



Neutral Citation Number: [2020] EWHC 1956 (Admin)

Case No: CO/2/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2020

Before :

MRS JUSTICE LANG DBE

Between :

THE QUEEN
on the application of

Claimant

STEPHENIE OLUWITSE ALAKE

- and -

SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Defendant

Joseph Plowright (instructed by **Perera Solicitors**) for the **Claimant**
Tom Tabori (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 16 July 2020

Approved Judgment

Mrs Justice Lang :

1. This is a renewed application for judicial review of the Defendant's decision dated 26 August 2019 to refuse the Claimant's application for a replacement British passport.
2. Permission was refused on the papers on 17 March 2020 by HH Judge Pearce, sitting as a Judge of the High Court. He did, however, extend time for making the claim.

Facts

3. The Claimant was born in Nigeria on 20 September 1984. Her mother was a Nigerian national, who is sadly deceased. The Claimant claims that her father is Mr O. A. Alake, a British citizen, who was married to her mother at the time of her birth, but left them in Nigeria when he returned to the UK soon after her birth. In 1986 her parents separated.
4. The Claimant travelled to the UK in 2004, and moved in with her aunt in 2005. She has been residing in the UK since then. She claims she last saw her father ten years ago.
5. On 2 April 2007, the Claimant was issued with a British passport based on her claimed father's identity and British nationality. She and her partner, Kazzem Shittu, have two sons, born in 2011 and 2015, who have also been issued with British passports.
6. In July 2017 the Claimant applied to Her Majesty's Passport Office ("HMPO") for a replacement passport. As part of their identity checks, HMPO asked the Claimant to provide some additional information, including her parents' wedding certificate. The Claimant provided a copy of a Nigerian wedding certificate. Following overseas checks in Nigeria, the wedding certificate was deemed to be unverifiable i.e. it could not be matched with the records in the central registry. The Claimant attended an interview at the passport office and as she was unable to provide sufficient details, her aunt provided the passport office with a statement, confirming that Mr Alake was the Claimant's father. Her aunt had last seen him in 2006, when she asked him to support the Claimant but he refused.
7. Neither the Claimant nor her aunt know Mr Alake's current contact details.
8. HMPO managed to trace Mr Alake. HMPO had a file on him because he had been a victim of identity theft in the past, at which time HMPO had taken steps to establish his genuine identity. He answered questions posed by the passport office and in January 2018 he sent a written statement stating that the marriage certificate was a fake; he did not know the Claimant's mother and did not marry her; and he did not know the Claimant and she was not his daughter.
9. In March 2018, HMPO revoked the Claimant's passport and the passports of her sons. As a result, the Claimant has been unable to work or claim benefits and she has become depressed. Her future in the UK is in jeopardy. The Claimant and her sons filed a claim for judicial review. Permission was granted in an order dated 5 September 2018 by John Howell QC, sitting as a Deputy High Court Judge, on the

ground that HMPO should have given the Claimant an opportunity to respond to Mr Alake's statement before making a decision. In the 'Observations' section of his order, he said it was possible that the Claimant could have raised matters which might have made a difference to the decision, for example, requesting HMPO "to help arrange for a DNA test between Mr Alake and the First Claimant".

10. Following the grant of permission, the parties entered into a consent order, sealed on 16 October 2018, under which the Claimant and her sons submitted a further set of passport applications and the Defendant agreed to issue fresh decisions.
11. By letter dated 11 December 2018, HMPO refused the applications (the second refusal). The Claimant's solicitors challenged the refusal in a pre-action protocol letter. In a letter dated 13 February 2019, HMPO responded, accepting that the decisions had not been properly made, and agreeing to make fresh decisions.
12. On 12 March 2019 the Claimant sent a further application. She was then invited to attend an interview, bringing with her as many forms of identification as possible, and she duly attended on 5 July 2019. The Claimant's solicitors complained to HMPO about the conduct of the interview, saying it was bullying and intimidating. But HMPO denied this. The account given by the case officer who conducted the interview indicated that she was unco-operative.
13. By letter dated 26 August 2019, HMPO refused the Claimant's application again, on the ground that it was not satisfied that the Claimant had provided enough evidence to confirm her claimed relationship with her alleged father and therefore it was not satisfied that her status as a British citizen had been established. This was the third refusal and this is the decision which is challenged in this claim. The letter was not received until November 2019; hence the extension of time granted by HH Judge Pearce.

