



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/30363/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15<sup>th</sup> May 2015**

**Decision & Reasons  
Promulgated**

**On 14<sup>th</sup> August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MS MUMA SINKALA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Mr C Ijezie, Solicitor

**DECISION AND REASONS**

1. The Appellant is a citizen of Zambia born on 8<sup>th</sup> October 1989. The Appellant's immigration history was that she arrived in the UK in September 2007 with leave to remain in the United Kingdom as a student. This leave was subsequently extended until 14<sup>th</sup> May 2014 as a Tier 1 Post-Study Migrant. Prior to expiry of her visa the Appellant applied for leave to remain in the United Kingdom and by Notice of Refusal dated 14<sup>th</sup> July

2014 the Appellant's application was refused on the basis that she did not meet the requirements of the Immigration Rules and that there were no exceptional circumstances which would bring the Appellant within the provisions of Article 8 outside the Immigration Rules.

2. The Appellant appealed and the appeal came before First-tier Tribunal Judge Nixon sitting at Birmingham on 12<sup>th</sup> November 2014. The Appellant's case before the First-tier Tribunal Judge was that she had developed a private life in the UK, had filed additional Grounds of Appeal under Section 120 of the Nationality, Immigration and Asylum Act 2002 and argued that she had a right of abode in the United Kingdom as she was in fact a British citizen. Arguments in support of such contention were that both her parents, grandparents and great-grandparents were citizens of the UK and colonies and that she therefore qualified as a British citizen and was entitled to such a right of abode. In a determination promulgated on 18<sup>th</sup> November 2014 the Appellant's appeal was dismissed under the Rules and on human rights grounds.
3. On 27<sup>th</sup> November 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 12<sup>th</sup> January 2015 First-tier Tribunal Judge Shimmin granted permission to appeal. Judge Shimmin noted that the Grounds of Appeal argued that on the basis of the findings made by the judge as to the status of the Appellant's parents the judge erred in finding the Appellant was not entitled to a right of abode.
4. On 23<sup>rd</sup> January 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response submitted that the Appellant's grounds were purely opportunistic and merely sought to detract from the very proper, reasonable and sustainable findings of the First-tier Tribunal Judge. The Rule 24 reply noted that the Appellant had purported to rely on post-decision evidence submitted with her application for leave to appeal and that there was no compelling explanation or reason offered why those documents were not submitted in support of the original application.
5. The appeal came initially before me to determine whether or not there was a material error of law on 20<sup>th</sup> February 2015. At that hearing the Appellant appeared by her instructed solicitor Mr Ijezie and the Secretary of State by her Home Office Presenting Officer Mr Jarvis. They continue to be the legal representatives at the restored hearing.
6. I was satisfied that there was a material error of law in the determination of the First-tier Tribunal Judge. In particular by disposing of the appeal by stating that the evidence relating to the grandparents is sufficient is I found a material error of law when it seemed to me as a matter of law it was necessary to look at the parents' position and that it was necessary for the judge to go further and to provide detailed findings based on the factual situation and the relevant statutory authorities.
7. The findings of fact as against the analysis as to whether there is a right of abode are not challenged and consequently I was satisfied that the correct

approach in this matter was to find that there was a material error of law, to set aside the decision of the First-tier Tribunal, and to adjourn the hearing reserving it to myself within the Upper Tribunal to be disposed of by way of submissions at a time and date to be fixed. I noted that both legal representatives personally wished to appear at the restored hearing. As set out in the directions whilst the Appellant was perfectly entitled to and may well wish to, attend the next hearing if the venue were to be somewhere that was not convenient to her then I was, bearing in mind the matter would be dealt with by submissions alone be prepared to excuse her attendance.

8. I gave directions for the hearing of this matter and noted that the only issue outstanding is whether or not the Appellant is entitled under statutory authority, in particular the terms of the British Nationality Act 1981, to automatically be entitled to British citizenship and a right of abode. In accordance with my directions I am very helpfully provided by Mr Jarvis and Mr Ijezie with the following
- A background statute and guidance bundle.
  - An extensive Appellant's bundle extending to 199 pages.
  - A consolidated bundle of Practice Directions.
  - Skeleton argument on behalf of the Respondent.

