Neutral Citation No: [2009] NIQB 52 | *Ref:* **TRE7539**

Judgment: approved by the Court for handing down | *Delivered:* **5/5/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Burnett's Application [2009] NIQB 52

_____

IN THE MATTER OF AN APPLICATION BY BEATRICE ALSTRID BURNETT FOR JUDICIAL REVIEW OF A DECISION OF THE HOME OFFICE

_____

TREACY J

Introduction

[1] In these proceedings the applicant claims relief principally against the decision of the respondent immigration officer of 20 August 2008 refusing her leave to enter the UK and of the decision dated 27 August 2008 ordering her removal from the UK.

Factual Background

[2] The applicant was born in Harare, Zimbabwe on 4 November 1976, first coming to the UK in May 2003 on a visitor's visa subsequently obtaining a 2 year student visa and studying at Holborn College in London.

[3] In her affidavit the applicant deposes that in or around March 2005 she made an application for a British passport by virtue of the citizenship of her father, John Frederick Burnett, a retired dentist who was born in Newcastle, England. She submitted her application together with a copy of her birth certificate to the British High Commission in Pretoria. On 26 May 2005 she was issued with a British passport valid for a 10 year period.

[4] At the time of the swearing of her affidavit she deposed that she had been working for Belfast City Council as a finance clerk since 10 December 2007 and has lived in Belfast since December 2007.

[5] She averred that she had on numerous occasions travelled to and from the UK using her British passport and that until 10 August 2008 she had not encountered any difficulties.

[6] On that date she was returning from visiting her fiancé in the USA, via Paris. When she arrived at Belfast International Airport her passport was retained by immigration control and she was issued with a notice, inter alia, requesting her to attend at the airport for interview on 20 August 2008.

[7] On 20 August she was interviewed by Maire Jamison, Immigration Officer, of the Border Force of the United Kingdom Border Agency who has averred as follows in her affidavit:

> "**3. Prior to my interview of the Applicant I had received information from Mr Mike Tinney from the British High Commission in Pretoria. He conveyed the information he had received from the Central Registry for Passports, Citizenship, National and Voters' Registration, Brands, Births, Deaths and Marriages in Zimbabwe by letter of 9th July 2008 (pages 13 in the exhibited bundle). That letter revealed that the birth certificate used by the Applicant to obtain her British passport was not authentic.**
>
> **4. I had reviewed all available evidence in relation to the Applicant's case and discussed the matter with my Chief Immigration Officer, Mr Innes, in advance of the interview. However, as the record of the interview demonstrates, the Applicant was unable during the course of same to provide me with information which would alter the apparently incontrovertible fact that her passport had been obtained with a birth certificate that was not authentic. Throughout the interview I was alive to the possibility that the Applicant may have been someone who was otherwise entitled to British citizenship, or a right of abode or entitlement to reside in the UK, notwithstanding the fact that her passport had been obtained by deception. The Applicant did not advise me of any facts which indicated that she had other claims to citizenship or right of abode, other than through her avowed father, Mr Burnett.**

> **5. Of some significance was the Applicant's response to question 53 of that interview, at internal page 10 of the document. Despite the Applicant having throughout the course of the interview asserting that John Fredrick Burnett was her natural father, her volunteering that she "always knew [her] father would get [her] because he knew paperwork was false" was in my mind a telling admission that she was privy to the fraudulent acquisition of the passport through the forged birth certificate. Moreover, her denial that there was any issue with her birth certificate ran contrary to her having stated that she had previously been advised by the Zimbabwean police that her birth certificate was incorrect.**
>
> **6. I note the assertion in the Applicant's grounds on which she seeks relief in that she claims to be a British citizen who has the right of abode, and who therefore does not require leave to enter the UK. However, the Applicant's citizenship is dependant on her having been the biological daughter of a British father, namely John Frederick Burnett.**
>
> **7. Based on the information made available to me from Mr Tinney (page 12 of the exhibited bundle - see especially paragraph 4 of his letter) and the basis of the representations made to me by the Applicant during interview, I formed the opinion that the Applicant was never entitled to the British passport, which had been obtained by deception.**
>
> **8. Accordingly, it was clear to me that it was appropriate to serve on the Applicant a notice IS 82A which is entitled 'Notice of Refusal of Leave to enter' (pages 15-16 in the exhibited bundle)."**

[8] The notice of refusal of leave to enter states, so far as material, as follows:

> "**You have presented British passport number 705274297 in the name of Beatrice Alstrid Burnett showing nationality as "British citizen". As evidence of your claim to British citizenship you presented as Zimbabwean birth certificate (entry number DWN/720/78) to the British High Commission in Pretoria in 2005. The Zimbabwean authorities have subsequently confirmed that this**

> **document is not authentic. That if this information had been known at the time the passport would not have been issued. Therefore British passport number 705274297 issued 16 May 2005 was obtained by deceptive means and in doing so your conduct leaves me to believe that your exclusion from the United Kingdom is conducive to the public good. Furthermore you have failed to produce a document that satisfactorily establishes your nationality or identity.**
>
> **I therefore refuse you leave to enter the United Kingdom."**

[9] The notice also gave directions for the applicant's removal to the port in which she had been previously landed, namely Paris.

