a presumption as to nationality. A counterfeit passport, or one fraudulently obtained, raises no such presumption: page 16. The guidance requires consideration of how national authorities operate the law and of their operation of it in relation to the individual applicant. The position of those authorities is likely to be decisive rather than the letter of the law: pages 19 and 20.

### **The law**

[21] The burden is on an applicant to demonstrate that paragraph 403 applies in his favour: *R (JM (Zimbabwe)) v Secretary of State for the Home Department* [2018] 1 WLR 4318, paragraph 5. The standard of proof in relation to question of nationality, other than in a case where it is relevant to whether an individual will suffer persecution, is the balance of probabilities: *RM (Sierra Leone) v Secretary of State for the Home Department* [2015] EWCA Civ 541, paragraph 35.

[22] A person claiming to be stateless must take all reasonably practicable steps to gather together and submit all documents and other materials which evidence his identity and residence in the state in issue, and which otherwise bear on his nationality. He ought also to apply for nationality of the state or states with which he has the closest connection (the *Bradshaw* principle). If he comes up against a brick wall, then, depending on the reasons given, a decision maker must decide on the balance of probabilities whether the person has established that he is stateless. There are cases in which it would not be reasonable to expect the applicant to take that course, and in those cases the Secretary of State will assist the applicant by making inquiries on his behalf: *AS (Guinea) v Secretary of State for the Home Department*, paragraph 57, and authorities cited in paragraphs 48 to 56, including *Bradshaw v Secretary of State for the Home Department* [1994] Imm AR 359 (reported as *R v Secretary of State for the Home Department ex p Valentina Bradshaw*, although it is in fact a decision of the Outer House).

[23] In *R (Nhamo) v Secretary of State for the Home Department* [2012] EWHC 422 (Admin), cited with approval in *AS (Guinea)*, Sales J explained that the view of the national authorities of the foreign state, and in particular a view given by the executive authorities of the state, as opposed to the ruling of a judicial authority, will not usually be determinative on the question of nationality of that state: paragraph 35.

## **Submissions**

### ***Mr Lindsey***

[24] Counsel for Mr Lindsey criticised the reasoning of the Secretary of State. He founded on particular passages in the decision letter.

- (a) The decision letter contained this passage:

“You claim that you resided in Barbados until 1996 which equates to a period of 24 years. It is not deemed credible that you would be unable to provide details of a country where you resided for 24 years. As stated above, no explanation has been provided as to why you are unable to provide details of your parents.”

The first two sentences were apparently a reference to Mr Lindsey’s interview with officials when he was returned to Barbados in 2008. The final sentence was factually incorrect, as Mr Lindsey had explained that he was unofficially adopted at an early age and never knew his birth parents.

(b) The decision letter also represented that there was no evidence that Mr Lindsey had made any further attempts since 2014 to “clarify” his nationality. That was incorrect in the light of the 2017 application for an ETD.

(c) The decision relied in part on part of the decision refusing asylum to Mr Lindsey. The decision maker in that case had concluded that because Mr Lindsey had had a Barbadian passport, he must have had a birth or baptismal certificate. The present decision maker had left out of account that Mr Lindsey’s claim that he obtained the passport before 1996 by irregular means. That claim undermined the notion that he must have had a birth or baptismal certificate in order to obtain it.

(d) The decision included the following:

“You claim that you submitted a birth certificate application to the Barbados Registration Office but you were advised that they had no record of you. In support of your application you submitted a letter from the Barbados Registration Office stating that no birth records were found for you. However, it is by your own account that this is because they did not keep records dating back to 1996. Therefore little weight can be taken from this document.”

That passage contained a misrepresentation of what Mr Lindsey said in his statement about what immigration officers told him in 2008. The reference to 1996 was in the context of a discussion about records from the time he obtained a passport.

