



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-002288
First-tier Tribunal No: EA/52114/2021
IA/10103/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL

Between

GIFTY LETSU-ANKU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Chowdhury Rahman, instructed by R Spio & Co Solicitors
For the Respondent: Susanha Cunha, Senior Presenting Officer

Heard at Field House on 24 November 2022

DECISION AND REASONS

1. The appellant is a Ghanaian national who appeals, with permission granted by the Upper Tribunal, against the decision of First-tier Tribunal Judge Barker (“the judge”). By that decision, the judge found that the appellant was not entitled to a Derivative Residence Card as the primary carer of a British citizen. Whilst the judge accepted that the appellant was the primary carer of her daughter and that her daughter would be unable to reside in the United Kingdom or in another EEA State if the appellant left the United Kingdom, she did not accept that her daughter was a British citizen. In order to explain the basis on which the judge reached that finding, we need to set out something of the relevant chronology.

Background

2. The appellant entered the UK as a visitor in July 2015. She overstayed upon the expiry of her leave to enter and, in February 2017, she applied for leave to remain on human rights grounds. We do not have a copy of that application before us but it is clear that it was made in reliance on the appellant’s

relationship with her daughter, who was said to be a British citizen by birth, having been born in the United Kingdom to a British father and a Ghanaian mother. The appellant stated, in outline, that she needed to remain in the UK with her child. She provided evidence in support of her application, including:

- (i) The child's British passport, issued on 3 August 2016 and valid for five years;
 - (ii) The child's birth certificate, showing that she had been born at Guy's and St Thomas' Hospital on 15 March 2016 and giving the names of the parents as the appellant and one Mr Bonney; and
 - (iii) A letter from a Specialist Registrar at Guy's and St Thomas' Hospital detailing the family history of cardiomyopathy and stating that the child had been 'born at 38+1 weeks gestation and is now approximately 10-weeks postnatal age'.
3. The Secretary of State sought further information from the appellant on 11 October 2017. She was clearly concerned about the chronology given by the appellant. If Mr Bonney was the father, conception could only have taken place after her arrival in the UK, where they had first met, whereas the date of the child's birth (apparently at full term) showed that she must already have been pregnant when she travelled to the UK. The appellant was given an opportunity to provide evidence that Mr Bonney was indeed the father. She did not respond to the letter.
4. On 22 November 2017, the respondent refused the application, stating amongst other things that she was not satisfied that the appellant's daughter was Mr Bonney's child or that she was a British citizen. She considered it more likely that the child's father was a Ghanaian national and that the child had been conceived with him in Ghana.

The First Appeal

5. The appellant appealed against the respondent's decision. Her appeal was heard by Judge A W Khan, sitting in Harmondsworth on 29 November 2019. The appellant was legally represented. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and submissions from the advocates. In his reserved decision, which was issued on 31 December 2018, the judge found that the appellant's daughter was not a British citizen and that the appellant had 'been totally discredited in cross-examination.' He concluded that the appellant and others had colluded to deceive the British authorities as to the paternity of the child and their reasons for being in the UK. This was, he concluded, 'a very serious and coordinated effort by the appellant, her husband and Mr Bonney to circumvent the United Kingdom Immigration Rules and controls.'
6. The appellant secured permission to appeal against Judge Khan's decision but her appeal was dismissed by Deputy Upper Tribunal Judge Parkes on 19 March 2019. There is no suggestion in the papers that the appellant sought permission to appeal to the Court of Appeal.

The Derivative Residence Card Application

7. Approximately five months later, on 1 August 2019, the appellant applied for a Derivative Residence Card as her daughter's primary carer. The application form was completed by the solicitors who have conducted this appeal. In Section 1 of

the application form, she stated that she was applying as the primary carer of a British citizen child. At Section 2, she stated that she was the sole carer of a British child and she gave the name of her daughter who was born on 15 March 2016. Also in that section, she stated that she was submitting the child's birth certificate and her passport as evidence of her British citizenship. At section 2.21, she stated that Mr Bonney was the child's father and that he was also in the United Kingdom. At section 7.8, the appellant indicated that she had not engaged in activities which might indicate that she was not a person of good character.