### **Relevant Issues**

9. Both skeleton arguments produced to me which form the principal thrust of the submissions are most helpful. From them the following questions are, it is submitted to me, of relevance
- Did the Appellant's parents have citizenship of the United Kingdom and colonies status before Zambian independence in 1964?
  - Was the Appellant's paternal grandfather a British subject on 1<sup>st</sup> January 1949?
  - In any event were the Appellant's parents citizens of the United Kingdom and colonies (CUKCs) after Zambian independence in 1964?
  - In the alternative - did the Appellant's parents have the right of abode for the purpose of Section 2(1) of the 1971 Act?

### **The Appellant's Evidence**

10. Whilst no evidence was given before me by the Appellant in order to set out the background of this matter it is appropriate to recite the historical facts. The Appellant states that her mother Mrs Pauline Sinkala was born on 11<sup>th</sup> May 1959 as a citizen of the United Kingdom and colonies (CUKC). Her parents and mother were born British subjects in 1924 and 1939 respectively and her paternal grandfather and paternal grandmother were,

it is contended, British subjects at the time of her father's birth in 1924. Her paternal grandfather had been born in 1902 and her paternal grandmother in 1920. The Appellant's maternal grandparents were British subjects at the time of her birth in 1939 her maternal grandfather having been born in 1903 and her maternal grandmother in 1905. Her maternal grandmother obtained her Zambian citizenship on 23<sup>rd</sup> March 1976 without losing her CUKC status and in 1988 entered the UK to join her father who was studying at the time. At the time of entry into the UK she did not need a visa and did not apply for one.

11. The Appellant believes her father's lineage was that he was born a citizen of the UK and colonies on 26<sup>th</sup> March 1958 in the British Colonial Protectorate of Northern Rhodesia. The Appellant's father's parents were born British subjects in 1935 and 1949 respectively. The Appellant's maternal grandmother is still alive. The Appellant's father's grandparents were British subjects at the time of her father's birth in 1935. Her father's maternal grandparents were British subjects at the time of his mother's birth in 1949. Her father obtained his Zambian citizenship on 14<sup>th</sup> October 1977 without losing his CUKC status. In October 1987 he entered the UK for further studies and at the time of entry did not need a visa nor did he apply for one.
12. The Appellant was born on 8<sup>th</sup> October 1989 at Liverpool General Hospital. She lived with her parents in the UK for slightly over a year after she was born and re-entered the UK in 2007 with a student visa valid until 31<sup>st</sup> March 2008 which was subsequently extended to 31<sup>st</sup> October 2011. She was subsequently granted post-study work leave valid until 14<sup>th</sup> May 2014 when she submitted the application for further leave which has led to the current appeal.
13. It is the Appellant's contention that she qualifies as a British citizen and/or is entitled to right of abode. She is of good character and conduct and does not have any criminal record. She has been in the UK for a period of eight years and has developed family and private life here. Since 2003 she has worked for Santander Bank plc. She has close relatives living in Sheffield who are settled here. It is against that background that this appeal comes to be considered.

### **Submissions/Discussions**

14. It is the submission of Mr Ijezie that the Appellant is entitled under Sections 1, 11 and 50 of the British Nationality Act 1981 to automatic entitlement to British citizenship and under Section 2(1)(a) of the Immigration Act (as substituted by Section 39(2) of the British Nationality Act 1981) to a right of abode.
15. He submits that the findings made at paragraph 15 of her determination by First-tier Tribunal Judge Nixon are unchallenged and that the CUKC status of the Appellant's parents did not change upon the independence of Zambia in 1964. He consequently contends that the Appellant's parents

qualified for a right of abode prior to 1<sup>st</sup> January 1983 by virtue of Section 2(1)(b)(ii) of the 1971 Immigration Act (as enacted).

16. He contends that it therefore follows that since the Appellant's parents are CUKCs with a right of abode as "patrials" before 1<sup>st</sup> January 1983 that the Appellant's parents automatically qualify as British citizens on the commencement date of the 1981 Act (i.e. 1<sup>st</sup> January 1983) by virtue of Section 11 of the British Nationality Act 1981 and as confirmed by paragraph 15.3.1 of the Home Office publication entitled "British nationality: summary."
17. Mr Jarvis contends that the Appellant's assertion that the "factual findings" of the First-tier Tribunal Judge should stand is untenable. Those factual findings can be narrowed to three issues and it is the third one that is contentious.
  - (a) The Appellant's mother was born in Zambia (Northern Rhodesia) on 11<sup>th</sup> May 1959.
  - (b) The Appellant's father was born in Zambia (Northern Rhodesia) on 26<sup>th</sup> March 1958.
  - (c) The parents were CUKCs as a consequence of the Zambian Independence Constitution Act and the Appellant being the daughter of people with that lineage.