(e) The decision maker referred to a failure by Mr Lindsey to contact the Barbados High Commission after submitting his application for limited leave. That was an irrelevant consideration. The language used was “Since submitting your stateless leave application you have provided no evidence that you have made an attempt to contact the Barbadian High Commission.”

[25] Counsel submitted that the decision that Mr Lindsey was a national of Barbados was irrational where Mr Lindsey had been refused entry twice in 2008, and in the light of the later failed attempts to obtain a birth certificate and ETDs. It was clear that Barbados did not consider Mr Lindsey to be a national, and that was decisive of the matter before the Secretary of State. He had taken reasonable steps to facilitate his readmission to Barbados but had not secured entry, and had sought and failed to obtain or re-establish his nationality with the appropriate authorities there. He satisfied the requirements of paragraph 403(c).

[26] The Secretary of State had not followed the policy set out in her published guidance for decision makers. In the absence of a good reason for departing from the policy, that was unlawful: *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, paragraph 26. Barbados had as a matter of fact, and over a long period, treated Mr Lindsey as not being a Barbadian national. The Barbadian authorities returned him to the United Kingdom and had not provided travel documents when requested to do so. That was decisive.

[27] Where the Secretary of State was relying on paragraph 403(d) fairness required that she call an applicant for interview in order to assess his credibility.

[28] Finally, the letter referred to a failure to corroborate Mr Lindsey’s claim that he was a stateless person, where there was no requirement for corroboration.

*Secretary of State*

[29] Counsel submitted that there was no material error of law. Mr Lindsey had not applied for nationality to the authorities of Barbados. Even if the decision letter disclosed errors of law, the application was bound to fail because of that. In any event the decision letter required to be read fairly and as a whole, and it did not disclose any error of approach.

**Decision**

[30] In the light of the Secretary of State's principal submission in this case, it is difficult to understand why the application was not refused with explicit reference to paragraph 403(e) of the Immigration Rules. The decision maker clearly had in mind that Mr Lindsey had not pursued the matter of his nationality with the authorities of Barbados.

The decision letter includes at pages 6 and 7:

“... according to your legal representatives you submitted the latest birth certificate application on 15 November 2014.

There is no evidence that you have made any further attempts since 2014 to clarify your nationality.

...

Since submitting your stateless leave consideration, you have provided no evidence that you have made attempts to contact the Barbadian High Commission.

...

Since submitting your stateless application, you have provided no evidence that you have made an attempt to clarify your nationality with the Barbadian authorities.”

[31] The Home Office file contains a reference to an application for a birth certificate in 2014 and early 2015, although the application was not produced, and there is no record of any response to the application. The letter from Mr Lindsey's agents which accompanied his application for limited leave narrated that on 15 November 2014 he completed a birth certificate application which was passed to the Home Office for review before being sent to

the Barbados High Commission. It appears to be factually correct that the most recent application for a birth certificate was in 2014. Mr Lindsey claims to have been born in Barbados. That is likely to be significant to the question of his nationality.

[32] Mr Way submitted that the Secretary of State's reliance in these proceedings on Mr Lindsey's failure to apply for nationality amounted to an attempt to introduce an entirely new reason for refusal. That is not the case. The Secretary of State clearly took into account inaction on Mr Lindsey's part so far as seeking to establish or re-establish his nationality was concerned, although that was not analysed by reference to paragraph 403(e). That he has not made an application for nationality is in any event a clear failure to satisfy one of the requirements set out in *AS (Guinea)*. It means that Mr Lindsey's application would be bound to fail.