8. Many of these answers are concerning. The firm of solicitors who completed the application form, and who represent the appellant in this appeal, acted for her in her previous appeal. Given the findings which were made by Judge Khan, only a matter of months before the application was made, it was not correct to state that the appellant's daughter was a British citizen, or to state that Mr Bonney was her father. Evidently, given the strident findings made by Judge Khan, there was also at least one significant matter related to the appellant's character which should have been declared at section 7.8 of the form.
9. The respondent sought further information from the appellant, who provided evidence of her divorce from her previous husband, Mr Letsu-Anku. The divorce certificate showed that the marriage had been dissolved by order of the court in Ghana on 19 November 2015.
10. The respondent refused the application on 24 June 2021. She stated that she was not satisfied that the appellant's daughter was a British citizen. She recalled the findings made in the previous appeal and noted that the divorce documents showed that the appellant was still married to her ex-husband when she entered the United Kingdom. She concluded as follows:

Compelling medical evidence was produced at a previous appeal, indicating that your sponsor was conceived before your arrival into the UK and before you met Joseph Bonney, the claimed father of your sponsor. On the basis of this evidence, your appeal against a previous refusal was dismissed. As you have been unable to provide alternative evidence of your sponsor's paternity when this was requested, this department maintains that the father of your sponsor is not the male listed on your sponsor's birth certificate. As you have not provided evidence of how your sponsor qualifies for British citizenship (despite holding a British passport) your application falls for refusal on this occasion.

The Second Appeal

11. The appellant appealed for a second time. Her appeal was heard by the judge, sitting in Birmingham, on 22 April 2022. The appellant was represented by counsel (not Mr Rahman) and the respondent was represented by a Presenting Officer. The judge directed herself that the only issue was whether the appellant's daughter was a British citizen, it having been accepted that the appellant was her primary carer and that the child would be unable to live in the UK in the event of the appellant's departure. The judge directed herself to the salient parts of Devaseelan v SSHD [2003] Imm AR 1 and she noted that Judge Khan's decision had not been set aside and 'still stands'. She noted that the issue in the previous appeal was the same. She reminded herself of Judge Khan's findings.

12. The judge noted that the Presenting Officer had submitted that the evidence before the Tribunal on both occasions was essentially the same. The judge observed that the submission made by counsel was that the respondent had taken no action since Judge Khan's decision and that she was entitled to consider the matter afresh. She considered that the Presenting Officer's submission was compelling but 'in an abundance of fairness to the appellant' she considered all of the evidence provided. She remarked that the Secretary of State had 'made no effort to deprive [the appellant's daughter] of her British nationality that she has by virtue of her British passport'.
13. The judge went on to reach the same findings as Judge Khan, for the same reasons. She considered the medical evidence to undermine the appellant's claim to have conceived the child after arriving in the UK and she considered the appellant's account to be implausible. It was not credible, she reasoned, that the appellant 'would come to a country foreign to her, with her husband at that time, and with the sole purpose of salvaging what she describes as a failing marriage, she would then have sex with a stranger just three days after her arrival.' The naming of Mr Bonner on the birth certificate did not prove paternity and the passport had been issued before any questions were raised about paternity.
14. At [46], the judge considered that counsel had made a 'powerful submission' when he drew attention to the fact that the respondent had 'done nothing to deprive the child of her British nationality [or] to revoke the child's passport'. She noted, however, that the passport had expired in August 2021 and that there was no new passport or any indication that the appellant had applied for a new passport for her daughter. Her apparent inaction served to 'dilute' the force of the argument about the respondent's inaction. The judge considered that the appellant having lost contact with her husband and Mr Bonner was a 'convenient fabrication' designed to defend against a suggestion that she should have produced DNA evidence. The letter from Guy's and St Thomas' served to undermine her claim about the paternity of the child. So it was that she dismissed the appeal.