It is the contention of Mr Jarvis that the finding of CUKC status for any of the relevant parties is not purely a question of fact but a mixed one of fact and law and that it is unsafe for the Upper Tribunal to preserve a finding on the position of the Appellant's parents where the Appellant simultaneously argues that the First-tier Tribunal Judge materially erred in findings relating to the nationality/status of the Appellant's grandparents.

18. Further the Appellant's own case is that Section 2(1)(b)(ii) of the 1971 Act is the channel through which the Appellant's parents had the right of the abode in the UK namely that
  - (a) The Appellant's paternal grandfather was a CUKC **and**;
  - (b) Had this status by birth, adoption, naturalisation or registration in the UK or its islands.

Therefore it is Mr Jarvis' submission that the evidence relating to the Appellant's grandparent is at the heart of this appeal.

19. Mr Jarvis points out that taking the claim at its highest the Appellant cannot possibly show that she has acquired British citizenship. He notes that as a starting point the Appellant relies on the British Nationality Act 1981 which states

- “(i) a person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is –
  - (a) a British citizen; or
  - (b) settled in the United Kingdom (or that country).”

20. Consequently the Appellant claims that her parents were British citizens at the time she was born by virtue of Section 11 of the British Nationality Act. That statutory guidance states

“11. Citizens of UK and colonies who are to become British citizens at commencement.

- (i) subject to sub-Section (2), a person who immediately before commencement –
  - (a) was a citizen of the United Kingdom and colonies; and
  - (b) had the right of abode in the United Kingdom under the Immigration Act 1971 as then in force, shall at commencement become a British citizen.”

Mr Jarvis states that the important words there are to refer to the 1971 Immigration Act that was then in force. He emphasises the words “then in force” which he submits are important. He kindly provides me with a copy of the relevant Section 2 at that time.

“2-(1) A person is under this Act to have the right of abode, in the United Kingdom if –

- (a) he is a citizen of the United Kingdom and colonies who has that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the islands; or
- (b) he is a citizen of the United Kingdom and colonies born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption, and the parent either –
  - (i) then had that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the islands; or
  - (ii) had been born to or legally adopted by a parent who at the time of that birth or adoption so had it; or
- (c) he is a citizen of the United Kingdom and colonies who has at any time been settled in the United Kingdom and islands and had at that time (and while such a citizen)

been ordinarily resident there for the last five years or more; or ...”

21. Mr Jarvis consequently applying the statutory guidance submits that it is necessary firstly for the Appellant to show that her parents were CUKCs immediately before 1<sup>st</sup> January 1983 and secondly that her parents had the right of abode in respect of the 1971 Act. He submits that in order to show that her parents would be treated as British citizens for the purpose of the 1981 Act the Appellant would have to show that her parents remained CUKCs, and had at that time been settled in the United Kingdom and had been ordinarily resident there for the last five years. He thereafter takes me to the definitions within the 71 Act of “settled” and “ordinary resident.” He consequently contends that the CUKC was obliged to have been resident for five years and have had indefinite leave to remain at the end of that period before 1<sup>st</sup> January 1983.
22. Mr Ijezie has already submitted that the CUKC status of the Appellant’s parents did not change upon the independence of Zambia in 1964 and put forward his submissions as to why they had CUKC status. Mr Jarvis seeks to challenge/examine that scenario. He starts by pointing out that by Section 1 of the Zambian Independence Act 1964 the territories which comprised Northern Rhodesia before independence were a protectorate and consequently as a result of that Section 4 of the British Nationality Act 1948 did not apply to the Appellant’s family. It is the Secretary of State’s contention that the only way the Appellant can claim that her parents were CUKCs before independence in 1964 is via Section 5 of the British Nationality Act 1948. That states
- “5(1) Subject to the provisions of this Section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and colonies by descent if his father is a citizen of the United Kingdom and colonies at the time of the birth;
- Providing that if the father of such a person is a citizen of the United Kingdom and colonies by descent only that person shall not be a citizen of the United Kingdom and colonies by virtue of this section unless –
- (a) that person is born or his father was born in a protectorate, protected state, mandated territory or trust territory or any place in a foreign country whereby treaty, capitulation, grant, usage, sufferance, or other lawful means, his majesty then has or had jurisdiction over British subjects.”
23. It is consequently the submission of Mr Jarvis that the Appellant has to show
- (a) That at the date of her father’s birth (26<sup>th</sup> March 1958) his father (i.e. the Appellant’s paternal grandfather) was a CUKC.
- (b) That the Appellant’s paternal grandfather obtained the CUKC by descent from his father (i.e. the Appellant’s great grandfather).

