Neutral Citation No. [2010] NICA 2 | *Ref:* **GIR7710**

Judgment: approved by the Court for handing down | *Delivered:* **19/01/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Burnett's (Beatrice Alstrid) Application [2010] NICA 2

IN THE MATTER OF AN APPLICATION BY BEATRICE ALSTRID BURNETT FOR JUDICIAL REVIEW

HIGGINS LJ, GIRVAN LJ AND COGHLIN LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal from the decision of Treacy J who dismissed the appellant's application for judicial review of two decisions, namely one made by an immigration officer on 20 August 2008 refusing the appellant leave to enter the United Kingdom and the other being a decision on 27 August 2008 ordering her removal from the United Kingdom. The appellant was at the time of the impugned decisions the holder of a United Kingdom passport. By her judicial review application she challenged both the lawfulness of the decisions and the procedure followed by the immigration authorities in purporting to refuse her leave to enter the United Kingdom and ordering her removal. Treacy J concluded that her claim to be a British citizen by descent had no foundation in fact since she was not the natural child of Mr Burnett, a British citizen whose child she claimed to be when she applied for the passport. In her application for the passport she had relied on a Zimbabwean

birth certificate as the evidential basis for her claim to be entitled to British citizenship by descent. The appellant now accepts that that alleged birth certificate was not in fact an authentic record of her birth.

Factual Background

[2] The appellant made an application to the British High Commission in Pretoria for a British passport in March 2008. She claimed to be the natural child of John Frederick Burnett, a retired dentist who was born in Newcastle upon Tyne and who was a British citizen. She presented as evidence of her birth a certified copy of an entry of the birth allegedly registered in the district of Mount Darwin in Zimbabwe. It purported to record the date of her birth as 4 November 1976 and the date of alleged registration was recorded as 15 February 1978. The document clearly records that the father of the child was John Frederick Burnett. The contents of the appellant's application form submitted with the alleged birth certificate make clear that the applicant was claiming British citizenship by descent on the basis of her father's nationality.

[3] In her grounding affidavit the appellant asserted that when she sought to obtain the British passport she understood that her natural father was required to sign a legitimisation form because her father had married her mother after her birth. She exhibited a letter sent by the Nationality and Passport Section (Consular Directorate) in the United Kingdom to the British High Commission in Pretoria. This letter indicated that it was accepted for administrative purposes that the applicant was legitimated by her parents' marriage on 14 September 1990 for the purposes of Section 47 of the British Nationality Act 1981. She could be deemed accordingly to have been a citizen of the United Kingdom and Colonies under Section 5(1) of the British Nationality Act 1948 and to have become a British citizen under Section 11(1) of the British Nationality Act 1981. The issue of a passport was authorised on that basis.

[4] In July 2008 the appellant renounced her Zimbabwean citizenship, that renunciation being registered on 15 July 2008. According to the appellant, this was necessary because she was informed on a visit to Zimbabwe that it was illegal to have dual citizenship.

[5] The appellant used her British passport to travel to and from the United Kingdom and elsewhere. She moved to Belfast in December 2007 and began working for Belfast City Council. The appellant had no difficulty using the passport until August 2008. On 10 August 2008 when returning to Belfast via Paris from a visit to her fiancé in the United States she was stopped by an immigration officer at Belfast International Airport. When she produced her British passport she was told that her passport was to be retained by the immigration authorities and that she should attend for interview on 20 August 2008. She was informed that her birth certificate was not authentic.

She was, however, released and granted temporary admission to the United Kingdom on the basis that she was liable to be detained.

[6] The immigration authority's decision to hold the passport and to require her attendance for interview was brought about by information supplied to the Chief Immigration Officer at Belfast International Airport following the scanning of the passport. This indicated that further checks were required. On contacting the Border Forces Risk Assessment Unit the immigration officer learned that there was a suspicion that the applicant had fraudulently obtained the passport by use of a birth certificate which was not authentic. He was also advised that the appellant had another possible identity, namely Astrid Beatrice Chisaka.

[7] Marie Jamison, an immigration officer, conducted the interview on 20 August 2008. Prior to the interview she obtained information from the Central Registry for Passports, Citizenship, Nationality and Voters Registration, Births, Deaths and Marriages in Zimbabwe under cover of letter of 9 July 2008. That letter stated that the birth registration document was not authentic according to the records held at the Central Registry in Zimbabwe. Those records showed that the child was born in Harare but the registration purported to record the birth as occurring in Mount Darwin. Furthermore, the registration details did not exist either at Harare or Mount Darwin. According to Marie Jamison, the appellant was unable during the interview to provide any information which altered the apparently clear evidence that the birth certificate was not authentic. The appellant presented no evidence to show that she had a claim to British citizenship other than through her avowed father Mr Burnett. In the course of the interview the appellant stated that she "always knew her father would get her because he knew the paperwork was false." She stated that she had previously been advised by Zimbabwean police that her birth certificate was incorrect.