[33] The decision is poorly drafted in a number of respects. The criticism identified at paragraph 24(a) of this opinion is well founded so far as the lack of explanation regarding Mr Lindsey's ignorance of his birth parents is concerned. He did provide an explanation for that. So far as the point at 24(b) is concerned, the decision maker may have intended reference to attempts by Mr Lindsey personally, rather than the applications for ETDs by Home Office officials. I have read the reference to 2014 (24(b)) as a reference to the latest application for a birth certificate. It is difficult to know what the decision maker has made of the passage from the reasons for refusal for asylum (24(b)). I observe that the decision maker was not bound to accept the account that Mr Lindsey obtained his passport irregularly, but there is no indication of what view he or she has taken of it. The criticism identified at paragraph 24 (d) is well founded. It is not clear why the decision maker expected evidence to have been gathered about attempts to clarify nationality after making the application for limited leave (24(e)). It is factually correct that none had been. If further

evidence had been collected and submitted before the application was determined I assume that it would have been taken into account. I do not regard that criticism as having any merit.

[34] There has been no material error of law in the Secretary of State's decision-making, for the reason identified in the Secretary of State's submission. The burden of proving that he is stateless lies on Mr Lindsey. A person in his position must make an application for nationality to the state with which he has the closest connection: *AS (Guinea)*, paragraph 57. He has not done so. It is implicit in that requirement that he do so in good faith and in such a manner as to provide the authorities of Barbados with all the information that might assist them in identifying him as one of their citizens.

[35] Nothing that Mr Lindsey has done, or that Home Office officials have done with his cooperation, meets the requirement identified in *AS (Guinea)*. Home Office officials have submitted two travel document applications to the Barbadian authorities with the cooperation of, and on the basis of information supplied by, Mr Lindsey. Neither of the applications for a travel document was successful. The information in the Home Office case record suggests a failure to respond to the applications. There is no entry indicating an outright refusal.

[36] There is nothing in this case to make it unreasonable for the Secretary of State to require Mr Lindsey to apply for nationality. The circumstances that there have been attempts to remove him and unsuccessful applications for travel documents do not have that result.

[37] It is relevant to note that the only application for which the result has been produced is the one to the Barbados Supreme Court for a birth certificate. The application narrates that Ms Drakes was Mr Lindsey's mother when on his account she was not, and it is

therefore unlikely that any search by reference to her name would have been fruitful. The response invites further information. Mr Lindsey has not come up against a “brick wall”. There has been no clear determination by the authorities of Barbados that Mr Lindsey is not a citizen of Barbados.

[38] There will be cases, as the guidance recognises, in which the demands placed on the applicant by the state to the which application is made become obviously unreasonable, or where the delay on the part of that state in dealing with an application becomes so pronounced, that there has been a de facto refusal to recognise the individual as a national. That is not the situation in this case. The complaint that the Secretary of State has failed to follow her published policy in that regard is ill-founded.

[39] Although it is not necessary for the determination of this petition, I note that no single application in this case to the authorities of Barbados discloses all of the information that is possible to glean from the individual applications that have been submitted over the years and from the information that Mr Lindsey presented in his application to the Secretary of State in 2020. I have set out above the information provided in 2008, 2014 and 2017. In the 2017 application, for example, there is no mention that the individual identified as Mr Lindsey’s mother is not his mother, but his adoptive mother. The same is true of the 2008 application for a birth certificate, in which her surname and forename are reversed. In the 2014 application his primary school is not named. In the 2017 application the name only of his primary school appears. That is not the only information that Mr Lindsey has about his education. On his application for limited leave in 2020 he identifies two schools, Providence Elementary School (1976-1984), and Ellerton School (1984-1986). The records of Mr Lindsey’s schools are, perhaps, an obvious point for inquiry.

[40] Again, although it is not necessary to decide these points, I do not accept that it was incumbent on the Secretary of State to call Mr Lindsey for interview. Paragraph 403(d) requires an applicant to obtain and submit all reasonably available evidence to enable the Secretary of State to determine whether they are stateless or whether they are admissible to another country. It is not obvious why the Secretary of State would require to interview an individual in order to assess whether he has complied with that requirement. The reference to corroboration is inept, but I am satisfied that the decision maker was using it to try to convey that he or she was not satisfied on the evidence that Mr Lindsey was stateless, rather than to communicate that there was a formal requirement for corroboration.

### **Disposal**

[41] I refuse the petition for judicial review