



Upper Tribunal

(Immigration and Asylum Chamber)

IA/03887/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

Reasons Promulgated

On the 7th April 2016
2016

Decision &

On the 20th April

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS AMENDEE BHAIROO

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Mr Reynolds (Counsel)

For the Secretary of State: Miss Fijiwala (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Metzger promulgated on the 26th August 2015, in which he allowed the Claimant's appeal against the Secretary of State's decision to refuse to grant her a certificate confirming that she had the right of abode in the United Kingdom under Section 2 of the Immigration Act 1971 (as amended by Section 39 of the British Nationality Act 1981).

2. The Claimant is a citizen of Mauritius who was born on the 11th October 1986. She had applied under Section 10 of the Nationality, Immigration and Asylum Act 2002 for a certificate that she had the right of abode in the United Kingdom. Within the Secretary of State's refusal letter dated the 5th January 2015, it was stated that under Section 2 of the Immigration Act 1971 (amended by Section 39 of the British Nationality Act 1981) all British citizens and certain Commonwealth citizens had the right of abode in the United Kingdom. It was stated that there were two ways in which a Commonwealth citizen was eligible for the right of abode in the United Kingdom:
 - i) As a Commonwealth (not British) citizen born before the 1st January 1983 to a parent or adopted parent who was born, registered/naturalised in the United Kingdom prior to your birth;
 - ii) As a female Commonwealth citizen who was married before the 1st January 1983 to a man with a right of abode in the United Kingdom prior to the 1st January 1983.
3. It was found that the Claimant was born in Mauritius on the 11th October 1986 to parents also born in Mauritius and that their Citizenship of the United Kingdom and Colonies (CUKC) was lost automatically on the 12th March 1968, as a result of the Mauritius Independence Act 1968. It was found that her parents lost their CUKC status and became citizens of Mauritius on that date. The Claimant did not have a parent who was born, registered/naturalised in the United Kingdom prior to her birth and had no entitlement through marriage. Her application was therefore refused.
4. The Claimant sought to appeal that decision to the First-tier Tribunal and that appeal was heard by First-tier Tribunal Judge Metzger at Taylor House, London on the 12th August 2015. He stated specifically that the Claimant had acquired the right of abode through her parents who immediately before the commencement of the British Nationality Act 1981 had Citizenship of the United Kingdom and that the Claimant, as a

Commonwealth citizen, had the right of abode since the 1st January 1983 and had not ceased to be a Commonwealth citizen at any time since then and therefore met the conditions necessary under Section 39(2) of the British Nationality Act 1981. He did not accept that the Mauritius Independence Act 1968 had the effect claimed by the Secretary of State, in terms of meaning that the Claimant's parents ceased to be citizens of the United Kingdom.

5. The Secretary of State has sought to appeal that decision to the Upper Tribunal. Within the Grounds of Appeal it is argued that upon the enactment of the Mauritius Independence Act 1968 on the 12th March 1968, the Claimant's parents lost their CUKC (Citizenship of the United Kingdom and Colonies) status and that there was no evidence before Judge Metzger that the Claimant's parents had registered as British citizens or met any of the requirements under Section 2 or 3 of the 1968 Act and thus were Mauritian citizens under the umbrella of British Commonwealth Citizenship. It is argued that the refusal letter set out the only two ways that a Commonwealth citizen would be eligible for a right of abode in the United Kingdom and that the Claimant did not meet either category.
6. Permission to appeal was granted by First-tier Tribunal Judge Frankish on the 20th December 2015 who found that there was an arguable error of law in First-tier Tribunal Judge Metzger allowing the appeal against the refusal of a right of abode under Section 2 of the Immigration Act 1971 and Section 39 of the British Nationality Act 1981 and that the First-tier Tribunal Judge had arguably overlooked the fact that the Claimant lost her CUKC status by reason of the Mauritius Independence Act 1968 and non-registration of her parents as CUKC citizens under Sections 2 or 3 of that Act and of the British Nationality Act 1981.
7. The appeal in the Upper Tribunal initially came before me on the 5th February 2016, and I adjourned the appeal on that date, in order to allow for the preparation of full written Skeleton Arguments on the issue. I am most grateful to the parties for having prepared such Skeleton Arguments, which I have carefully considered and taken account of, in addition to the

oral submissions made by the legal representatives, in reaching my decision. I am also most grateful to Miss Fijiwala for having provided me with a copy of the Court of Appeal's decision in the case of The Secretary of State for the Home Department v Ize-Iyamu [2016] EWCA Civ 118. Although this case dealt with the question as to whether or not a Nigerian citizen born on the 23rd July 1975 had a right of abode in the United Kingdom, following the enactment of the Nigerian Independence Act 1960, and therefore was clearly dealing with the effect of a different piece of legislation, I do consider it is useful as a guide as to how the Upper Tribunal should approach the question of "right of abode", but I fully bear in mind that it is not a binding precedent in this case, given that it relates to a completely different piece of independence legislation and relates to a different country.