Grounds for judicial review

14. Following exchange of pre-action protocol correspondence, this second claim for judicial review was issued on 30 December 2019, on two grounds:
 - i) It was procedurally unfair and therefore unlawful to refuse the Claimant's application for a British passport without offering any assistance to the Claimant to undergo DNA testing to demonstrate that she is the daughter of her claimed father.
 - ii) It was procedurally unfair not to disclose the interview notes and a recording of the interview which took place on 5 July 2019, prior to deciding not to grant her application for a passport.
15. In the claim, the Claimant did not contend that HMPO was under an obligation to conduct the DNA test itself, and acknowledged HMPO had no power to require the parties to undertake a DNA test. The Claimant put her case in this way at paragraph 20 of the statement of facts and grounds:

“.... It has always been the Claimant’s case that she does not know where her father lives. The Passport Office do know where the Claimant’s father lives. It is therefore submitted that in light of the seriousness of having her passport revoked and her application for a British passport refused, the Passport Office could have, at the very least, written to the claimant’s alleged father, asking him whether he would consent to a DNA test...”

16. Ground 2 is no longer pursued – which sought disclosure of interview notes and records – as the documents have now been supplied.

17. In his decision refusing permission, HH Judge Pearce said:

“2. The Claimant relies two grounds in support of her argument that the Defendant’s decision to refuse her application for a British passport was unlawful:

a. That the Defendant has not offered any assistance to the Claimant to demonstrate that she is the daughter of the man who she claims is her father, through which relationship she claims to be entitled to a British passport.

b. The Defendant had not disclosed the notes of an interview on 5 July 2019 or a recording of that interview by the time of making the decision on 26 August 2019 not to grant the Claimant a passport.

3. Under the first ground, the Claimant contends that, given that the identity Claimant’s father is central to this case and that his whereabouts are known to the Defendant (as demonstrated by their communication with him) but not the Claimant, it is incumbent on the Defendant to assist with arrangements for DNA testing to resolve the issue. They draw attention to the fact that Mr John Howell QC, sitting as a Deputy High Court Judge, observed that the Defendant might assist in such arrangements in granting permission to bring judicial review proceedings of a previous decision of the Defendant in respect of the Claimant’s application for a passport in September 2018.

4. The Defendant submits that DNA testing is not the only route to proving paternity and that the other evidence does not on balance prove the paternity of Mr Alake. This may be correct, but DNA testing would no doubt be powerful evidence on the issue and would probably determine it one way or the other.

5. The Defendant also states that it has no statutory power to require Mr Alake to provide DNA evidence. It is stated in the Defendant’s letter of 26 August 2019 that, during the

interview on 28 June 2019, the Claimant said that the Defendant should “*facilitate, conduct and pay for a DNA test between her and her alleged father...*” I am unaware of any statutory obligation on the Defendant to do this and none has been suggested on behalf of the Claimant.