[8] The immigration authorities concluded that the appellant was never entitled to the British passport which had been obtained by deception. They concluded that it was appropriate to serve on her a notice IS82A (a notice of refusal of leave to enter). This document was not tailored to deal with the situation where the immigration authorities concluded that a person purporting to hold a British passport had no right to it. There was no right of appeal against the conclusion that a person was not entitled to hold a British passport and for this reason the box in the form referring to a right of appeal was considered to be irrelevant. The appellant was given temporary admission to permit her to collect her belongings in advance of her removal.

[9] It was common case before Treacy J that the birth certificate which accompanied the application for the British passport was not authentic. The appellant asserted before Treacy J that she made enquiries with her family which revealed a birth certificate different from the one submitted with her

application for a passport in which a Zimbabwean national is named as her father. Miss Higgins QC on behalf of the appellant stated in her submissions to this court that the appellant accepted that she now realised that Mr Burnett was not her natural father. The appellant does, however, assert that she acted at all times in good faith believing that Mr Burnett was her father at the time when she applied for the British passport. She did not accept that she had obtained the British passport by means of deliberate deception.

The lower court's decision

[11] In dismissing the appellant's judicial review challenge Treacy J concluded that the applicant's citizenship must be regarded as a nullity. She was not, as she claimed, the natural daughter of Mr Burnett. She misrepresented herself as a natural daughter of a British citizen and obtained her passport on that basis. A passport is not conclusive evidence of citizenship. On the evidence it was clear that the appellant was not a British citizen. The power of deprivation of citizenship was irrelevant since such a power only arises where citizenship has been obtained by a person whom it is proposed to deprive of citizenship. As the applicant never obtained citizenship and never had been a British citizen there was nothing of which she could be deprived. Thus the procedural safeguards attaching to the process of deprivation of citizenship did not come into play in the present instance. The respondent conceded that the notice issued to the applicant on 20 August 2008 did not identify a right of appeal. There was a right of appeal under the relevant legislation in relation to the decisions to refuse entry and to remove an entrant but the failure to identify this statutory right of appeal engendered no procedural unfairness to the appellant since it was still open to the appellant to appeal against a decision to exclude her from the United Kingdom.

The appellant's case

[12] Miss Higgins QC who appeared with Mr Flanagan on behalf of the appellant argued that the judge erred in finding that the appellant's passport was a nullity. There was, she argued, a clear distinction between people who fraudulently obtained passports in someone else's name and those who wrongly obtain passports in their own name. The latter can only be deprived of their citizenship under Section 40 of the British Nationality Act 1981. The scheme of the Immigration Act 1971 only extended to persons who were not British citizens or who cannot produce a passport to establish proof of such citizenship. On production of her British passport the immigration authorities were bound to grant the appellant leave to enter and if they were proposing to deprive her of the right to use the passport they were bound to follow the statutory procedure for deprivation of citizenship under Section 40 of the 1981 Act as amended by the Nationality, Immigration and Asylum Act 2002 and the Immigration, Asylum and Nationality Act 2006. The 2002 Act

changed the general deprivation of citizenship test so that only British citizens may be deprived of citizenship status if he has done anything seriously prejudicial to the national interest of the United Kingdom and if the Secretary of State considered it conducive to the public interest to deprive him of citizenship. A person could not be deprived of citizenship if the consequence was to render him stateless which according to the appellant's argument would now happen in her case. The Act also provided that a person who has obtained citizenship by registration or naturalisation by false representation or by concealment of a material fact could only be deprived of citizenship by properly following the procedural requirements in Section 40. It was clearly intended that persons facing deprivation of citizenship in such circumstances should have an appeal process which did not arise in the case of those who are refused British citizenship. Miss Higgins also argued by way of a point not raised before Treacy J that the appellant had also acquired her citizenship by way of registration. It was argued that this triggered the specific procedural safeguards relating to the procedures applying to the deprivation of citizenship acquired by registration.

[13] It was further argued that on the basis of the evidence available to the immigration authorities on 10 August and 20 August 2008 they had insufficient evidence to conclude that the appellant was not a British citizen or that she had intentionally deceived the authorities when obtaining her passport. Miss Jamison, the relevant immigration officer, initially considered that the burden of establishing citizenship fell on the appellant whereas the burden was on the respondent authorities to prove that she was not a British citizen at the time when she produced a passport which was clear evidence that she was.

[14] Counsel contended that the powers of an immigration officer to stop and question a person on entry into the United Kingdom did not extend to stopping, questioning or restricting the movement of a person such as the appellant who produced a British passport. The extensive powers to stop, question, search, arrest and detain contained in the Immigration Act 1971 are to control those illegally entering the country. It expressly precludes questioning persons who can produce a passport which describes the holder as a British citizen. There is nothing in the 1971 Act which provides for the removal or retention of a passport obtained by fraud or deception.