My Findings on Error of Law and Materiality

8. The Claimant herself, her father and grandfather were all born in Mauritius. Her father, from his birth certificate, was born on the 28th September 1956. By virtue of Section 4 of the British Nationality Act 1948, a person born within the United Kingdom and Colonies after the commencement of the Act became a citizen of the United Kingdom and Colonies. By virtue of Section 12(1) a person who was a British subject before the commencement of the Act became also a citizen of the United Kingdom and Colonies, if he had been born within the territories of the United Kingdom and Colonies and would have been a citizen of the United Kingdom and Colonies if Section 4 had been in force at the time of his birth. As a result following the passing of the British Nationality Act 1948, the Claimant's father and grandfather became citizens of the United Kingdom and Colonies.

9. As was stated within paragraph [3] of the Court of Appeal decision in the case of The Secretary of State for the Home Department v Ize-Iyamu, under the British Nationality Act 1948, citizens of the United Kingdom and Colonies had the status of British Subjects and were free to enter and remain in this country at will. It was argued by Mr Reynolds on behalf of

the Claimant that the Court of Appeal in the case of The Secretary of State for the Home Department v Ize-Iyamu did not consider the effect of Section 1(1) of the British Nationality Act 1948 which stated that “every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (iii) of this section is a citizen of that country shall by virtue of that Citizenship have the status of a British subject”. However, when one reads [3] of the Judgment of the Court of Appeal, the Court of Appeal specifically recognised, as stated above, that “under the British Nationality Act 1948 citizens of the United Kingdom and Colonies had the status of British Subjects and were free to enter and remain in this country at will”. The argument that the Court of Appeal level had not considered that section or the British subject issue, is therefore entirely misconceived.

10. By virtue of Section 1(1) of the Mauritius Independence Act 1968 on the 12th March 1968, Mauritius became independent from the United Kingdom. By Section 2(2) of the Mauritius Independence Act 1968 “except as provided by Section 3 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and Colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Mauritius”.

11. Under Section 3 of the Mauritius Independence Act 1968 it was stated that:

“3(1) subject to subsection (5) of this section, a person shall not cease to be a citizen of the United Kingdom and Colonies under Section 2(2) of this Act if he, his father or his father’s father –

- (a) was born in the United Kingdom or in a colony or an associated state; or
- (b) is or was a person naturalised in the United Kingdom and Colonies; or
- (c) was registered as a citizen of the United Kingdom and Colonies, or

- (d) became a British subject by reason of the annexation of any territory included in a colony.
- (ii) A person shall not cease to be a citizen of the United Kingdom and Colonies under the said Section 2(2) if either –
 - (a) he was born in a protectorate or protected state, or his father or his father's father was so born and is or at any time was a British subject”.

However, pursuant to Section 3(5), it was provided that

“3(5) In this section –

- (a) references to a colony shall be construed as not including any territory which, on the appointed day, is not a colony for the purposes of the British Nationality Act 1948 as that Act has effect on that day, and accordingly does not include Mauritius, and
- (b) references to a protectorate or protected state shall be construed as not including any territory which, on the appointed day, is not a protectorate or a protected state (as the case may be) for the purposes of that Act as it has effect on that day;

and subsection (i) of this section shall not apply to a person by virtue of any certificate of naturalisation granted or registration effected by the Governor or Government of a territory which by virtue of this subsection is excluded from references in this section to a colony, protectorate or protected state”.