6. It is arguable that, if she were asked to assist with a DNA test in these circumstances, the Defendant’s duty, apparently knowing the whereabouts of the putative father, would be to provide assistance in the performance of a DNA test by contacting the father and asking him to cooperate, as suggested in paragraph 20 of the Claimant’s written grounds. Whilst he might decline to do so, a failure to cooperate would be relevant evidence from which the Defendant might draw an inference as to the true paternity of the Claimant.
 7. However, the difficulty for the Claimant is that she cannot show that the Defendant has failed to discharge such a duty, since no request has been made to the Defendant. The evidence, as quoted above, is that the Claimant requested the Defendant to pay for and arrange the testing. I cannot see that the Defendant is under any obligation to do this. In correspondence on her behalf, solicitors have spoken of an obligation “*to facilitate and arrange a DNA*” (sic). Again, it is not arguable that the Defendant is under any such wide unfocussed duty.
 8. The Defendant’s evidence from the notes of interview, suggests that the interviewing officer may have been amenable to providing some assistance but that the Claimant’s only request was that the Defendant arrange and pay for the DNA test. I do not see that the it is incumbent on the Defendant to volunteer her assistance in trying to arrange a DNA test, not least because the Claimant appeared to indicate an intention only to take part in such a test if the Defendant both arranged and paid for it.
 9. Accordingly, the first ground cannot succeed, and I refuse permission.”
18. In the ‘Judicial Review Renewal Grounds’, counsel analysed the correspondence, the interview notes of 5 July, and the order of John Howell QC, and submitted that, in the particular circumstances of this case, HMPO must have been aware that the Claimant was at the very least seeking assistance from HMPO to contact her father to ask him to provide a DNA test. It was not necessary for her to make a formal specific request, as HH Judge Pearce found. Counsel also cast doubt on whether the Claimant had said at interview that she was expecting the passport office to facilitate, conduct and pay for a DNA test in the interview as this was not recorded in the interview notes. It did, however, appear in the Claimant’s solicitor’s letter of 27 November 2019.

19. In his oral submissions, counsel for the Claimant relied in particular upon HMPO's letter of 13 February 2019 which conceded that the second decision was flawed because it "failed to address the option of voluntary DNA evidence" and added that, when the application was re-considered, "HM Passport Office will also suggest that the new case officer offers voluntary DNA testing to your client". He submitted it was procedurally unfair to make the 26 August 2019 decision without offering a voluntary DNA test or even addressing it as an option.
20. The Defendant submitted that there was no statutory or common law basis for imposing upon HMPO a duty to facilitate and arrange a DNA test. Counsel conducted an analysis of the documents, and submitted that the Claimant and her solicitors had not at any stage made a request to HMPO to ask Mr Alake to co-operate with a DNA test.

Conclusions

21. Section 3(8) of the Immigration Act 1971 provides that "when any question arises under this Act whether or not a person is a British citizen it shall lie on the person asserting it to prove that it is." Thus, it is for the Claimant to establish, on the balance of probabilities, that she is the daughter of Mr Alake, and that he is a British citizen. As matters stand, she is unable to provide sufficient evidence that she is Mr Alake's daughter, to counter Mr Alake's categorical denial of paternity. A DNA test may be the only way in which she can do so, but she cannot find Mr Alake to ask him if he will agree to be tested.
22. HMPO has a broad discretion as to the nature of any checks and investigations it undertakes when considering an application for a passport. It has no statutory power to require DNA tests to be taken. It is not under any statutory obligation to facilitate DNA tests, and it is not its policy or practice to do so. Where appropriate, it will accept DNA evidence presented by an applicant (see, for example, regulation 3 of the British Nationality (Proof of Paternity) Regulations 2006).
23. However, I consider it is arguable that, in the unusual circumstances of this particular case, HMPO has acted procedurally unfairly in refusing the Claimant's application for a passport on 26 August 2019, without giving any or any proper consideration to the option of HMPO asking Mr Alake if he would agree to a DNA test voluntarily. I set out below the circumstances which have led me to this conclusion.
24. Permission was granted in an order dated 5 September 2018 by John Howell QC, sitting as a Deputy High Court Judge, on the ground that HMPO should have given the Claimant an opportunity to respond to Mr Alake's statement before making a decision. In the 'Observations' section of his order, Mr Howell QC said:

"On the basis of the information available It would not be appropriate to conclude in the absence of argument that there was nothing that the First Claimant could have said, including, for example, requesting (as her solicitors did in their letter dated March 15th 2018) the Defendant to help arrange for a DNA test between Mr Alake and the First Claimant (given that she does not apparently know where he now lives), that might

have led to inquiries that might have made a difference to the decision”.

