OUTER HOUSE, COURT OF SESSION

[2020] CSOH 105

P1036/19

OPINION OF LORD CLARK

in the petition of

CA

Petitioner

for

Judicial Review of a decision by the Secretary of State for the Home Department

Petitioner: Forrest; Drummond Miller LLP
Respondent: Maciver; OAG

18 December 2020

Introduction

[1] The petitioner seeks reduction of a decision made by the Secretary of State for the Home Department ("the respondent") on 12 August 2019, rejecting an application by the petitioner for leave to remain in the UK.

Background

[2] The petitioner was born in India in 1990. In January 2012, he entered the UK using his own passport and with a student visa that was valid until 11 July 2014. He remained in the UK. At around the end of February 2017, the petitioner sought advice about regularising his presence in the UK. He intended to submit an application for leave to remain in the UK

on the ground that he had established a private life here. To do so he required to submit his Indian passport. He avers that he lost his passport in 2015. On 5 April 2017, he attended the Consulate General of India in Edinburgh to apply for a new Indian passport. He avers that he was told that a passport could not be issued to him because he had been deprived of his citizenship of India. He was served with a removal notice from the Home Office on 8 June 2017, stating that he was liable to be removed from the UK. On 17 November 2017 he completed an application for leave to remain in the UK as a stateless person. The application was submitted to the respondent under cover of a letter dated 13 November 2017 from his solicitors and was accompanied by several enclosures including a statement from him, two letters said to be from the Indian authorities, and an expert report. It was submitted on his behalf, *inter alia*, that even if the application was rejected on the ground that he was not stateless, he had established a private life in the UK and any rejection would amount to a disproportionate interference with this right. It was also submitted that there were insurmountable obstacles to his returning to India. On 14 August 2018 the respondent wrote to the petitioner and requested his consent to allow her to approach the Indian authorities to verify their letters. On 4 October 2018, the petitioner's solicitors replied stating that the petitioner refused to give his consent, explaining his reasons for that refusal. On 11 April 2019 the respondent rejected his application. The petitioner applied for an administrative review. Following the review, the respondent withdrew her decision. She issued a new decision on 14 June 2019. She again rejected the application. The petitioner applied for an administrative review. The respondent again withdrew her decision. On 12 August 2019, the respondent issued a new decision, in which she rejected the petitioner's application for leave to remain. This decision is challenged in the petition.

The respondent's decision

[3] The key passages in the respondent's decision letter (with grammatical errors uncorrected and omitting irrelevant points) are as follows:

> "Consideration of your claim
>
> …In support of your application you have provided a letter purportedly signed by [X] dated 16 May 2017. You have provided a document providing background information regarding [X], who it is understood is Member Legislative Assembly Delhi. This letter states that records show you are no longer an Indian Citizen.
>
> The Home Office wrote to you on 14/08/2018 to request your consent to contact the Indian High Commission so that we may verify the information in the above-mentioned letter.
>
> However, it is noted that you have refused to provide consent in order for the Home Office to further investigate the claim that you have been stripped of your Indian nationality. Consideration has been given to Section 4.2 of the Asylum Policy Instructions for Statelessness and applications for leave to remain regarding the burden and standard of proof in stateless cases. With regards to enquires with authorities it is stated:
>
> > ' . . .Enquiries of the authorities of the country of former habitual residence which disclose the applicant's personal details must be done with the written consent of the applicant; but if that consent is denied without good reason (for example, it has already been established that the person's claimed fear of those authorities was not well-founded), it may be inferred that the applicant is not genuinely willing to cooperate and is failing to discharge the burden of proof, taking account of all the available information.'
>
> It is understood that when asked to provide consent in order for the Home Office to contact the Indian authorities on your behalf you refused this request as your legal representatives claim that '…you have no desire to have anything to do with them (Indian authorities) and they have made clear they wish to have nothing to do with you.' It is considered that this is not a valid reason for denying consent to verify the document you have provided to support your application for leave as a stateless person. They also claim that you are concerned that the Indian authorities will be extremely displeased with you for disclosing their removal of your citizenship apparently in breach of the statelessness convention however, it is not accepted that you have a well-founded fear of return to lndia or that the Indian authorities would be unwilling to oblige you.
>
> It is further noted that your representatives have also submitted a psychological report …it is considered that this report is not pertinent to your claim to be stateless as it provides no information as to why you are unwilling to allow the Home Office

to verify the letter you have provided from the Indian High Commission, it is considered that this letter is a fundamental piece of evidence in determining your claim to be stateless. Therefore, without the opportunity verify the document with the issuing authority, little weight has been given to this piece of evidence.