[10] At the hearing before me it was common case that the birth certificate which accompanied the application for the British passport was not authentic. In fact the applicant now asserts 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.

The Issues

[11] The principal question which this case raises is whether the applicant's citizenship is a nullity in which case the Immigration authorities were entitled to refuse leave to enter and to order her removal. A negative answer to this question has profound implications for the applicant who has renounced her Zimbabwean nationality and whose rights of appeal against the impugned decisions would thereby be significantly attenuated

The applicant's contentions

[12] In her Order 53 Statement the applicant sought to challenge the impugned decisions on grounds of illegality, procedural unfairness and breach of Art.6 ECHR. In respect of illegality the principal contention was, in summary form, that for such time as she holds a valid passport she does not require leave to enter the UK and cannot be lawfully refused leave to enter. Procedural unfairness was alleged on the basis of the failure of the immigration decision to identify the statutory basis of the right of appeal. Finally it was submitted that if the applicants passport had been revoked without formal notice or opportunity to seek redress that would give rise to a violation of Art.6

The respondent's contentions

[13] The respondent contended that it had good reason for declining to accept the evidence the applicant offered that she was a British citizen and therefore had the right of abode pursuant to section 3(8) and (9) of the Immigration Act 1971. The respondent contended that the fact that the applicant held a passport at the time of her attempted entry did not mean that the respondent's action in refusing her leave to enter was ultra vires. The issuing of a passport is not conclusive evidence of citizenship and if the respondent can show to a high degree of probability that a UK passport was obtained by fraud or false representation that it may be declined as evidence of right of abode.

[14] The respondent submitted that this was not as the applicant claimed a question of **depriving** her of her citizenship which would then have permitted her to appeal the decision to the Asylum Immigration Tribunal but rather that this was a clear case in which the putative citizenship is to be regarded as a **nullity**. In this respect the respondent submitted that section 40 of the British Nationality Act 1981 was not engaged. They submitted that the applicant's supposed British citizenship had not been withdrawn on the basis that it was obtained fraudulently but on the basis that the applicant is not and never was a British citizen. They contended that the power of deprivation was irrelevant as deprivation arose only in cases where citizenship *has been obtained* by the person whom it is proposed to deprive of it and that as the applicant had never obtained citizenship there was nothing of which to deprive her.

[15] Using the name of Burnett and a false birth certificate in that name in order to obtain a British passport the applicant was in effect, the Respondent submitted, adopting the identity of the natural daughter of Mr Burnett. In using the passport in this way to secure admission she was falsely presenting herself to the immigration officer as being the person in respect of whom the passport had been issued. It was thus clearly established that she was not entitled to either the passport or indeed citizenship and accordingly none of the respondent's actions were illegal.

[16] So far as the question of procedural fairness is concerned the respondent submitted that the applicant's claim to citizenship was void and a nullity with the consequence that there is a very limited right of appeal from the respondent's decision. Although the Notice IS82A issued to the applicant on 20 August 2008 failed to identify the applicant's limited rights of appeal (essentially on grounds of race, human rights and/or asylum) pursuant to the provisions of sections 82, 88 and 89 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") the respondent contended that since the applicant had not advanced any of the above grounds there was no procedural error operating to cause any procedural unfairness. More importantly, it was argued, was that the applicant's rights to appeal against the decision on those grounds remain unchanged and unexhausted and therefore such an appeal could be mounted if it was felt appropriate.

[17] So far as the applicant's reliance on Article 6 was concerned the respondent submitted that Article 6 does not apply to immigration cases relying principally on Maaouia v. France [2001] 33 EHRR 42.

The Law

[18] Section 3(8) and (9) of the Immigration Act 1971 provides:

> "(8) 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.
>
> (9) A person seeking to enter the United Kingdom and claiming to have the right of abode there shall prove that he has that right by means of either – a United Kingdom passport describing him as a British citizen or as a citizen of the United Kingdom and colonies having the right of abode in the United Kingdom; or a certificate . . ."