25. In the light of this order, HMPO entered into a consent order with the Claimants to re-consider their passport applications. Whilst these ‘Observations’ of Mr Howell QC, which were made only at permission stage, were not part of his formal order and were not binding on HMPO, the Claimant submits that the understanding between the parties when they entered into the consent order was that HMPO would give the Claimant the opportunities referred to by Mr Howell QC in his ‘Observations’.
26. Although such an understanding is not reflected in the terms of the consent order, it is arguably to be found in the letter of 13 February 2019 where HMPO said (*emphasis added*):

“I refer to the judgment made by John Howell QC on 5 September 2018 ...It was noted that the Secretary of State for the Home Office (SSHD) failed to provide your client with the following opportunities to support their passport application:

- The failure to offer your client the opportunity to defend the statement made by her alleged father ... to whom her claim to British nationality is derived, and
- Failure of HM Passport Office to assist with voluntary DNA testing, and
- Failure to provide the requisite explanation regarding your client’s parents’ marriage certificate which has been deemed as unverifiable.

For the reasons stated above, HM Passport Office agreed to offer your client the chance to submit a further passport application free of charge in our Consent order of 28 September 2018. The new application would present your client with the opportunity to offer further evidence to support her claim. In addition HM Passport would need to address the comments made in the judgment and provide a fair and just explanation should your client’s new application be unsuccessful.

.....Unfortunately despite instruction to do so the case officer failed to take into account the concerns raised by John Howell QC in your client’s previous judicial review. HM Passport Office failed to offer the services of a further interview whereby your client could have provided additional evidence to support her claim to British nationality and counter challenge the allegation of her alleged father who denies their relationship as daughter and father.

I also accept that our decision letter dated 11 December 2018 adopted too high a burden of proof on your client and failed to address the option of voluntary DNA evidence and provide

reasons why your client's parents' marriage certificate was unverifiable. It is for these reasons that I am offering to review a further passport application on behalf of your client free of charge.

...

...When considering the new application form we will take into account the recommendations made by John Howell QC. HM Passport Office will also suggest that the new case officer offers voluntary DNA testing to your client. Clarification of how DNA evidence is considered is described below...

27. The letter of 13 February 2019 was HMPO's response to the Claimant's pre-action letter of 5 February 2019 in which the main issue identified was HMPO's failure to assist the Claimant to obtain a DNA test because she was not able to contact Mr Alake herself, as she did not know his whereabouts. This was said to be procedurally unfair and irrational. It is arguable that this was a sufficiently clear request for HMPO's assistance in contacting her father to ask him to take a DNA test, particularly in the light of the terms of John Howell QC's 'Observation'. HMPO's response to that letter was to acknowledge that the previous decision was unlawful because the case officer "failed to address the option of voluntary DNA evidence" and to agree that, on the next occasion, "HM Passport Office will also suggest that the new case officer offers voluntary DNA testing to your client", which does support the Claimant's case. It indicates that HMPO was well aware that the Claimant was seeking HMPO's assistance with a DNA test.

28. The interview duly took place on 5 July 2019. The case officer's notes set out the matters which were identified in the letter of 13 February 2019 as arising from John Howell QC's order, including the option of a voluntary DNA test:

"Points to prove/defences as set out by litigation:

- Is the applicant the true holder of the identity
- To give the applicant the opportunity to defend the statement made by her alleged father
- Explain to the applicant HMPO's position regarding her parents' marriage certificate being unverifiable
- The option of a voluntary DNA test as advised by Litigation (?)"

29. The notes then describe an exchange with the Claimant at the beginning of the interview, where the case officer indicated that they could discuss the possibility of a DNA test later in the interview:

"Before I started the interview I asked Ms Alake as to her understanding of why she had been asked to attend the passport

office today – Ms Alake thought it would be to discuss/attend a DNA test.

I explained that although that is something that may be arranged between Ms Alake and her alleged Father that we could discuss later in the interview, she was actually here for an identity interview similar to the one she had attended before.”