Furthermore, it is considered that the psychological report is not official documentation from the Indian authorities and therefore is not confirmation that you have been stripped of your nationality and therefore this report adds little weight to your stateless claim.

Furthermore, document j) of your supporting evidence; The case of *Tamveer Ahmed* v *SSHD* references how 'it is for an individual claimant to show that a document on which he seeks to rely can be relied upon'. Furthermore, 'the decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.'

With the above in mind and given that you have failed to provide consent for further checks on the document to be made, no reliance can be placed on document b) or j) in support of your Stateless Claim.

Furthermore, consideration has been given to Section 10 of the *India: Act No. 57 of 1955, Citizenship Act, 1955*, 30 December 1955, which states:

> '10. Deprivation of citizenship
>
> (1) A citizen of India who is such by naturalization or by virtue only of clause (c) of Article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of Article 6h of the Constitution or clause (a) of sub-section (1) of Section 5 of this Act, shall cease to be a citizen of India, if he ls deprived of that citizenship by an order of the Central government under this section.
>
> (2) Subject to the provisions of this section, the Central Government may, by order, deprive such citizen of Indian citizenship, if it is satisfied that
>
> … (e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period has neither been at any time a student of any educational institution in a country outside lndia or in the service of a Government in India or of an international organization of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.
>
> (3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that the person should continue to be a citizen of India.

> (4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made, and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, of his right, upon making an application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.'

…Consideration has specifically been given to Section 10(e) of this act, however there is no information available for believing that you are considered to have been *ordinarily resident* out of India for a period of 7 years. Furthermore Section 3 of the act states that a person will not be deprived unless it is satisfied that it is not conducive to the public good that the person should continue to be a citizen of India.

Taking the above information into consideration, without direct confirmation from the Indian authorities to confirm the information in the letters dated 05-Apr -2017 and 16-May 2017 is correct, it is not accepted that you have been deprived of your Indian citizenship as claimed.

It is therefore not considered that you have demonstrated, on the balance of probabilities, that you are stateless as claimed and therefore it is considered that you do not meet the definition under Paragraph 401 of the Immigration Rules and consequently your application fails to meet the requirements of Paragraph 403(b).

…

It is further considered that even if the letter you have provided indicating that you have lost your Indian nationality was verified as genuine there is no evidence to demonstrate that you have taken all available steps to re-acquire your nationality..."

Submissions for the petitioner

Competency

[4] The ground of challenge based upon Article 8 of the ECHR was no longer insisted upon. On the remaining matters, in summary, the respondent had erred in law in rejecting the petitioner's application for leave to remain on the ground of statelessness. A person aggrieved by a decision of the respondent can apply for administrative review only if he or she can establish what is called a "case working error". This can be done only if the respondent wrongly applied either: (i) the immigration rules; or (ii) her published policy in

relation to the issues upon which the person is aggrieved. The issues raised by the petitioner did not fall within these areas; rather, they related to the respondent's obligations to reach rational conclusions in relation to whether: (a) the reason given by the petitioner for withholding his consent to allow her to contact the authorities in India, to verify information he had provided, was a valid one; and (b) the petitioner has not been deprived of his nationality of India or that no steps were taken to re-acquire his nationality. Neither of these issues involved case working errors, as defined. There was no challenge to the rules themselves or, properly analysed, a challenge to the policy guidance. The issues raised in the petition challenge the rationality of conclusions that the respondent has reached, firstly on the basis of information the petitioner himself provided and secondly on the basis of information the respondent obtained.

[5] The challenge in this case was not comparable to an example given in the Administrative Guidance, version 10. That example illustrated a challenge that is quite broad in scope and refers to an aspect of the policy. But the present challenge was more restrictive. In relation to *MDMH Bangladesh* [2013] CSOH 143, the Lord Ordinary reviewed previous authorities and accepted that there had to be an effective alternative remedy if judicial review was to be incompetent. The issues between the parties here could not properly or effectively be decided by the alternative remedy of administrative review.