- (c) And either the Appellant's father or paternal grandfather were born in a protectorate (as one option).

He then goes on to submit that in order to discover whether the Appellant's paternal grandfather was a CUKC on 26<sup>th</sup> March 1958 regard has to be had to the transitional provisions of the British Nationality Act 1948 in particular Section 12 which sets out the qualification for becoming a citizen of the UK and colonies in the event that the person was a British subject immediately before the date of commencement of the Act (1<sup>st</sup> January 1949). Consequently he submits the initial question thereafter to be asked is whether or not the Appellant's paternal grandfather was a British subject on 1<sup>st</sup> January 1949 and in order to determine that regard has to be given to the definition of British subject which is to be found in the British Nationality and Status of Aliens Act 1914 (as amended after 1933). Those persons who are natural born British subjects pursuant to that Act are set out at part 1 Section 1(1) of the Act. Paragraph 1(1)(a) states

"The following person shall be deemed to be natural-born British subjects namely:-

(a) any person born within his majesty's dominions and allegiance."

24. Therefore it is Mr Jarvis' contention that if the Appellant's grandfather was born in Northern Rhodesia as claimed he was born within a protectorate and as a consequence the Appellant cannot claim he was born within his majesty's dominions and allegiance. He contends that this is supported by paragraph 1.3.1 of the British Nationality summary document which states

"At common law, subject status was acquired by birth within the crown's 'dominions and allegiance.'"

25. Schedule 1 of the 1914 Act lists the dominions. I acknowledge that Northern Rhodesia is not recited as one of his majesty's dominions. Consequently it is submitted by Mr Jarvis that either

(a) The Appellant's great grandfather has to be born within his majesty's allegiance and be a British subject at the time of her grandfather's birth (Section 1(1)(b)(i)) British Nationality and Status of Aliens Act 1914; or

(b) The Appellant's great grandfather was naturalised (Section 1(1)(b)(ii)), was a British subject by annexation (Section 1(1)(b)(iii)), in the service of the crown (Section 1(1)(b)(iv)) or his birth was registered by a British Consulate (Section 1(1)(b)).

26. In reply to such assertions Mr Ijezie states that the Appellant has never claimed, nor supplied, any evidence that her great grandfather was a British subject as defined by the 1914 Act nor is there any evidence as to where he was born.



27. Mr Ijezie takes me to paragraph 12(3) of the British Nationality Act 1948. This paragraph as previously indicated refers to the transitional provisions. Paragraph 12(3) states

“A person who was a British subject immediately before the date of the commencement of this Act shall on that date become a citizen of the United Kingdom and colonies if he was born within the territory comprised at the commencement of this Act in a protectorate, protected state or United Kingdom trust territory.”

Consequently Mr Ijezie argues that whilst Section 2 of the 1971 Immigration Act requires the grandparents to be CUKCs at the time the Appellant’s parents were born this is the case because they were born prior to Zambia’s independence. This is challenged by Mr Jarvis who points out that the thrust of the Secretary of State’s argument is that the whole issue of whether or not an Appellant’s relative lived in a protectorate is predicated on their being a British subject in the first place and the Appellant’s grandfather was not a British subject.

28. The Appellant argues that her parents retained their CUKC status even after Zambian independence by virtue of the exceptions to Section 3(3) of the Zambian Independence Act 1964. These read

“4(1) Subject to sub-Section (5) of this section, a person shall not cease to be a citizen of the United Kingdom and colonies under Section 3(3) of this Act if he, his father or his father’s father –

(a) was born in the United Kingdom or in a colony; and

(2) a person shall not cease to be a citizen of the United Kingdom and colonies under the said Section 3(3) if either:

(a) he was born in a protectorate or protected state, or

(b) his father or his father’s father was so born and is or at any time was a British subject.