[19] A passport furnishes unqualified, though nor irrebuttable, evidence for the purposes of entry into the UK under section 3(8) and (9) of the Act 1971. The production of a passport does not constitute conclusive evidence of citizenship and if the respondent can show to a high degree of probability that a UK passport was obtained by fraud or false representation it may be declined as evidence of right of abode – see Obi [1997] Imm AR 420. See also ex parte Ginwalla [1998] EWHC Admin 1067 at para 12-13 thereof.

[20] If the applicants citizenship is a nullity it is clear that section 40 of the Nationality, Immigration and Asylum Act 2002 is not engaged and the applicant does not therefore enjoy a right of appeal to the AIT under section 40A(1).Distinguishing between whether citizenship is a nullity or subject to deprivation (and the accompanying safeguards) under section 40 is not always a straightforward task. This is very helpfully explained and illustrated by chapter 55 of the UK Border Agency British Nationality Case Working Instructions (item 4 in the applicant's book of authorities).

[21] In the light of a series of Court of Appeal decisions in England I am driven to the conclusion that the applicant's citizenship must be regarded as a nullity. These cases are Mahmood [1981] QB 59,Ahktar [1981] QB 46,Egaz [1994} 496 and, most recently, Bibi [2007}EWCA Civ 740.The three earlier decisions .are fully and helpfully reviewed in Bibi at paras 17-20.I consider that Mahmood, Akhtar and Bibi are directly in point .The decision in Egaz was analysed and distinguished at paras 19-20 of Bibi and ,in the light of that

analysis, which I accept, the decision in Egaz is of no assistance to this applicant. Put shortly this applicant is in an analogous position to the appellants in Mahmood, Akhtar and Bibi in that she was not the person described in the application. She was not, as claimed, the natural daughter of Mr Burnett. She misrepresented herself as the natural daughter of a British citizen, and obtained the passport on the basis that she was that person when she was not.

[22] In ex parte Sultan Mahmood [1981] QB 59 following the death of his brother in law, named Mr I, Mr M assumed the identity of I, used his passport and ultimately secured registration as a UK citizen in the name of I. He argued that until he might be deprived of citizenship under section 20 of the Act 1948 he remained a UK citizen. Roskill LJ at page 61 c-g said:

> "**The Secretary of State's intention cannot have been to grant registration to the appellant for he did not know who the appellant was. He wrongly believed the appellant to be Javed Iqbal, which he was not, nor could have been, for that individual was dead.**
>
> **. . . I accept that in some cases it may be difficult to draw a dividing line in these cases between a registration which is a nullity and therefore void, as I think is the case with the present registration, in which case the alleged citizen by registration cannot bring himself within section 20(1) at all, and a registration which is only voidable, in which case the machinery of section 20 . . . has to be invoked . . . [counsel for the Secretary of State] accepted that it was not easy to formulate a dividing line between the two classes of case. I agree, but wherever that line is drawn, I am clearly of the view that the instant case is one in which the alleged British registration was a nullity.**"

[23] In the present case it could not have been the Secretary of State's intention to grant the applicant a passport had she not been the natural daughter of Mr John Frederick Burnett.

[24] In the same case Geoffrey Lane LJ said at page 63 a-b:

> "**It seems to me that the only question to be decided is whether the appellant ever was a citizen of the United Kingdom by registration. I find it difficult to see how he could be. He chose to assume the identity of a dead man, he took the oath of allegiance and filled in the necessary forms in the**

> **dead man's name. I find it impossible to say that in those circumstances Sultan Mahood became a citizen of the United Kingdom any more than did Javed Iqbal. The proceedings were ineffective and section 20 never applied.**"

[25] In ex parte Akhtar [1981] QB 46 the applicant claimed to be Mr PA, and had been registered as UK citizen on the basis of his claim to be the son of a UK citizen Mr A (not unlike the present case). The Secretary of State had reasonable grounds for doubting whether the applicant's name was PA, whether Mr A had a son named PA and in particular, irrespective of names, whether the applicant was Mr A's son. Templeman LJ at page 53 c-d said:

> "**The applicant relies on the registration effected on the application of Waris Ali. In my judgment, that registration does not prove that the applicant is a citizen of the United Kingdom and colonies by registration. When Waris Ali applied for the registration he undoubtedly intended to procure the registration of the applicant and nobody else. But the effect of the registration cannot depend on the intention of the applicant, Waris Ali. The registration which was in fact effected was the registration of Parvas Akhtar, son of Waris Ali. The registration applies to the applicant and is conclusive of the claim of the applicant to be patrial if, but only if, the applicant is Parvas Akhtar, son of Waris Ali. But the applicant has not proved that he is the person registered. The immigration officer believes and has reasonable grounds for believing that the applicant is not the person registered, but is Abdul Hamid, son of Noor Hussein and as such an illegal entrant. The registration was expressed to apply and could only apply to a person who was named or who called himself Parvas Akhtar and was a son of Waris Ali. There was no power and no intention on the part of the registration authorities to register Abdul Hamid and no power or official intention to register any Parvas Akhtar other than the son of Waris Ali. In order to rely on the registration the applicant must show that he answers to the description of Parvas Akhtar, son of Waris Ali. He has not done this and has not shown that he is registered as a citizen of the United Kingdom and colonies.**"

[26] In the present case there was no power and no intention on part of the registration authorities to register anyone other than the natural daughter of Mr Burnett.