[6] Turning to the second reason why the petition was competent, put short, proceeding with an administrative review would not really have mattered. Having regard to the views the respondent expressed in her decision and how similar these were to her previous decision, it was difficult to see what, if anything, taken up in an administrative review would have made her change her mind. There was therefore nothing to be gained from

again seeking an administrative review. The respondent's plea on competency should therefore be rejected.

Reduction

[7] Moving to the question of reduction, two errors had been made. The first concerned the respondent's conclusion that the reason given by the petitioner for withholding his consent to allow her to contact the authorities in India, to verify information he had provided, was not a valid one. The central fact was that the petitioner had produced a letter from the Consulate General dated 5 April 2017 which stated that he had been deprived of his Indian nationality. In addition there was a shorter letter or statement, from a member of the Indian parliament, stating that the records showed that the petitioner is no longer an Indian citizen. The respondent also took into account other points, including that the petitioner's agents stated that he had no desire to have anything to do with the authorities, and the authorities had made clear they wanted nothing to do with him. The conclusion she reached in those circumstances was not rational because she gives no reason as to why the petitioner's refusal to give consent was not a valid reason or, if it is taken that she does give a reason, it is not a reason that is based on the facts that were presented to her. In the reasoning part of the decision letter, she states that "it is not accepted that you have a well-founded fear of return to India or that the Indian authorities would be unwilling to oblige you." But that was not what was said on his behalf. All he was saying was that he does not trust an authority whom he alleges has withdrawn has nationality, not that they would act in a similar way to his disadvantage in the future. He was not talking about fear of return. He had given a reason for refusing his request to allow contact with the authorities, but the respondent had not given a valid reason for rejecting his position.

[8] The other ground for reduction was that the respondent's conclusion that the petitioner has not been deprived of his nationality of India or that no steps were taken to re-acquire his nationality was not rationally reached. The respondent's conclusion appeared to have been reached on a flawed interpretation of the provisions of the law of India. The relevant provisions were set out in the decision letter. In *R (MK (India))* v *Secretary of State for the Home Department* 2017 EWHC (Admin) 1365 the issue included whether the applicant was a national of India and that in turn depended upon the law of India, which was a matter of fact to be proved by evidence. The evidence in that case included a reference to section 10 of the 1955 Act. The decision makes clear that it is normally necessary to have not merely evidence, but expert evidence, to prove foreign law. It was necessary to gather and assess the evidence, including evidence concerning the law and practice in the country in question.

[9] The respondent's interpretation of the evidence was flawed. She should have paid regard to the expert report relied upon by the petitioner. In her decision letter the respondent did refer to this expert report, but she did not properly take it into account. The expert made reference to having to address the legal framework or background in which the petitioner had been deprived of his nationality. In dealing with the legal framework, he set out what the petitioner would require to establish to be entitled to Indian citizenship. He went on to discuss why the absence of this information, or lack of access to it, might lead the authorities in India to conclude that he the petitioner has no connection with India and that might be why they had deprived him of nationality. The effect of the report was that whether the petitioner has been deprived of his citizenship may not be based on the facts relied upon by the respondent, or at least solely on those facts, which were that he had not been an ordinary resident for 7 years. On the respondent's interpretation of the statutory provisions, she appeared to conclude that the petitioner could only be deprived of

citizenship if his presence is not conducive to the public good. But the expert dealt with other factors in his discussion and analysis.

[10] Unlike *R (MK (India))* there was not enough evidence before the respondent to reach the conclusion she did regarding citizenship. In that respect she had erred in concluding that foreign law meant that he could not have been deprived of his citizenship. Her decision was based on a refusal by her to accept that he has been deprived of his nationality. There was no other expert evidence before her. She does not address what the expert said as to why the petitioner might have been deprived of his nationality. She does not give reasons on matters that attracted the attention of the expert.

