Practitioner's note on

R (Roehrig) v Secretary of State for the Home Department

[2023] EWHC 31 (Admin)

1. On 20 January 2023, Eyre J ("the judge") handed down judgment in *R (Roehrig) v Secretary of State for the Home Department* [2023] EWHC 31 (Admin). The judge dismissed the claim.

2. The Claimant (**"C"**) was born in the UK on 20 October 2000 to a French national mother (**"M"**) who was, at the time of C's birth, exercising free movement rights as a worker. C claimed that, on birth, he had automatically acquired British citizenship by virtue of s.1(1)(b) of the British Nationality Act 1981 (**"the BNA 1981"**), which provides that a person born in the UK automatically acquires British citizenship if, at the time of their birth, their mother or father is settled in the UK. Per s.50(2) of the BNA 1981, a person is settled if they are *"ordinarily resident in the United Kingdom …without being subject under the immigration laws to any restriction on the period for which he may remain."* 'Immigration laws' are defined in s.50(1) of the BNA 1981 as *"the Immigration Act 1971 and any law for purposes similar to that Act which is for the time being or has at any time been in force in any part of the United Kingdom"*.

3. C's argument, in essence, was that M was (i) ordinarily resident in the UK (ii) without being subject under the immigration laws to any restriction on the period for which she may remain and, accordingly, C automatically became a British citizenship on birth.

4. Furthermore, C relied on the fact that, prior to 2 October 2000, the Secretary of State had understood the meaning of s.1(1)(b) precisely as contended for by C, that is, as providing for automatic citizenship for those born in the UK to persons exercising EU free movement rights. The Secretary of State had, until the hearing of the judicial review claim, operated a policy of continuing to recognise the rights of persons in C's position but born prior to 2 October 2000 to British citizenship on the basis of the Secretary of State's previous understanding of s.1(1)(b) of the BNA 1981. The Secretary of State claimed that her understanding of the meaning of "settled" changed following the decisions of the CJEU in *Kaba v Secretary of State for the Home Department (No 1) and (No 2)* [2003] 1 CMLR 38 and 39. According to the Secretary of State, on the basis of that changed analysis, the Secretary of State promulgated the Immigration (European Economic Area) Regulations 2000 (**"the 2000 Regulations"**). Regulation 8(2) of the 2000 Regulations purports to deem that certain persons exercising EU rights, including M, are not settled for the purposes of the BNA 1981.

5. In the course of the hearing of the judicial review claim, counsel for the Secretary of State informed the Court that a decision had been taken to 'pause' the policy of recognising the right to citizenship of those in C's position born before 2 October 2000.

6. C's arguments before the Court were, thus, as follows:

   (1) M's rights derived from the EU Treaties, as given effect by s.2 of the European Communities Act 1972 (**"the ECA 1972"**). M's residence was not subject to any restrictions under *"the immigration laws"* as defined in the BNA 1981, because her residence was regulated by EU law. This was the analysis adopted by President of the Upper Tribunal McCloskey J in *Secretary of State for the Home Department v Capparelli* [2017] UKUT 000162 (IAC), a tribunal of coordinate jurisdiction to the High Court. The earlier decision of the Immigration Appeal Tribunal in *Gal v Secretary of State for the Home Department* (unreported 26th January 1994), which came to the contrary conclusion, was not of equivalent precedent value and was correctly found to have been incorrectly decided by McCloskey J.

   (2) In any event, M was not subject to a restriction on the period for which she might remain in the UK. 'Period' should be taken to refer to a time period, that is, the time period for which leave to remain is granted. The fact that M's right to remain in the UK was conditional on her working or exercising some other EU right did not bring M within the threshold requirement of being subject to a restriction *"on the period for which"* she could remain. Such an argument would bring in all persons subject to any sort of condition. The decision of the Court of Appeal in *R (Coomasaru) v Immigration Appeal Tribunal* [1983] 1 WLR 14, relied on by the Secretary of State, was inapposite because it dealt with a very different situation that was not analogous to the position of EU citizens exercising free movement rights.

   (3) Regulation 8(2) of the 2000 regulations could not affect the meaning of s.50(2) BNA 1981 and was ultra vires s.2(2) of the ECA 1972.

7. The Secretary of State argued as follows:

   (1) M was not settled because the time period for which she could remain in the UK was limited to the period in which she continued to fulfil the conditions upon which such entitlement was based.

   (2) A person is only settled for the purposes of s.50(2) if they enjoy an indefinite or permanent right to remain in the UK.

   (3) "Immigration laws" is defined widely and includes include any legislation which has the function of regulating rights to enter and/or remain in the UK.

   (4) In *Coomasaru,* the Court of Appeal held that a grant of leave that is contingent on continuing employment amounted to a restriction on the period for which a person may remain. That situation was analogous to that of M.

   (5) Regulation 8(2) of the 2000 Regulations was *intra vires* and accurately reflected the nature of EU free movement rights and their proper categorisation for the purposes of the BNA 1981.

8. The judge dismissed the claim and accepted the Secretary of State's arguments on interpretation of the relevant provisions of the BNA 1981. The judge concluded as follows:

   (1) In relation to the question of whether any restrictions to which M was subject were under *"the immigration laws"*:

      (a) *Capparelli* could be distinguished because, at the relevant time under consideration in that case, EU rules on free movement were given effect via the Immigration Rules; whereas here the legal regime was *"very different"* due to the intervention of *"statutory instrument under powers given by an Act of Parliament"*

i.e. the 2000 Regulations and other provisions that had come into force subsequent to the time under consideration in _*Capparelli*_. Accordingly, the judge considered that the normal rule of precedent, namely that he was obliged to follow a decision of the Upper Tribunal unless persuaded it was wrong, did not apply. See §74. The judge further said that, if he were wrong that _*Capparelli*_ was distinguishable, it was wrongly decided: §91.

(b) _*Kaba (No1)*_ and _*(No 2)*_ were not relevant to the interpretation of the BNA 1981: §§76-80.

(c) The 2000 Regulations were immigration laws for the purposes of s.50(1) of the BNA 1981: §§82-84.

(2) In relation to the question of whether M was subject to a restriction on the period for which she may remain:

(a) The judge considered himself bound by the Court of Appeal's decision in _*Coomasaru*_ and considered that the case was not distinguishable from the present situation. Accordingly, the judge concluded that M was subject to a restriction on the period for which she may remain on the basis of an application of _*Coomasaru*_: §§91-104

(b) The judge concluded that, even if he were not bound by Coomasaru, he would have come to the same conclusion: §§105-110.

(3) The judge concluded that, in light of his conclusions on the interpretation of the BNA 1981, he did not need to address the vires of Regulation 8(2) of the 2000 Regulations; but added that, if he were wrong on those issues, it would appear that Regulation 8(2) was ultra vires.

9. The judgment is of considerable significance not only because it directly affects a significant cohort of other persons in the same position as C, i.e. those born to a parent exercising EU free movement rights on or after 2 October 2000. In addition, the position of those persons in an analogous situation who were born prior to 2 October 2000 and had, pursuant to the Secretary of State's understanding of the law at that point had their British citizenship recognised is also affected because of the 'pause' of that policy communicated by the Secretary of State in the course of the hearing.

The Claimant is represented by:

- Jessica Simor KC, Matrix Chambers, and
- Adrian Berry, senior counsel at Garden Court Chambers, and
- Admas Habteslasie at Landmark chambers.

Instructing solicitor:

Solange Valdez-Symonds, solicitor at Project for the Registration of Children as British Citizens (PRCBC) and consultant solicitor at Cardinal Hume Centre.

20 January 2023