The Appeal to the Upper Tribunal

15. The single ground of appeal might be stated quite shortly: it is that the judge gave inadequate reasons for concluding that the appellant's daughter was not a British citizen. It was submitted that the judge failed to engage in any meaningful way with the appellant's submission that the Secretary of State had not 'interfered' with the child's nationality for a significant period of time; that nothing had been done to deprive the child of her nationality; and that the judge had erred in focusing instead on the appellant's failure to renew her daughter's passport.
16. Judge Blundell granted permission to appeal, noting that the judge's focus on the appellant's inaction was arguably wrong in law. It was also noted in the grant of permission to appeal, however, that there was arguably no statutory basis on which the respondent could have deprived the appellant's child of her British citizenship and that the position might instead be that the respondent was entitled to proceed on the basis that she was never a British citizen, regardless of the issue of a passport to her in 2016.
17. The appeal having been listed before a panel including the Vice President, specific case management directions were given. The respondent was directed to provide a response to the grounds of appeal and the appellant was directed to

provide a skeleton argument. The respondent provided a late response, noting that she had not seen the grant of permission but that she opposed the appeal.

18. Mr Rahman provided a skeleton argument in the early hours of 24 November, seemingly because the appellant had only recently decided that she wished to proceed with the appeal.
19. Defaults such as these really should not occur. We were particularly concerned by the suggestion made by Ms Cunha at the hearing that she was content to proceed without sight of the grant of permission to appeal; that is an important document which frames the arguments which are to be developed and efforts really ought to have been made by the respondent to obtain it.

Submissions

20. We heard lengthy submissions from Mr Rahman in development of his skeleton argument. As we understood him, he pursued the complaint in the grounds of appeal that the judge had given inadequate reasons for finding against the appellant on the issue of her daughter's nationality. He submitted that the judge's reasoning in respect of the medical evidence was deficient. There was no expert evidence and that vitiated the judge's assessment of the case as a whole; the letter from Guy's and St Thomas' Hospital did not 'show the whole picture'. Although the burden was on the appellant, the Secretary of State had been 'better placed' to investigate the issue of the child's paternity. Judge Khan had been biased against the appellant and the judge had adopted a similar approach. The appellant was a victim 'in terms of everything', which the judge had failed to recognise.
21. We noted that it was the appellant who had adduced the letter from Guy's and St Thomas' Hospital and that she had seemingly said nothing to the judge to cast doubt on what was said in that letter. Mr Rahman agreed but submitted that it was still incumbent on the judge to consider for herself whether the gestational information in the letter might be in error.
22. We asked Mr Rahman whether he had considered the point raised in the grant of permission to appeal to the Upper Tribunal, as to whether the respondent had any power to take further action in respect of the child's nationality. He submitted that such a power did exist and was to be found in section 40 of the British Nationality Act 1981. He had apparently not considered that provision before the hearing but we gave him an opportunity to do so. Having considered it, he accepted (as we understood him) that the section conferred no power to deprive a person of their British citizenship where that citizenship was acquired by birth.
23. When pressed as to whether there was an error of law in the judge's decision, Mr Rahman submitted that she had erred in failing to consider Article 8 ECHR and that the just and proper course was to remit the appeal to the FtT in order that the point could be considered. There were clearly exceptional circumstances in this case, he submitted.
24. We asked Mr Rahman whether he was aware of what had been said in Amirteymour v SSHD [2017] EWCA Civ 353; [2017] Imm AR 1368, about the scope of an appeal against a decision to refuse a Derivative Residence Card. He said that he was, and he confirmed that there was no notice under section 120 of the Nationality, Immigration and Asylum Act 2002 which served to expand the

First-tier Tribunal's jurisdiction to cover Article 8 ECHR in the manner contemplated by Sales LJ (as then was) at [38] of Amirteymour.

25. We also asked Mr Rahman how it was that we were able to find that the judge in the FtT had erred in law in relation to Article 8 ECHR if she had no jurisdiction to consider that issue. He submitted that this was immaterial, and that we were able to, and should, remit the appeal to the First-tier Tribunal whether or not it had erred in law in order that it could consider a ground of appeal which was not available to the appellant.
26. We indicated that we did not need to hear from Ms Cunha and that our decision would be issued in writing.