Submissions for the respondent

Competency

[11] When the respondent's application was refused in the decision letter, his remedy was to apply for an administrative review. The letter itself was, as it were, topped and tailed by encouraging an application for administrative review. He was informed that he could do so and given instructions on to how to apply, within 14 days. This would have been no surprise, given that he had already on two occasions applied for and succeeded in administrative review of the respondent's decisions. As in *MDMH Bangladesh*, this was a review procedure available to the petitioner. It derived from an enactment. The Lord Ordinary in that case had held that the existence of the statutory remedy precludes judicial review, unless there were special or exceptional circumstances. Here the administrative review procedure was an alternative remedy. On any view, the petitioner's arguments founded upon case working errors as set out in the appendix to the rules governing the review. The submission for the petitioner that all that administrative review

is capable of dealing with is a failure to address the policy was wrong. By way of example, that was not the approach on the first occasion when the petitioner applied for administrative review. He contended that a matter had been left out of account and that insufficient reasons had been given for the decision. While these were not quite the same as the contentions in the petition, nonetheless they are alleged errors which the petitioner took as falling within the ambit of administrative review. That application was successful, thus illustrating that the points raised fell within the scope of administrative review. Given that those issues could be dealt with by administrative review, so could the present complaints.

[12] On each of the heads dealt with in the decision letter, the respondent was applying her policy, firstly, as to how refusal to contact the Consulate General could be treated and secondly, as to how Indian law should be interpreted. The example given and referred to in the petitioner's submissions was of an incorrect application of the policy. The claimant had not been given what had been allowed. The matters raised by the petitioner in this case were of a similar ilk. The respondent has applied a policy but the argument is that she has done so wrongly. Accordingly, administrative review was available. The issue was whether on the face of the policy the decision fell within it, that is within the rules and the guidance as to interpreting the rules. It did, and so there was an alternative statutory remedy available.

[13] There were no special or exceptional circumstances that merited recourse to judicial review. If the application for administrative review had been made and was unsuccessful, there would then be a further decision for challenge in this court. There was no basis for the petitioner not taking that step for the third time. The submission for the petitioner that taking such a step would not have mattered seemed to be saying that, had he made an application, the petitioner would have been left in the same position. That was in effect

speculation on the utility of a step he was required to take and it did not make him any less obliged to do it. It was certainly not a special or exceptional circumstance. The application would indeed matter; if there was a rejection the petitioner could then come to this court to have it reviewed.

Reduction

[14] The first contention appeared to be that having been subject of a decision stripping him of nationality, it followed from the very nature of that claim that his decision to refuse co-operation with the authorities was justifiable. However, the respondent gave full consideration to his position and was entitled to reject that as a good reason for refusing to contact the consulate. It was clear from the letter sent by the petitioner's agents to the respondent that he did not want to face a disadvantage when he returned to India. It was not clear how that is said to differ from the point referred to in the decision letter of having a fear of return. If there was a fear of the authorities in India, then the petitioner could make an asylum claim, but if an asylum claim failed that would establish no basis for a fear of authorities. No asylum claim was ever made. The nearest one comes to that situation is the Article 8 ECHR claim, now accepted by the petitioner to have no basis.

[15] What the petitioner was seeking to do is argue that a distaste for the Indian authorities is a justifiable reason for refusing to allow contact. The submission that in equating that with a fear of the authorities, the respondent had not reached a legitimate view, did not stand up. If an applicant genuinely fears the authorities the policy allows that to be taken into account, but if the alleged fear is not well-founded, or something short of a fear, that is not good enough; *a fortiori* a distaste for them would not be a good reason. This assumed that these concepts were indeed different, which was not accepted. The nub of the

petitioner's point appeared to be that he would be placed at a disadvantage if sent back to India, but that was not elaborated upon or properly specified. If his safety is alleged to be affected he should make a claim for the protection of this country. If the alleged disadvantage does not reach that threshold then there was no question, as the policy is cast, that the respondent correctly found there to be no good reason for the petitioner not having dealings with the authorities.

