



Neutral Citation Number: [2020] EWHC 1139 (Admin)

Case No: CO/3719/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2020

Before :

Anthony Ellera QC Deputy High Court Judge

Between :

THE QUEEN
on the application of

Claimant

WENDY NMAI
- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Defendant

Mr Asad Maqsood (instructed by **Frederick Rine Solicitors**) for the **Claimant**
Mr Zane Malik (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 9 & 10 July 2019

Approved Judgment

Anthony Ellera QC Deputy High Court Judge:

1. This is an application for Judicial Review of a decision of the Defendant (“the SSHD”) declining to issue the Claimant with a British passport.
2. The Claimant and the SSHD have been represented before me respectively by Asad Maqsood and Zane Malik.
3. The Claimant asserts that she was born on 31 December 1973 in Birmingham to Nigerian parents and named by them Wendy Ngozi Nmai (“WN”). As WN she has claimed British citizenship and an entitlement to a British passport.
4. As will appear, the SSHD has on a number of occasions refused to issue the Claimant with a passport. The thread of such refusals is that the Claimant has not satisfied the SSHD that she is WN.
5. The issue of fact for me is whether the Claimant is WN.
6. The copy of the birth certificate for WN shows that she was born on 31 December 1973 in Dudley Road Hospital, Winson Green (Birmingham). It shows her parents were Mr Peter Oti Nmai and Ms Kate Nmai. Mr Nmai was described as a student of business studies. The parents’ address was given as 151 Birmingham Road, Birmingham. The registration was on 1 February 1974.
7. WN was a citizen of the United Kingdom and Colonies by birth (Section 4 of the British Nationality Act 1948). She became a British citizen on 1 January 1983 (under Section 11 of the British Nationality Act 1981). She will also have had the right of abode under Section 2 of the Immigration Act 1971.
8. Guidance was given by the Court of Appeal in *R (Harrison) v. SSHD* [2003] EWCA Civ 432 as to the role of this Court in Judicial Review claims involving disputes as to a person’s nationality. Keene LJ (with whom May LJ and Arden LJ agreed at [34]) held as follows:

“If, therefore, there is a dispute as to whether a person has the legal right under the 1981 Act of the status of a British citizen, that dispute is something which can be resolved in the courts. Such a person can bring proceedings for a declaration that he is entitled as of right under that Act to British citizenship ... In determining that matter the court will itself resolve any issues of fact as well as any issues of law. This is not, in truth, judicial review of a decision taken by any administrative body or person, but the more conventional resolution of a dispute with which the courts are very familiar. That being so, the court would not afford to the Secretary of State any margin of appreciation or degree of defence where the resolution of issues of fact is concerned. It will find the facts for itself according to the evidence before it.”

9. It follows, as Mr Malik submits, that it is for me to decide whether the Claimant is WN who was born in the United Kingdom on 31 December 1973 and is a British citizen. The Judicial Review claim is, therefore, not restricted to conventional public law grounds.

10. Section 3(8) of the Immigration Act 1971 concerns the burden of proof and provides that:

“Where 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 should lie on the person asserting it to prove that he is.”

Accordingly, as Mr Malik submits, the burden is on the Claimant to prove that she is a British citizen.

11. There is a single standard of proof and that is the balance of probabilities (note Eder J in *R (Sinha) v. Secretary of State for the Home Department* [2013] EWHC 711 (Admin) at 14).

12. As will appear, the Claimant has relied on documents in contending that she is WN. Mr Malik has cited the decision of the Court of Appeal in *MA (Bangladesh) v. SSHD* [2016] EWCA Civ 175. Lloyd Jones LJ as he then was (with whom Davis LJ and Underhill LJ agreed) at [21] observed:

“[Collins J] noted from experience and country information that there are countries where it is easy and often relatively inexpensive to obtain ‘forged’ documents. Some are false in that they are not made by whoever purports to be the author and the information they contain is wholly or partially untrue. Some are ‘genuine’ to the extent that they emanate from a proper source, in a proper form, on the proper paper, with the proper seals, but the information they contain is wholly or partially untrue. Courts and tribunals need to differentiate between form and content, i.e. whether a document is properly issued by the purported author and whether the contents are true. It is necessary to shake off any preconception that official looking documents are genuine, based on experience of documents in the United Kingdom and to approach them with an open mind.”

13. Lloyd Jones LJ at [22] added:

“... it is for the individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely. There is no legal justification for an argument that if the Secretary of State alleges that a document relied on by an individual claimant is a forgery and the Secretary of State fails to establish this on the balance of probabilities or even to a higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. Such an argument is manifestly

incorrect, given that whether the document is a forgery is not the question at issue. The only question is whether the document is one upon which reliance should properly be placed.”

14. Finally, Lloyd Jones LJ at [32] identified these three principles:

- “(1) ... it is for an individual claimant to show the document on which he seeks to rely can be relied on.
- (2) The decision-maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
- (3) Only very rarely will there be a need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegations on the basis of abilities to the higher civil standard does not show that a document is reliable. The decision-maker still needs to apply principles (1) and (2).”