Analysis

27. Before we come to the substance of this appeal, it is necessary to say something about the submissions which we have just recorded. In doing so, we recognise that Mr Rahman was not counsel before the FtT and that he was instructed at reasonably short notice for the hearing before us. Notwithstanding those difficulties, we are bound to observe that the submissions he made about the jurisdiction of the Upper Tribunal and the First-tier Tribunal were entirely misguided.
28. As the Court of Appeal explained in Amirteymour, a person who appeals against the refusal of a Derivative Residence Card does not have available to them the ground of appeal that their removal would be unlawful under section 6 of the Human Rights Act 1998 unless the respondent issues a notice under s120 of the Nationality, Immigration and Asylum Act 2002. There was no such notice in this case, and the FtT did not have jurisdiction to consider arguments under the ECHR. That was seemingly understood by trial counsel, as it was by the judge, and there was accordingly no consideration of any Article 8 ECHR claim in the judge's decision. That was as it should have been.
29. The Upper Tribunal's jurisdiction is a statutory one. In the case of a statutory appeal such as this, its jurisdiction is limited by the Tribunals, Courts and Enforcement Act 2007. By section 12(1) of that Act, the Upper Tribunal must consider whether the making of the decision under appeal involved the making of an error on a point of law. If it finds that there was such an error, the Upper Tribunal may (but need not) set aside the decision of the FtT and, if it does, it must either remit the case to the FtT or remake the decision on the appeal: s12(2) refers.
30. This statutory framework has been in existence for many years and should be well understood by any Tribunal practitioner, whether they are a member of the Bar, a solicitor or an accredited OISC representative entitled to conduct advocacy. We were alarmed, therefore, by Mr Rahman's submission that an appeal might be remitted to the FtT where there was no error of law in the decision under appeal and where the FtT would have no jurisdiction to consider the ground upon which remittal was ordered. The submission is so obviously wrong that we propose to say no more about it.
31. We were even more concerned by Mr Rahman's submission that Judge Khan *and* Judge Barker were somehow biased against the appellant. That is a very serious accusation to make against any judicial office holder. It is one which should only be made with a proper evidential foundation, or where there are reasonable grounds for the allegation, to use the language of Rule C7 of the Bar Code of Conduct. There was no foundation whatsoever for the allegation in this case. It

was not pleaded in the grounds of appeal to the Upper Tribunal (whether in 2017 or in 2022) and it should have formed no part of Mr Rahman's submission. Mr Rahman did not attempt to pursue the point when he was pressed upon it but the allegation should not have been made in the first place.

32. Turning to the citizenship of the appellant's daughter, it is quite plain that there is no material error of law in the judge's decision. As we think Mr Rahman was eventually constrained to accept, there is no further action which the Secretary of State could have taken in relation to the appellant's daughter's citizenship.
33. The respondent had stated in her first decision that she did not consider the child to be British, despite the issue of a passport to her in 2016. That conclusion had been upheld on appeal, as we have recorded, with the judge making the strongest of findings about the appellant's collusion with her husband and Mr Bonney so as to procure a British passport by deception. The existence of that deception did not require or enable the respondent to take any action under section 40 of the British Nationality Act 1981, however. As is clear from s40(3) of that Act, the power of deprivation only arises where a person is registered or naturalised as a British citizen. This is not such a case. The appellant's daughter was born in the United Kingdom and the respondent was told that one of her parents was Mr Bonney, who is a British citizen. The Secretary of State was entitled to assume at that point that the information she was given was correct. She therefore proceeded, initially, on the basis that the appellant's daughter was a person to whom s1(1) of the British Nationality Act 1981 applied and who had acquired British citizenship by birth.
34. When it became clear to the respondent that the appellant's daughter was probably not related to Mr Bonney as claimed, she was entitled to proceed on the basis that the child was not, and never had been a British citizen. The statutory appeal process provided an opportunity for that question of fact to be considered by Judge Khan, in the context of a human rights appeal, and he resolved the question adversely to the appellant. Section 40 provided no basis for the respondent to take any further action in relation to the child's citizenship and Mr Rahman was unable to explain to us what other sort of action might properly have been taken. In our judgment, there was nothing further that the respondent could or should have done. She had prevailed in the appeal and she was entitled to treat the appellant's daughter as a person who had not acquired British citizenship by birth.
35. The respondent would, from that point, have been entitled to request the return of the appellant's daughter's passport. That document described her as a British citizen and had been issued to her as such. The basis of her entitlement having fallen away, the respondent might properly have demanded the return of the passport. The respondent's inaction in this respect was of no significance in this appeal, however. By the time the judge came to consider the appeal, the passport had expired. Given its expiry and the fact that a passport is merely evidence (and not conferment) of nationality, the fact that the child possessed that passport between 2016 and 2021 was all but irrelevant to the judge's consideration. Had the appellant's daughter used the passport for travel, or if she had been able to renew it, the point may possibly have acquired some significance. As the judge recognised, however, nothing of that nature had occurred.
36. On any proper analysis, therefore, the respondent's 'inaction' was of no consequence in this appeal and the judge was not required to say anything more about it. She was wrong, with respect, to characterise the submission which was