[15] Miss Higgins further contended that the appellant was entitled to the benefit of Article 6 procedural safeguards in any decision-making process that led to deprivation of her citizenship, something recognised in Section 40 and Section 40A of the 1981 Act. She argued that the judge wrongly concluded that on the basis of Maaoui v. France (2000) ECHR 455 Article 6 did not apply to aliens. Prima facie the appellant was not an alien. As a putative British citizen she was entitled to the benefit of Article 6 in a determination of her civil rights and one of which it was submitted was the civil right to enjoyment

of her citizenship. Article 8 rights were engaged and this in itself triggered Article 6 rights.

[16] The decision taken by the immigration authorities rendered the appellant stateless. Article 8(2) of the Convention on the Reduction of Statelessness provides that a person can be deprived of his nationality where that nationality has been obtained by misrepresentation or fraud. Article 8(4) provides that contracting states shall not exercise a power of deprivation permitted by Article 8(2) except in accordance with law which shall provide for the person concerned the right to a fair hearing by a court or other independent body. It was submitted that Articles 6 and 8 of the Convention should be interpreted consistently with the provisions of Article 8 of the 1961 Convention which renders unlawful summary deprivation of citizenship. The requirements of fairness at common law would have entailed a fair hearing in the circumstances of the case. The procedure followed in the present case which summarily deprived the appellant of citizenship in circumstances which rendered her stateless was unlawful.

Discussion

[17] British citizenship is the primary category of British nationality and carries with it the right of abode in the United Kingdom. All those who on 31 December 1982 were citizens of the United Kingdom and Colonies and had the right of abode in the United Kingdom under the Immigration Act 1971 as then in force automatically became British citizens on 1 January 1983 (the date on which the British Nationality Act 1981 came into force by virtue of Section 11(1) of that Act.) In order to determine whether a person automatically became a citizen of the United Kingdom on 1 January 1983 it may be necessary to trace ancestry to determine whether a person automatically became a citizen of the United Kingdom and Colonies under the British Nationality Act 1948. In the words of Lord Bridge in R v. Foreign Secretary ex parte Ross Clunis [1991] 2 AC 427 and 445 the section is looking at past circumstances as determinative of future status. Under Section 5 of the 1948 Act a person born after the commencement of the 1948 Act was a citizen of the United Kingdom and Colonies by descent if his father was a citizen of the United Kingdom and Colonies at the time of his birth. Under Section 32(2) of the 1948 Act a "child" fell to be construed as a *legitimate* child of the father. The alleged father of the appellant married the mother on 14 September 1990. Under Section 47(1) of the 1981 Act an illegitimate child as from the date of the marriage falls to be treated as if he had been born legitimate. By the combined effect of the 1948 Act and 1981 Act the appellant would be a British citizen and thus entitled to a British passport if she had, indeed, been the natural daughter of Mr Burnett, a British citizen, subsequently legitimated by Mr Burnett's marriage to the appellant's mother in 1990 when the 1981 Act was in force.

[18] The right of the appellant to claim to be a British citizen and her entitlement to hold and rely on a British passport was thus dependent on the accuracy of her claim to be a British citizen by descent from Mr Burnett. Having regard to her concession that she is not in fact the natural daughter of Mr Burnett she, accordingly, is not and never was a British citizen. Her statutory right to British citizenship by descent thus never existed. Although Miss Higgins pressed upon the court the argument that she fell to be considered as having acquired citizenship by registration such an argument must fail. The appellant did not go through any of the statutory procedures whereby a person may acquire British citizenship by registration under the various statutory provisions set out in the 1981 Act in Section 3 et seq.

[19] While it is now clear that the appellant is not and never was entitled to British citizenship Miss Higgins argues that at the time of her entry into the United Kingdom on 10 August the immigration authorities had no entitlement to stop or challenge the appellant who then held a British passport which appeared ex facie regular and had no authority to purport to refuse her leave to enter the United Kingdom save on a temporary basis pending removal. Section 1 of the Immigration Act provides that:-

> "All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person."

Section 2(1) confers the right of abode in the United Kingdom on a person if he is a British citizen. Section 3(1) of the 1971 provides:-

> "Except as otherwise provided by or under this Act, where a person is not a British citizen –
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under this Act;
> (b) . . .
> (c) . . ."

Under Section 3(8) it is provided:-

> "When any question arises under this Act whether or not a person is a British citizen or is entitled to

> any exemption under this Act, it shall lie on the person asserting it to prove that he is."

Section 3(9) provides:-

> "A person seeking to enter the United Kingdom and claiming to have the right of abode there shall prove it by means of –
>
> (a) A United Kingdom passport describing him as a British citizen . . ."