29. The Appellant claims that her paternal grandfather was born in the British colonial protectorate of Northern Rhodesia in 1935. It is pointed out that there is no documentary support for this assertion but that the Appellant claims that her paternal grandfather Wilton Sinkala was born in “a colony.” She also asserts that her father was therefore born in a protectorate (or protected state) for the purpose of Section 4(2)(a) of the Zambian Independence Act 1964 and for her paternal grandfather Wilton Sinkala for the purpose of Section 4(2)(b) of the Zambian Independence Act 1964. It is therefore the Appellant’s claim and submission that as a consequence of those assertions and evidence the exception in Section 4(1)(a) of the Zambian Independence Act 1964 applies to her father (and by consequence of Section 4(3) her mother as well) in that they did not lose their CUKC status on Zambia’s independence as was the general consequence of Section 3(3) Zambian Independence Act 1964.

30. That assertion is challenged by Mr Jarvis on behalf of the Secretary of State. The basis of this is that Section 5 of the Zambian Independence Act 1964 makes plain that any reference in Section 4 to a colony protectorate or a protected state does not include a reference to Zambia. He submits that the Appellant's evidence/assertion relating to the birthplace of her father and paternal grandfather being Northern Rhodesia/Zambia means that her father (and mother) were (and are) Zambian nationals as a consequence of independence on 24<sup>th</sup> October 1964 as per Section 3(3) of the Zambian Independence Act 1964. He consequently submits that as a result of this the Appellant cannot even assert that her father and/or mother were CUKCs for the purpose of Section 2(1)(c) of the 1971 Act.
31. The arguments then proceeded to discussion on whether or not the Appellant's parents have a right of abode for the purpose of Section 2(1) of the Immigration Act 1971 i.e. the status of the Appellant's parents' right to abode as at 1<sup>st</sup> January 1983. It is the contention of the Appellant's representatives that the Appellant's parents automatically qualify as British citizens on the commencement date of the British Nationality Act 1981 on the basis that on that date pursuant to Section 11(1) of the 81 Act the CUKC status of the Appellant's parents was deemed to have automatically changed to British citizenship. Further, and I do not think this is a contentious point, Section 2(1)(a) of the Immigration Act 1971 was substituted by Section 39(2) of the British Nationality Act 1981. Therefore Mr Ijezie contends that since the Appellant's parents automatically qualify as British citizens on the commencement date of the 1981 Act i.e. 1<sup>st</sup> January 1983 and the Appellant was born in the UK on 8<sup>th</sup> October 1989 it therefore follows that the Appellant qualifies as a British citizen by virtue of Section 1(1)(a) of the British Nationality Act. In the alternative he submits that since the Appellant's parents are CUKCs with a right of abode on or before 1<sup>st</sup> January 1983 it follows that the Appellant qualifies as a British citizen by Section 1(1)(b) of the British Nationality Act 1981 taking into account the definition of the word "settled" in Section 50 of that statute. Therefore his final submission is that the Appellant qualifies as a British citizen and has a right of abode under Section 2(1)(a) of the Immigration Act 1971 as substituted by Section 39(2) of the British Nationality Act 1981.
32. Mr Jarvis contends that even if the Appellant's parents were CUKCs after Zambian independence in 1964 they did not have the right of abode with reference to Section 2(1) of the 1971 Act. He points out that the Appellant's case is that Section 2(1)(b)(ii) of the 1971 Act applies to her father and or mother. He takes me to the relevant section

"2(1) A person is under this Act to have the right of abode in the United Kingdom if ...

- (b) he is a citizen of the United Kingdom and colonies born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption and the parent either -

- (i) then had that citizenship by his birth adoption naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the islands; or
- (ii) had been born to or legally adopted by a parent who at the time of that birth or adoption so had it; or”

He consequently contends that the Appellant’s reliance on Section 2(1)(b) (ii) is therefore wholly misconceived because the section clearly requires the Appellant’s father to be a CUKC at the material time, for the Appellant’s paternal grandfather to have been a CUKC when the Appellant’s father was born i.e. on 26<sup>th</sup> March 1958 and that the Appellant’s paternal grandfather’s CUKC status at the time of the Appellant’s father’s birth or at any later point had been registered in the UK (or the UK’s islands).