made on this point as a 'powerful' one. Her error in characterising the submission in that way was immaterial, however, as it was an error which favoured the appellant.

37. Mr Rahman suggested that the judge's reasoning was deficient in other respects. He spent some time in his submissions dealing with the medical evidence. As we understood him, his complaint was that there had been no expert evidence as to the paternity of the child or the length of her gestation.
38. That is undoubtedly so, but to make that point is to overlook the burden of proof and the effect of Devaseelan. The appellant bore the burden of proving that her daughter was a British citizen. The point had been decided adversely to her by Judge Khan and that finding stood in the absence of further evidence. So much is clear from Devaseelan and, more recently, the decision of the Court of Appeal in SSH D v Al-Sirri [2021] EWCA Civ 113; [2021] 1 WLR 2137.
39. The appellant's short bundle before the FtT provided no evidence whatsoever which would have entitled the judge to go behind Judge Khan's findings. We cannot understand how the respondent was meant to have adduced expert evidence before Judge Barker. As we suggested to Mr Rahman at the hearing, the respondent was entitled initially to proceed on the basis that what she had been told about the child's paternity was true. Then, when the child's paternity was called into question by the letter from the hospital, the respondent was entitled to conclude that the child's father was not Mr Bonney. It was not for her to call, for example, for DNA samples from the child and the possible fathers; if that was to be done, it was for the appellant to do it. Nor, by this stage, could the respondent have sought expert evidence from a paediatrician, for example, about the likely gestational period; the child had long since been born and we know of no basis upon which such an opinion could have been proffered. Both judges were undeniably entitled to take judicial notice that the normal gestational period for a child is nine months: Preston-Jones v Preston Jones [1951] AC 391. There was no basis before Judge Khan on which the respondent could or should have sought expert evidence, and that was certainly the position before Judge Barker, since the paternity of the child had already been settled by an earlier judicial finding.
40. Mr Rahman also sought to criticise Judge Khan and Judge Barker for relying on the letter from Guy's and St Thomas' Hospital. He was wrong to do so. We have set out the material part of the letter above. It was for the judges to decide what weight to place on that letter. Neither of them suggested that it was expert evidence. They were nevertheless entitled to place weight on it, suggesting as it did that the child had been conceived appreciably before the appellant came to the UK. We consider that it was open to the judges to proceed on that basis, since the information in that letter (as to the date of conception) most likely came from the appellant herself, and she was unable to offer any explanation for the difficulty when the point was put squarely to her in front of Judge Khan.
41. Ultimately, the appeal before Judge Barker could not succeed. The single point in issue between the parties had been litigated before the FtT. Its conclusion had been upheld on appeal. There was no further evidence which cast any doubt on the correctness of the first judge's findings. If there is any error of law in the decision of the judge, it is that she said more than that and went on to assess for herself evidence which had already been the subject of a concluded judicial analysis.

42. The position of the appellant's daughter is now clear beyond doubt. She is not a British citizen. She is no longer a British passport holder. The judge did not err in concluding, in these circumstances, that the appellant has no right to remain in the UK as her primary carer. The appellant's appeal is therefore dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appellant's appeal is dismissed and the decision of the FtT shall stand.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 December 2022