[16] There was a psychological report referred to, but it made no link between the disorder suffered by the petitioner and why he would not allow contact with the authorities. The report was also based solely upon the account given by the petitioner, but in any event if what he said is correct, the report does not deal with why he should not contact the authorities or why he would have an unpleasant encounter with them. Under reference to *Tanveer Ahmed* [2002] UKIAT 439, it is for the claimant to show that a document on which he seeks to rely is a genuine one. The genuineness of documents is to be assessed in the round. Here, the document relied upon, the letter said to be from the Consulate General, was not rejected solely on the basis that contact with the authorities was not allowed by the petitioner, but was also rejected because of what the respondent says regarding the law of India. The respondent was entitled to reject the letter. She was entitled to use the refusal to allow contact as a part of that decision. It was also consistent with her policy about how to address refusal of contact. Her overall task was to assess the material before her, including the reliability of a document. Refusal to allow contact with the authorities would be a refusal to allow her to dig deeper into the material before her and was relevant to how she ought to consider that material. The respondent had given a thorough and nuanced treatment of the application.

[17] Turning next to whether the respondent was justified in reaching her conclusion on Indian law, the petitioner's challenge on this point in the oral submissions differed from the petition. While the petitioner was correct that section 10(2)(e) of the relevant legislation in India allows citizenship to be ended, the respondent concluded that the petitioner had not demonstrated that this had happened. Unless the respondent erred in a relevant manner, for example by making a completely irrational assessment, then it did not matter if she was wrong or had erred in her consideration of Indian law. The arguments for the petitioner that section 10(2)(e) allowed deprivation of citizenship could only take him so far. There is a reference in the decision letter to whether the petitioner was an "ordinary resident" of the UK, a phrase that has a meaning within sub-paragraph (e). Put shortly, the respondent had no information available to indicate that the petitioner was an ordinary resident. His time in the UK might or might not amount to ordinary residence. The respondent was making the point that she did not know and nothing had been presented to her that the petitioner might be within that category.

[18] In relation to the contention that the respondent had erred by failing to take into account the expert report, this was not foreshadowed in the petition or the Note of Argument for the petitioner and was a quite different challenge to one based upon the rationality of the respondent's reasoning that the law of India required certain things to be satisfied. The Note of Argument relied upon an allegedly flawed interpretation of statutory provisions of the law of India. That contention was based upon textual analysis, not on a failure to have regard to evidence. However, dealing with this new contention, when one looked at the expert report, the expert did address the concept of an ordinary resident and said what it means, but he did so in the context of different legislation. He did not consider the concept of ordinary resident for the purposes of the 1955 Act. The respondent had not

left anything out of account. Moreover, everything the expert had learned came from the petitioner himself. The overall point being made by the petitioner was that *prima facie* section 10(2)(e) would allow a person to be stripped of citizenship. All we have is the petitioner's account that this has happened and he sought to bolster that with the letter from the Consulate General, referred to in the decision letter as the document which the respondent wished to verify.

[19] It was correct that section 10(2)(e) created the possibility of being deprived of citizenship. The unclear question of whether he was an ordinary resident was part of her hesitation in finding out if that applied to the petitioner but the respondent also made reference to subsection (3), which provides that citizenship will not be deprived unless the central government is satisfied that it is not conducive to public good that the person will continue to be a citizen of India. The petitioner submits that is was not open to the respondent to interpret section 10(3) as casting doubt upon the claim. But, on the contrary, she could have regard to what she considered, using her best endeavours, the Indian legislation to require and she had interpreted it as in her policy. There was nothing in the expert's report to say what "public good" might or might not require. The respondent was entitled to have regard to the fact that nothing was before her to address that point. In the petitioner's Note of Argument it is suggested that the issue of being conducive to public good does not apply to cases dealt with under subsection (2). It was not necessary to decide upon that issue, because the question of what Indian law requires is a question of fact and the respondent has had regard to the material before her in coming to her view. Unless there is something so perverse in her reading of it such as to render her conclusion unreasonable, she was entitled to come to the view that she did: that deprivation of citizenship as referred to in the legislation had not been demonstrated.

[20] The petitioner's contention in the petition, but not developed in submissions, that the petitioner had no right to seek to challenge being stripped of his nationality under section 10(2)(e) appeared to rely upon the wording of sections 10(4) and (5). However, these do not bear upon a person who falls under section 10(2)(e). There was information before the respondent of other appeal rights that might exist but the point being made in the decision letter is that the petitioner had failed to demonstrate that he has taken the steps available to him to challenge deprivation. The expert's report contained no treatment of that aspect of Indian law at all. The overall point was that what Indian law requires is a matter of fact. The respondent had sought to uncover what Indian law might require. She made an interpretation of it and reached certain views that she considered, to her satisfaction, meant that it had not been demonstrated that the petitioner had lost his nationality and exhausted any ability to have it returned.