30. However, the notes of interview indicate that no discussion about a possible DNA test took place, and certainly no assistance was offered. After asking some identity questions, the case officer asked her to listen to Mr Alake’s witness statement being read out, but the Claimant refused, saying that she already knew what it said. She became upset (perhaps understandably if she felt her father was rejecting her), and said “he had his own reasons being an African man”. She told the case officer that her father left her mother after getting her pregnant, and then married someone else when he was in the UK. According to the notes, the case officer explained to her why the marriage certificate was unverifiable, but the Claimant said she did not want to know and said that the interview was a waste of her time. The case officer said he would end the interview, and described her as hostile and disinterested. The impression I gained from these notes was that he did not pursue the DNA option because he felt she was not being co-operative in the identity interview.

31. The case officer’s decision letter of 26 August 2019 repeated the three matters arising from the order of John Howell QC, namely:

“(i) The opportunity to defend the statement made by Ms Alake’s alleged father

(ii) Assistance with a voluntary DNA test between Stephenie Alake and her alleged father...

(iii) A requisite explanation regarding Ms Alake’s parents’ marriage certificate ...”

32. The case officer then dealt with each of those matters in turn, thus providing further confirmation that HMPO had agreed to address the points made by John Howell QC in his order. On the matter of the DNA test the letter stated (*emphasis added*):

“When asked what Ms Alake thought the purpose of the interview as, she replied that she thought it was for a DNA test. I explained that this was not the case and as stated in the letter I had sent her it was in fact to attend an identity interview. I reassured Ms Alake that I was reviewing her application and needed to interview her as I had no previous dealings with the application in the past.

Regrettably, your client was not happy with this explanation and stated that it was a waste of her time and that she had previously answered all of these questions before. Ms Alake went on to say that it was up to Her Majesty’s Passport Office

to facilitate, conduct and pay for a DBA test between herself and her alleged father...

I explained to her again that this was not in accordance with Her Majesty's Passport Office's policy and that we did not have the scope to conduct or organise a DNA test and that as the applicant the onus was on herself to complete the test and present the results."

33. This account differs significantly from the account in the interview notes where there is no mention of any of the matters underlined in the quote above. This raises doubts in my mind as to what was actually said. But even assuming that the account in the decision letter was accurate, the case officer did not address the DNA option fully. It is arguable that, having explained to her that HMPO would not conduct or organise or fund a DNA test, he should have gone on to discuss and consider the more modest option of HMPO asking Mr Alake if he would take a DNA test voluntarily, as the Claimant had no means of contacting Mr Alake. If he decided that this option was not appropriate, he should arguably have explained the reasons for this conclusion in the decision letter.
34. For these reasons, I have concluded that the claim is arguable and permission should be granted.
35. Now that the claim is proceeding to a full hearing, Mr Plowright should amend his Statement of Facts and Grounds to include all the additional points made in his Renewal Grounds, and his oral submissions before me, and any other matters which he is instructed may be relevant. Mr Plowright should also consider whether the legal basis for his challenge - "procedural unfairness" - needs to be amplified, and whether he was right to concede at the permission hearing that the Claimant could not rely upon the doctrine of legitimate expectation. He is at liberty to amend the legal basis of his claim, if he considers it appropriate to do so. I stress that it is important that the Claimant's case is fully pleaded, so that the Defendant has a fair opportunity to respond, and so that the Defendant is not ambushed with new points in the Claimant's skeleton argument or at the hearing itself.
36. The draft order accompanying this judgment includes proposed case management directions, including amendment of the Statement of Facts and Grounds.
37. The revocation of the Claimant's passport in March 2018 has had drastic effects on her ability to work and claim benefits, and she is suffering from depression. The lengthy delay in resolving this matter has been, in part, a result of errors made by HMPO in its decision-making. Therefore I have proposed reduced timescales for the next steps in the case management directions and also proposed that this claim be expedited so as to be heard as soon as possible after 1 October 2020. Counsel are requested to provide their comments on these proposals.
38. It would be helpful for the Court hearing the substantive claim to be provided with material and authorities on HMPO's duties and powers, as well any relevant authorities on procedural unfairness. To assist as a starting point, I refer counsel to *R(Easy) v Secretary of State for the Home Department* CO/243/2015 which gives the

references for the Written Ministerial Statement (2013) and some leading cases on HMPO, which counsel will need to update.