33. Mr Jarvis states that in response to such requirements the Secretary of State makes the following points

- (a) The Appellant’s father was not a CUKC after 1964.
- (b) The Appellant has provided no documentary evidence that her paternal grandfather was a CUKC on 26<sup>th</sup> March 1958.
- (c) The Appellant has never claimed that her paternal grandfather’s CUKC status was ever registered in the UK (or islands).
- (d) That reliance could not be regarded as a “patrial” pursuant to Section 2(6) of the 1971 Act by which a person who was a CUKC and had the right of abode on the basis that the Appellant’s father did not have the right of abode. He further emphasises that the Appellant’s sole reliance appeared to be on paragraph 14.5.2 of the Home Office British national summary. That summary quotes

“The idea of patriality was that it should serve as a secondary status (e.g. an individual CUKC would also have been either a ‘patrial’ or a ‘non-patrial.’) A patrial was a person who had a right of abode in the UK under Section 2(6) of the 1971 Act and who, as a result was ‘free to live in,’ and to come and go into and from the UK without let or hindrance ...’ A ‘non-patrial’ on the other hand, could only enter and ‘live and work and settle in the UK by permission ...”

34. He contends that the only evidence supplied of the Appellant’s parents entering the UK shows they obtained leave to enter and further leave to remain on Zambian passports between 1987 and 1989. He submits that such entry was as “non-patrials.” He states that this does not support the Appellant’s contention that they were “patrials” i.e. people who were by the virtue of the right of abode free to come and go in the UK without permission.

35. Finally Mr Jarvis contends that the Appellant's father did not have the right of abode as a consequence of Section 2(1)(c) of the 1971 Act. That states

“(c) he is a citizen of the United Kingdom and colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more; or ...”

He states therefore that such a condition require that the Appellant's father was a CUKC at the material time i.e. immediately prior to the commencement of the British Nationality Act 1981 on 1<sup>st</sup> January 1983. He notes that the Appellant's father had been settled in the UK meaning that he had to be ordinarily resident without being subject under immigration laws to any restriction on the period for which he may remain. He equates this effectively to having indefinite leave to remain. Further the requirement was that the Appellant's father would have had to be an ordinary resident in the UK for at least five years at some point immediately prior to the commencement of the 81 Act. He notes that the Appellant does not claim that her father had been settled or ordinary resident in the UK during the relevant period prior to the commencement of the 1981 Act and the only evidence supplied (at its highest point - to use his words) indicates that the Appellant's father entered the UK with his wife on 3<sup>rd</sup> October 1987 with leave to enter extended until 28<sup>th</sup> November 1989. As a consequence of this he contends that the Appellant was, and is not, the child of a British citizen for the purpose of Section 1 of the British Nationality Act 1981 and therefore the appeal should be dismissed.

## Findings

36. It seems to me that the correct approach to this matter is to start with the ultimate conclusion namely that if an Appellant qualifies as a British citizen they would have a right of abode under Section 2(1)(a) of the 1971 Immigration Act and further if the Appellant's parents had CUKC status it would automatically be deemed to have changed to British citizenship status on 1<sup>st</sup> January 1983 by virtue of Section 11(1) of the British Nationality Act 1981 and would therefore qualify for a right of abode under Section 2(1)(a) of the 1971 Immigration Act. The question to be answered is whether or not those criteria are met.
37. The Appellant's legal representatives take a simplistic approach and make two alternative submissions of fact as to why their client qualifies for a right to abode. Firstly they state that the Appellant's parents automatically qualify as British citizens on the date of commencement of the British Nationality Act 1981. In the alternative they contend that the Appellant's parents are CUKCs with the right to abode on or before 1<sup>st</sup> January 1983 and therefore by a different route the Appellant qualifies as a British citizen under the 1981 Statute. The initial contention, namely the bland statement that the Appellant's parents were British citizens at the time of the Appellant's birth, seems to me to be unsustainable as a mere statement of fact as it is governed by the relevant law at that time. It would have been necessary to show that the Appellant's parents were

CUKCs immediately before 1<sup>st</sup> January 1973 and that her parents had a right of abode in respect of the relevant version of the 1971 Act at that time. Consequently the correct approach is to analyse the position with regard to her parents' CUKCs status. Again this has to be considered against the statement from the Appellant's legal representatives that the Appellant's parents were CUKCs with a right of abode on or before 1<sup>st</sup> January 1981.