Reply for the petitioner

[21] In relation to the law of India, the essence of the submission for the respondent appeared to be that there was before her provisions of Indian law and she made of them what she could and nothing presented to her indicated this might not be so. That was incorrect. The expert had indicated this might not be so. While neither in the Note of Argument or in the petition is it expressly mentioned, the challenge is a rationality challenge. Something is not rational if it leaves out of account a matter that should have been taken into account. In effect, the expert's view had been ignored and that is irrational. In relation to competency, the point about an administrative review making no difference is that the petitioner's view that his application had been repelled and that administrative review would not affect that outcome was an entirely justified assumption. The suggestion

was that the point about the respondent taking account of not being allowed to contact the Indian consulate was a matter that should have been taken to administrative review, but the decision letter was almost identical to a previous decision letter that had been the subject of administrative review. The respondent had once again relied on this issue. So, he was entirely justified in concluding that any attempt to invoke this remedy for a third time would have made no difference.

Decision and reasons

Issue 1: Competency

[22] In *MDMH Bangladesh* Lord Jones applied the well-recognised general principle that judicial review is not available where there is a statutory right of appeal, a point also illustrated in other cases (see eg *Levenside Medical Practice, petitioner* [2020] CSOH 67). Rule 58.3(1) of the Rules of the Court of Session provides that a petition for judicial review may not be lodged in respect of an application if that application could be made by appeal or review under or by virtue of any enactment. In *Gray* v *Braid Logistics (UK) Ltd* 2015 SC 222 it was stated (at para [21]) that the supervisory jurisdiction of the Court of Session may be seen as a development of the *nobile officium* of the court and hence generally may only apply where no other remedy is available. In the present case, counsel for the petitioner accepted that administrative review is an alternative remedy and did not seek to argue that the general principle of judicial review not being permitted in such circumstances did not apply here. In my opinion, he was correct to do so.

[23] In the context of immigration, administrative review was introduced to replace most of the previous appeal rights. The review is, as I understand the policy, carried out by a different individual from the original decision maker. It is a paper based exercise,

conducted relatively swiftly, and is to resolve case working errors. Additional evidence cannot be submitted. Administrative review is not an appeal, but rather is an internal review process. Questions may therefore arise as to whether, for particular purposes, it is the date of the decision or the date when the administrative review was decided that is to be taken as the relevant date (see *R (on the application of Topadar)* v *Secretary of State for the Home Department* [2020] EWCA Civ 1525; (*R (Sukhwinder Singh)* v *Secretary of State for the Home Department* JR/1361/2015). However, administrative review is an available remedy and does have a statutory footing. As explained in *R (on the application of Topadar),* section 3(2) of the Immigration Act 1971 confers power to provide for such a system of administrative review, allowing rules "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom". The court in that case held that

> "Rules providing for an administrative review to determine whether decisions refusing applications to vary an existing leave to remain should be withdrawn or remain in force are rules as to the practice to be followed in the administration of the 1971 Act for regulating stay in the United Kingdom."

Administrative review is also referred to in sections 3C(2)(d) and 3C(7) of the Immigration Act 1971, the latter defining it as "a review conducted under the immigration rules". I therefore conclude that administrative review exists by virtue of an enactment and is an alternative remedy for the purposes of the principles of when judicial review is available.

[24] The provisions governing administrative review are contained in appendix AR to the Immigration Rules and include:

> "2.1 Administrative review is the review of an *eligible decision* to decide whether the decision is wrong due to a *case working error*…
>
> 2.11 For the purposes of these Rules, a case working error is:
>
> …
>
> (d) Where the original decision maker otherwise applied the Immigration

> Rules incorrectly; or
>
> (e) Where the original decision maker failed to apply the Secretary of State's relevant published policy and guidance in relation to the application".