[20] Schedule 2 of the 1971 Act confers a wide range of powers on immigration authorities. Thus under paragraph 2(1) of the Schedule it is provided:-

> "An immigration officer may examine any persons who have arrived in the United Kingdom by ship or aircraft . . . for the purpose of determining –
>
> (a) whether any of them is or is not a British citizen; and
> (b) whether, if he is not, he may or may not enter the United Kingdom without leave; and
> (c) whether, if he may not –
>
> (i) he has been given leave which is still in force,
>
> (ii) he should be given leave and for what period or on what conditions (if any), or
>
> (iii) he should be refused leave]."

Under paragraph 4 it is the duty of any person examined under paragraph 2 to furnish to the person carrying out the examination all such information in his possession as that person may require for the purpose of his functions under that paragraph. A person on his examination under paragraph 2 shall if so required by the immigration officer produce either a *valid* passport with photograph or some other document *satisfactorily establishing* his identity and nationality or citizenship and declare whether or not he is carrying or conveying documents of any relevant description specified by the immigration officer and produce any documents of that description which he is carrying or conveying (italics added).

[21] Passports are issued under the Royal Prerogative in the discretion of the Secretary of State. They are the property of the Crown, not of the passport holder and may be withdrawn by the Crown at any time. A British passport does not confer citizenship but is merely evidence of it. The Immigration

Appeal Tribunal correctly held in Christodoulidou v. Secretary of State [1985] Immigration AR 179 that the conditions of entitlement to British citizenship are a matter of law. If a passport is issued showing a person to have a status which he does not hold in fact the passport may be withdrawn and cannot be relied on to assert a status to which the person is not entitled. That is exactly the situation which arises in the present case. On her own case the appellant was not a British citizen by descent. She did not fulfil any other conditions entitling her to the status of a British citizen. She cannot rely on a British passport obtained on a false premise to establish her claim to be treated as a British citizen. This is so irrespective of whether she did or did not know that she did not fulfil the criteria of British citizenship since her state of mind cannot be relevant to the objective question whether she was a British citizen by descent. The question of her good faith or lack of it in obtaining her passport and organising her life may arguably be relevant in any appeal to which she is entitled to bring on the grounds of race, human rights and/or asylum under section 40 of the Nationality Immigration and Asylum Act 2002. She has not exhausted the appeal rights under that Act to which the respondent concedes that she is entitled.

[22] Had the appellant sought to establish that she is a British citizen by descent and that the immigration authorities had incorrectly concluded that she was not entitled to that status she would have had a remedy either by way of plenary action or by judicial review there being no statutory appeal mechanism against an alleged wrongful refusal to recognise the citizenship of an aggrieved party. Since the appellant accepts that she is not entitled to British citizenship by descent and since for the reasons given she cannot rely on an acquisition of citizenship by registration she could not in fact assert such a claim by plenary action or judicial review proceedings. In these proceedings she is seeking to rely on procedural errors in the manner in which she was deprived of a right to enter the country on foot of the passport. She is not seeking to establish that she was a British citizen by descent.

[23] We conclude however that no unlawfulness on the part of the immigration authorities has been demonstrated. The evidence clearly justified the conclusion that the appellant could not rely on the passport that she had obtained on a false premise. We must reject the suggestion that the immigration officer cannot go behind a passport presented by a soi disant British citizen who is not so in fact. It is clear from the provisions of the Immigration Act 1971 that the immigration officer at the point of entry is entitled to question any entrant and to examine their purported entitlement to enter the United Kingdom. While a passport is clearly prima facie evidence of citizenship it is not conclusive and if the evidence establishes that the individual is not entitled to hold it the immigration authority must have the ability and the right to treat the person who is not in fact a British citizen accordingly.

[24] Since it must now be accepted that the appellant had no entitlement to hold the passport the granting of judicial review relief in relation to the alleged procedural irregularities, had there in fact been any (which we do not find), would be entirely inappropriate since the outcome to any review of the relevant decisions would be bound to be the same.

[25] However unfortunate it may be, the resultant statelessness of the appellant which flows from the recognition of the fact that she is not a British citizen and from her renunciation of Zimbabwean citizenship cannot change the legal outcome of this case. The appellant may not be without possible remedies. She has appeal rights under the 2002 Act to which we have referred. She may be entitled to resume Zimbabwean citizenship depending on whether the relevant Zimbabwean legislation contains a power of resumption of renounced citizenship equivalent to the power contained in Section 13 of the 1981 Act in the United Kingdom. As a stateless person she may be able to obtain travel documents in accordance with the international obligations of the United Kingdom (see Halsbury's Laws of England volume 4(2) paragraph 78).

[26] In the result we must uphold the decision of Treacy J and dismiss the appellant's appeal.