38. The approach of the two legal representatives differs. The Appellant's representatives take a simplistic approach seeking to rely on paragraph 15 of the determination of the First-tier Tribunal Judge that following independence the Appellant's parents retained their CUKC rights along with their new citizenship of Zambia and thus retained their right of abode as patrials. In finding that there was an error of law in the First-tier Tribunal and acknowledging that the issue of whether someone has a right of abode is a mixed analysis of fact and law I set aside the decision of the First-tier Tribunal Judge. I therefore do not consider that it is open to the Appellant's legal representatives to hide behind that finding. It is unsafe for the Upper Tribunal to preserve a finding relating to the position of the Appellant's parents where the Appellant simultaneously argues that the First-tier Tribunal Judge materially erred in findings relating to the nationality and status of the Appellant's grandparents. Consequently a bland statement made by the Appellant's legal representatives the Appellant's parents are CUKCs with a right to abode as patrials and relying on the decision of the First-tier Tribunal Judge for that conclusion goes to the very root of this appeal and is unsustainable as a fact. Albeit that this is a re-hearing by way of submissions only it is a re-hearing having found a material error of law in the decision of the First-tier Tribunal Judge as to whether or not the Appellant has a right to abode. In such circumstances it is fundamental that the whole principle upon which such a contention is maintained becomes subject to further judicial scrutiny.
39. It therefore is necessary to scrutinise the manner by which the Appellant's parents contend they have a right of abode under Section 2 of the 1971 Act. It is not sufficient to merely rely on the finding of the First-tier Tribunal Judge. She, I understand, was not given nearly as much information in this matter as I have been.
40. In order to succeed the Appellant will have to show tracing back further that her paternal grandfather was a CUKC and had this status as a result of birth, adoption, naturalisation or registration in the UK or its islands.
41. I find the arguments in what is a very complex analysis of law of the Secretary of State to be persuasive. It would be necessary for the Appellant to show that her parents were CUKCs prior to Zambian independence in 1964. Nothing has been produced by the Appellant to rebut the contention that the only manner in which that can be done is by showing that the Appellant's parents meet the requirements of Section 5 of the British Nationality Act 1948 namely that it would be necessary to show that at the date of her father's birth his father was a CUKC; that the Appellant's paternal grandfather obtained the CUKC by descent from his

father and that either the Appellant's father or paternal grandfather were born in a protectorate. I am not satisfied that they were. In order for the Appellant's paternal grandfather to have been a British subject on 1<sup>st</sup> January 1949 I agree, having followed the detailed paper trail with the submission made by Mr Jarvis, that it would have been necessary for him to be a "British subject" under the terms of the 1914 British Nationality and Status of Aliens Act. That has not been proven although I acknowledge the great difficulty that would befall such a tracing exercise to the Appellant. Further I agree with the contention made by the Secretary of State that the Zambian Independence Act of 1964 does not provide any assistance to the Appellants and that Section 5 of the Zambian Independence Act 1964 makes plain that any reference in Section 4 is to a colony, protectorate or a protected state does not include a reference to Zambia although it is difficult to construe what that section was referring to if it does not refer to Zambia. In any event a strong argument is put forward that the Appellant's parents did not have a right of abode pursuant to Section 2(1) of the 1971 Act and strong reasons are given for this by the Secretary of State in particular that the Appellant's father was not a CUKC after 1964, that there is no documentary evidence to show that the Appellant's paternal grandfather was a CUKC on 26<sup>th</sup> March 1958, that the Appellant has never claimed that her paternal grandfather's CUKC status was ever registered in the UK and could not be regarded as a "patrial."

42. For all these reasons I am satisfied, albeit I appreciate it will be a great disappointment to the Appellant, that the causative link of events that would require to be met in order for her to meet the requirements of the British Nationality Act 1981 and to qualify for a right of abode are not met and for those reasons, which extend considerably on those set out at paragraphs 16 and 17 of the First-tier Tribunal's Judge's determination, I find that the Appellant does not have a right of abode in the UK and the Appellant's appeal is dismissed.

### **Notice of Decision**

The Appellant's appeal seeking British citizenship and/or a right to abode in the UK based on the status of her parents and pursuant to the British Nationality Act 1981 do stand dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**  
**FEE AWARD**

No fee award.

Signed

Date

Deputy Upper Tribunal Judge D N Harris