[27] Ex parte Nahid Egaz [1994] QB 496 concerned a wife who had obtained naturalisation on the basis of her husband being a British citizen. Her husband was not in fact a British citizen but was using another person's passport to masquerade as such. The court held that although her husband was not of British citizenship her citizenship existed until she was deprived of it under section 40 of the Act of 1981. A substantial ground of that decision was the provision in s42(5) that a person to whom a certificate of naturalisation is granted "shall be a citizen" from the date of grant. Mahmood and Akhtar were distinguished on the basis that they exemplified situations in which "a person who is registered or to whom a certificate of naturalisation is granted does not answer the description in the registration or certificate".

[28] In the present case neither did the applicant answer the relevant description since she was not as she claimed the biological daughter of a British father.

[29] In Bibi v. Entry Clearance Officer, Dhaka [2007] EWCA Civ 740 the question before the Court of Appeal was whether the citizenship of AJ (the appellant's father and husband) which was fraudulently obtained in the name of AS should be treated as a nullity or whether there should be notional deprivation of a citizenship (AJ being deceased at the time of the proceedings). AJ obtained registration in another person's name as a citizen of the UK and colonies being a status which later became that of a British citizen and the question arose after his death whether his widow and children, who had remained abroad, enjoyed a right of abode in the UK. Lord Justice Wilson held that because he applied for registration in a false identity there was never a grant to AJ of citizenship and the appeal was dismissed. At para 20 he distinguishes Ejaz, where the applicant had not made any misrepresentation about her own identity, applying Mahmood and Akhtar as being directly in point because of the application for registration in a false identity.

Conclusions

[30] In the present case the applicant obtained the passport by relying on a birth certificate which purported to demonstrate that she was the natural child of Mr Burnett which she was not. By using the name of Burnett and a false birth certificate in that name she was adopting the fictional identity of the natural daughter of Mr Burnett and, accordingly, in my view in light of the consistent jurisprudence of the Court of Appeal in England her acquisition of citizenship must be treated as a nullity.

[31] A passport is not conclusive evidence of citizenship. It is now clear that the applicant is not and never was a British citizen. The power of deprivation of citizenship is, in the present context, irrelevant since, in my opinion, such a power only arises where citizenship has been obtained by the person whom it is proposed to deprive of it. As the applicant never obtained citizenship there is nothing of which to deprive her.

[32] By using the name of Burnett and a false birth certificate in that name she was adopting the fictional identity of the natural daughter of Mr Burnett. In using the passport to gain admission to the UK she was falsely presenting herself to the UK immigration authorities as being the person to whom the passport had been issued – namely the natural daughter of Mr Burnett. The applicant's citizenship was *dependent* on her having been the biological daughter of a British father, namely John Frederick Burnett. She was not. The applicant never therefore obtained citizenship and was never entitled to the British passport which had been fraudulently acquired by the provision of a forged birth certificate.

[33] She is not and never has been a British citizen. She has not therefore been deprived of her citizenship under section 40 of the British Nationality Act 1981 which in my view is plainly not engaged. It is common case that if it had been engaged this would have given her a right of appeal to the Asylum and Immigration Tribunal. Since I have held that the purported citizenship is a nullity and that section 40 of the Act is not engaged the applicant enjoys a very limited right of appeal under the Nationality, Immigration and Asylum Act 2002 which may be summarised as on the grounds of race, human rights and/asylum.

[34] The respondent has conceded that the notice IS82A issued to the applicant on 20 August 2008 did not identify the applicant's limited right of appeal. However since the applicant has never advanced any of these grounds (e.g. race, human rights or asylum) I am not persuaded that any procedural unfairness has resulted. More importantly however the applicant's right of appeal against the decision on those grounds remains unchanged and the respondent submitted, without demur from the applicant, that such an appeal remained unexhausted and extant.

[35] In light of the clear and consistent jurisprudence of the ECHR including Maaouia v. France that decisions regarding the entry stay and deportation of aliens do not come within the ambit of Article 6(1) I must reject the applicant's based on Article 6.

The application is dismissed.