12. The argument sought to be run by Mr Reynolds on behalf of the Claimant that Mauritius is a colony for the purposes of Section 3(1)(a) and that thereby the Claimant's father did not cease to be a citizen of the United Kingdom and Colonies upon the commencement of the Mauritius Independence Act 1968, completely overlooks the effect of Section 3(5) and that in that Section 3 references to a colony 'do not include Mauritius'. Further, the argument sought to be run by Mr Reynolds that the Claimant's father's birth was registered by the Governor or Government of Mauritius for the purposes of Section 3(1)(c) again fails to take account of

the effect of Section 3(5) that “subsection (i) of this section shall not apply to a person by virtue of any certificate of naturalisation granted or registration effect by the Governor or Government of a territory which by virtue of this subsection is excluded from references in this section to a colony, protectorate or protected state”. It was not in dispute that, and was not argued before me that the Claimant’s father and grandfather did become citizens of Mauritius upon Mauritius gaining independence, but in respect of the argument that the Claimant’s father and/or grandfather both retained their status of Citizens of the United Kingdom and Colonies, I find that as a result of Section 3(5) and the fact that the reference to colony in Section 3(1) did not include Mauritius, means that as a result of Section 2(2) the Claimant’s father and grandfather on that day ceased to be citizens of the United Kingdom and Colonies and became citizens of Mauritius.

13.As was stated in [5] of the Court of Appeal case of The Secretary of State for the Home Department v Ize-Iyamu, “the concept of the right of abode is central to the Immigration Act 1971. The Act, which superseded the Commonwealth Immigrants Act 1962-1968, imposed restrictions on the number of British Subjects who could enter and remain in this country as a right. Section 1 provided (and continues to provide) that those who have the right of abode are free to live in and to come into and go from the United Kingdom without let or hindrance, but that those not having the right of abode may live, work and settle in the United Kingdom only by permission and subject to the regulation and control imposed by the Act”.

14.Paragraph [6] through to [8] of the Court of Appeal decision, are also relevant in respect of the question regarding right of abode under the Immigration Act 1971 and the effect of the British Nationality Act 1981. The Court of Appeal stated in those paragraphs that:

“6. Section 2(1) of the Act defined those who had the right of abode. The section has since been amended, but for present purposes it is sufficient to note that as originally enacted such persons included (i) citizens of the United Kingdom and Colonies who had acquired that

citizenship by birth in the United Kingdom or any of the Islands, (ii) citizens of the United Kingdom and Colonies born to a parent who had that citizenship at the time of the birth and had himself acquired it by birth in the United Kingdom or any of the Islands and (iii) citizens of the United Kingdom and Colonies born to a parent who had that citizenship at the time of the birth and had himself been born to a parent who "so had it". (The islands to which the section referred were the Channel Islands and the Isle of Man: see section 33. In the rest of this judgment I shall refer for convenience simply to "the United Kingdom".) Subject to the meaning of the expression "so had it" in section 2(1)(b)(ii), to which it will be necessary to return, it can be seen that the broad scheme of the legislation was that the right of abode was restricted to those citizens of the United Kingdom and Colonies who had acquired that status in the United Kingdom, or one of whose parents or grandparents had himself acquired that status in the United Kingdom. Section 2 also made provision for the acquisition of the right of abode by adoption, naturalisation and registration, but none of those is relevant for present purposes.

7. Section 3(2) of the 1971 Act required the Secretary of State to draw up rules governing the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom of those who did not have the right of abode and required leave in order to do so. Section 1(5) of the Act provided that the rules should not make Commonwealth citizens already settled in this country any less free to come into and go from the United Kingdom than they had been before the Act was passed.

The British Nationality Act 1981

8. Further changes to the law governing the acquisition of British citizenship and the right of abode were made with effect from 1st January 1983 by the British Nationality Act 1981. By section 11 those who immediately before the commencement of the Act had been citizens of the United Kingdom and Colonies and had the right of abode

under the Immigration Act 1971 as then in force became British citizens when the Act came into force. A person born in the United Kingdom after that date became (and still becomes) a British citizen only if at the time of his birth his father or mother was a British citizen or was settled in the United Kingdom (section 1). A person born outside the United Kingdom after commencement became a British citizen only if his father or mother had acquired British citizenship otherwise than by descent. (Special provision was made for children born to parents serving overseas as members of the armed forces or civil servants.) The 1981 Act has been amended on more than one occasion, but for present purposes it is necessary to refer only to the current form of section 4C which resulted from amendments introduced by section 45 of the Borders, Citizenship and Immigration Act 2009 in order to remove the discriminatory effect of section 5 of the British Nationality Act 1948. (That section provided for the acquisition of the status of citizen of the United Kingdom and Colonies by descent from a person's father, but not his mother.) By section 4C those born before 1983 are able to acquire British citizenship by registration, subject to certain conditions, two of which have particular relevance to the present case. Of those, the first is that the applicant would at some time before 1st January 1983 have become a citizen of the United Kingdom and Colonies under section 5 of the 1948 Act if that section had also provided for the acquisition of citizenship by descent from a person's mother; the second is that immediately before 1st January 1983 the applicant would have had the right of abode in the United Kingdom by virtue of section 2 of the Immigration Act 1971. The 1981 Act also amended section 2 of the Immigration Act 1971, to which it will be necessary to refer in detail in a moment”.