I do not accept the submissions for the petitioner that the issues raised by him are not within the scope of this definition. It is clear that an incorrect application of the rules constitutes a case working error and, in my view, the reference to a failure to apply the relevant policy and guidance must be taken to include failing properly or correctly to do so. A purported application of the policy which proceeds on the basis of an irrational or illegal decision or finding is such a failure and is therefore a case working error. The petitioner's first challenge concerns the respondent's finding that the reasons given by the petitioner for withholding his consent to allow her to contact the authorities in India, to verify information he had provided, were not valid. In the decision letter, the respondent made specific reference to the policy. She identified section 4.2 of the Asylum Policy Instruction for Statelessness and how it dealt with the burden of proof, including that if consent to contact the authorities in the country of former habitual residence was denied by the applicant without good reason it may be inferred that he is refusing to co-operate and has not discharged the burden of proof, taking into account all of the available information. The respondent then referred to the reasons given on behalf of the petitioner for refusing contact and concluded that these were not valid reasons. The arguments for the petitioner are to the effect that the reasons should not have been taken to be invalid. In other words, the respondent had wrongly applied the policy since it can only apply where there is no good reason. The respondent sought to apply the policy and whether she did so wrongly is something that falls within the meaning of a case working error. The suggestion that there is a distinction between the rationality of her decision and whether it is a case working error

is not well-founded. It is plainly intended that an administrative review is an alternative remedy of wide application and its terms are so expressed. A subtle or nuanced approach to the precise nature of the alleged error is inappropriate.

[25] The second challenge is to the respondent's finding that the petitioner has not been deprived of his nationality of India or that no steps were taken to re-acquire his nationality, and the grounds relate to the respondent's reading and application of the Indian statute and allegedly not taking account of the expert's views. However, when seen and read in the context of the rest of the decision letter, all the respondent was doing was seeking to identify the relevant Indian legislation dealing with the circumstances in which deprivation of citizenship could occur. This included whether the petitioner could have been ordinarily resident out of India for a period of 7 years and whether the authorities had been satisfied that it is not conducive to the public good that the petitioner should continue to be a citizen of India. These factors simply added to the problems caused by not being able to obtain direct confirmation from the Indian authorities to show whether the information in the letters dated 5 April 2017 and 16 May 2017 was correct. In short, the respondent's reference to Indian law and its relevance formed part of her application of the policy and the immigration rules. Again, therefore, if she was wrong in that regard it fell within the wide definition of a case working error.

[26] I also do not accept the submission for the petitioner that the remedy of administrative review would not have been effective, as it would not have affected the outcome of his application (that is, it being repelled). This was said to be an entirely justified assumption. It is not appropriate to speculate upon, or seek to predict, what would have been the outcome of an administrative review that has not been applied for and hence not conducted. The assumption said to have been made does not cause that alternative remedy

to be ineffective. There was, in my view, no basis for any such foregone conclusion. Accordingly, the general rule of having to exhaust alternative remedies applies here: administrative review was a necessary step to be taken in order to make judicial review a competent remedy.

[27] For these reasons, this application for judicial review is not competent. It is, however, appropriate that I deal also with the submissions on reduction.

Issue 2: Reduction

[28] As the petitioner submitted, in an application for leave to remain it is for the claimant to show that a document on which he seeks to rely is a genuine one: *Tanveer Ahmed* [2002] UKIAT 439. The first argument on reduction is that the respondent's conclusion that the petitioner's refusal to give consent was not rational, because she gave no reason as to why the petitioner's refusal to give consent was not a valid reason or, if it is taken that she does give a reason, it is not a reason that is based on the facts that were presented to her. The decision letter quotes from the relevant policy document, which states that if "consent is denied without good reason (for example, it has already been established that the person's claimed fear of those authorities was not well-founded)" then the inference of non-cooperation and failing to discharge the burden of proof may be made, taking into account all of the circumstances. The respondent was plainly applying that test when referring to whether the petitioner's reasons were "valid". The respondent set out and gave consideration to the petitioner's position, including the somewhat vague reference to him and the authorities not wanting to have anything to do with each other. She had to assess whether or not that position gave a good reason for refusing to allow contact and she was entitled to reject the pursuer's position if it did not do so. There was no requirement to

elaborate further on why this was not a good reason. The submission that the petitioner was not saying that he had a fear of return, but just stating that he does not trust an authority whom he alleges has withdrawn his nationality, is of no real substance. He was certainly asserting that some form of disadvantage would be faced if he returned to India. The respondent's reference to the matter of fear of return appears to me to relate to what is said in the policy document about whether a fear of the authorities is well-founded, as a possible explanation for refusing consent to contact them. Her decision that the disadvantage asserted did not meet that test was not an irrational approach. If, however, all that the petitioner was seeking to argue was a lack of trust, there is no basis for viewing that as a good reason for his refusal to allow contact, particularly where that assertion was not elaborated upon or properly specified, and again the respondent's decision was therefore not irrational.

[29] The remaining point is the petitioner's contention that the respondent's conclusion, based on the Indian statute, that the petitioner has not been deprived of his nationality of India, or that no steps were taken to re-acquire his nationality, was not rationally reached. As is made clear in *R (MK (India))* v *Secretary of State for the Home Department*, where an issue depends upon the law of another state, that is a matter of fact. Expert evidence will commonly be required, but if the language has a plain and ordinary meaning that the decision maker applies, and there is no suggestion that expert evidence would support a different meaning, the absence of expert evidence is not of itself sufficient to render the decision irrational. The petitioner's argument, as it came to be, was not based upon an allegedly wrong interpretation of particular language in the provisions. There was no suggestion that the Citizenship Act 1955 referred to was not the correct legislation or that other legislative provisions qualified its effect. Indeed, the expert report refers to the

Citizenship Act 1955 as providing for the acquisition and determination of citizenship in India. The petitioner did not supply any information to show the reason why he had been allegedly deprived of his citizenship. It was therefore appropriate for the respondent to consider the grounds upon which that could have arisen, such as whether the petitioner had shown that he had been "ordinarily resident" in the UK for the relevant period. The respondent was entitled to find that there was no information available for believing that he was ordinarily resident out of India for a period of 7 years. As the respondent noted in the decision letter, section 10(3) states that a person will not be deprived of citizenship unless the authorities are satisfied that it is not conducive to the public good that the person should continue to be a citizen of India. This was another aspect of the test for deprivation upon which the petitioner had given no information and again the respondent was entitled to find that the test in the provision was not met.

[30] Counsel for the respondent was correct that the petitioner's argument that the respondent had erred by failing to take into account the contents of the expert report was not mentioned in the petition or the Note of Argument. On that basis it is not appropriate to entertain that submission. In any event, even it is considered, counsel did not suggest that there was anything in the expert report addressing the concept of an ordinary resident for the purposes of the Act referred to by the respondent. Moreover, it was not suggested that the report dealt with what would require to be established to show that continued citizenship would not be conducive to the public good in terms of section 10(3). The report suggests that the petitioner might have been deprived of his citizenship because of his actions "by not visiting India, since going abroad and not enrolling himself and obtaining Unique identification number", and that his "disregard for compliance with the Indian legal requirements and his continuous residence in the UK might have led to the stripping off of

his Indian citizenship by the Indian authorities". In essence, the respondent was considering the petitioner's position that he had been deprived of citizenship against the backdrop of him having shown no good reason for refusing to allow contact with the Indian authorities for verification of that matter. She then turned to the legislation (to which the expert specifically referred) which might shed light on how deprivation could occur. The legislation allowed such deprivation only if certain tests were met and the respondent was faced with a situation in which neither the petitioner nor the expert gave any grounds to demonstrate that these tests had been met. The matters mentioned by the expert and said by counsel to have been left out of account by the respondent were expressed as things that might have caused the deprivation of citizenship and seemed to rely largely on the point about the petitioner being abroad, which is addressed in section 10(2)(e). The expert did not put forward any clear alternative basis for deprivation of citizenship. The failure to refer to the expert's comments on this issue does not, in my view, support the contention that this aspect of the decision was irrational. The respondent interpreted the legislation to which the expert had referred and concluded that it had not been demonstrated that the petitioner had been deprived of his nationality or had exhausted any means of having it returned. In doing so, the respondent did not act irrationally and it has not been shown that she left out of account any expert evidence that could have had any material bearing on her conclusions. In any event, her views on these issues simply formed a further part of her reasoning, her earlier decision about the failure to consent having of itself sufficed to reject the application.

[31] For these reasons, I do not accept the arguments for the petitioner in respect of reduction.

Disposal

[32] I shall sustain the second plea-in-law for the respondent and dismiss the petition as incompetent.