15. In my judgment it is clear that the Claimant is not entitled to a right of abode under Section 2(1) of the Immigration Act 1971 as amended. She was not a citizen of the United Kingdom and Colonies who had acquired that Citizenship by birth in the United Kingdom or any of the islands, nor was she a citizen of the United Kingdom and Colonies born to a parent who had that Citizenship at the time of the birth and had himself acquired it by birth in the United Kingdom or any of the islands or, nor was she a

citizen of the United Kingdom and Colonies born to a parent who had that Citizenship at the time of the birth and had himself been born to a parent who "so had it". As result of the effect of the Mauritius Independence Act 1968, her father and grandfather (if still alive at that date) both lost their Citizen of the United Kingdom and Colonies status and became citizens of Mauritius, such that the Claimant is not entitled to a right of abode under Section 2(1) of the Immigration Act 1971. Nor, in such circumstances, did she acquire British Citizenship under the provisions of the British Nationality Act 1981, under Section 11, as immediately before commencement of the British Nationality Act 1981 she was not a citizen of the United Kingdom and Colonies and did not have the right of abode under the Immigration Act 1971 as was then in force.

16. In respect of the argument contained within the original Grounds of Appeal that the Claimant held "dual nationality", being that of a British citizen and Commonwealth citizen, as a result of Section 39(2) of the British Nationality Act 1981 as amended in Section 2 of the Immigration Act 1971, again that argument entirely misses the point that as a result of the Mauritius Independence Act 1968, the Claimant's father lost his CUKC Citizenship and became a citizen of Mauritius and therefore the Claimant does not hold dual nationality. Further, in any event the Commonwealth is not a nation, but a commonwealth of nations.

17. Further, in respect of the argument contained within the additional Grounds of Appeal and elaborated further within the Skeleton Argument produced on behalf of the Claimant and by Mr Reynolds that "Commonwealth citizens" are defined within the Home Office Directorate guidelines Annex A; Section 2 in respect of "persons entitled to a right of abode and that a Commonwealth citizen is defined as being a British citizen, a British overseas territory citizen, a British national (overseas), a British Subject, a British overseas citizen or a citizen of any country which, on the relevant date(s) is mentioned in schedule 3 the British Nationality Act 1981, which is said to include Mauritius and that under the IDI, "all other Commonwealth citizens who had right of abode under the original Section 2(i1(d) or Section 2(2) of the 1971 Act on the 31st December 1982 and had not ceased to be Commonwealth citizens at any time since then

(Section 2(1)(b)) qualified on or after the 1st January 1983”, again misses the point that the Claimant did not have a right of abode, nor did her father, under Section 2 of the 1971 Act.

18. In such circumstances, I find that it is quite clear that upon the enactment of the Mauritius Independence Act 1968, both the Claimant’s father and also her grandfather if still alive at that date would have lost their CUKC status and became citizens of Mauritius. As a result the Claimant is not entitled to a right of abode under Section 2 of the Immigration Act 1971. In such circumstances the decision of First-tier Tribunal Judge Metzger does contain a material error of law in that he erred in law by finding that the Claimant was entitled to a right of abode under Section 2 of the Immigration Act 1971. I therefore set aside the decision of First-tier Tribunal Judge Metzger and for the reasons given above, I re-make the decision and find that the Claimant does not have a right of abode in the United Kingdom and is not entitled therefore to a certificate of entitlement. I dismiss the Claimant’s appeal against the refusal of the Secretary of State to issue her a certificate stating that she had the right of abode in the United Kingdom.

Notice of Decision

The decision of First-tier Tribunal Judge Metzger does contain a material error of law and is set aside;

I re-make the decision, dismissing the Claimant’s appeal against the decision of the Secretary of State dated the 5th January 2015 under Section 10 of the Nationality, Immigration and Asylum Act 2002.

Signed

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty
2016

Dated 8th April