15. The Claimant cites in argument from the decision of Burnett J, as he then was, in ***R (on the application of Liaquat Ali) v. SSHD [2012] EWHC 3379 (Admin)***. That was a case in which an applicant for a new passport on the expiration of an earlier passport had failed because he had failed to satisfy the Secretary of State that he was “Liaquat Ali”. A problem for that claimant was that the SSHD had concluded that the 1999 passport issued to him was issued in error because investigation by the SSHD had discovered that there were two people who claimed to be Liaquat Ali who were asserting British nationality by right of descent from a Mohammed Moyna Mear. The Claimant before me has had cited to me Paragraph 23 of the reasons of Burnett J:

“The task for the court is the familiar one of evaluating whether the decision was one open to the SSHD on the information available to her, or otherwise considering conventional public law grounds of challenge. That is not to say that the fact that an individual has previously been issued with a British passport is not important in evaluating whether the decision reached was a rational one, in public law terms. It is unhelpful in this context to speak in the terms of burden of proof and the reality is that having once been satisfied that an individual was entitled to a passport, the Secretary of State would need to advance cogent reasons that stood up to scrutiny why, on a later application, she was taking a different view. The refusal to renew the passport of someone who has enjoyed the benefits of a British passport for a decade is a serious step with serious consequences. No less will be required to satisfy a rationality test.”

16. Given that the issue before me is as to whether the Claimant satisfies me that she is WN, I am not convinced that SSHD needs to give cogent reasons as suggested. As will appear, WN did have a 1997 passport. Issues thereafter arose as to whether the Claimant was WN. In contending that she is WN, the Claimant relies on a number of

documents including documents generated in Nigeria. It will be for her to satisfy me that the documents can be relied upon as establishing her identity and establishing when and whether I should place reliance on them in looking at the evidence in the round.

17. The decision of the SSHD impugned in this claim was made on 15 August 2018. The SSHD through the HM Passport Office remained unsatisfied as to the Claimant's identity (as WN) and would not be issuing passport facilities to her. The letter considered that the Claimant had failed to provide robust evidence of her alleged identity or to provide significant documentation pertaining to her identity and formative years growing up in Nigeria. It noted:

“Passports are issued when the SSHD is satisfied as to:

- (i) the identity of an applicant; and
- (ii) the British nationality of applicants, in accordance with the relevant nationality legislation; and
- (c) that there be no other reason for refusing a passport.

In summary your application for a passport has been refused.”

18. It is that decision which is challenged before me.
19. Mr Fordham QC sitting as a Deputy High Court Judge gave permission to seek Judicial Review on 17 December 2018. He directed that the Claimant and her witnesses should attend the hearing so that they could give oral evidence and be cross-examined (subject always to further order and the views of the Judge dealing with the substantive hearing). The Claimant made a witness statement on 10 June 2019 and her alleged brother, Hanson, made a statement on 15 June 2019. They attended the hearing before me and were cross-examined. I did not come to a different view to Mr Fordham QC on the point.
20. Mr Fordham QC also observed that a ground of Judicial Review was that there is said to be DNA evidence indicating her biological link to others said to be accepted to be family members of the individual to whom the birth certificate and passport are said truly to belong. He was not at that time in a position to know what to make of the material and, as will appear, I refer to that material.

The Claimant

21. The Claimant says she is WN and that the birth certificate on which she relies is indeed hers.
22. She asserts that shortly after her birth she and Hanson were taken into foster care by a Mrs Hall. She produces a copy letter from a Registrar at the Children's Hospital in Ladywood, Birmingham. It is addressed to a Dr Davies. It refers to Mrs Hall as foster mother. The letter refers to WN being admitted on 15 October 1974 following a two week illness. It refers to WN having developed two blisters on her back and thigh which had enlarged. Discharge was said to have been on 18 October 1974.

23. The Claimant asserts that she was the WN so described. She says she still has the mark of the blisters.
24. That point has not been checked in evidence before me.
25. Though the Hospital Registrar's letter is undated, it does appear to me to confirm WN's 1974 hospital treatment and the foster parentage of a Mrs Hall.
26. The Claimant and Hanson say that they were taken by an Aunt Ruth Denaria to Nigeria in about 1977 on the aunt's passport. They were then very young. They do not have a copy of that now late aunt's passport.
27. The Claimant and Hanson say they were joined by their parents in Nigeria in late 1977. At Paragraph 28 they say that they then lived with a maternal grandmother in Warri, Bendel State in Nigeria with four other siblings. They then say that they moved to Sapele Road, Benin City for a few years as their father obtained a job there.
28. The Claimant says, and Hanson confirms, that between September 1979 and June 1984 her primary school was Obaseki Primary School in Bendel State.
29. She produces a testimonial dated 3rd October 1984 from the Headmaster there referring to WN and the age of 11.
30. The Claimant then says that between September 1983 and 1991 her secondary school was Asoro Grammar School in Benin City (then Edo State). She produces copies of 1991 assessment sheets for WN at a senior secondary school in Edo State.
31. On 09 April 2003 the West African Examination Council produced and sent to an officer of the Defendant (Mr Jones) giving verification of examination results for WN in September 1991 at Asoro Grammar School. The letter copied to Mr Jones a September 1991 Senior School Certificate for WN recording grades 8 or 7 in English Language, Biology and Agricultural Science, low grades 7 and 8 being passes.
32. Mr Malik has produced to me the Defendant's Country Background Notes to Nigeria, Version 1.0, May 2019. It explains that in August 1991 Bendel State was split into Edo and Delta States. At Paragraph 6.4 the Note cautions "that Nigeria experiences high rates of document fraud" and that in Benin City practically any falsified document can be produced.
33. The Claimant was tested by Mr Malik on a record obtained from Asoro Grammar School dated 10 July 2016 setting out examination results for three years for WN and the failure/pass rates noted in the letter of 09.04.03 to Mr Jones.
34. I can see that I need caution about accepting that either the records of WN at Asoro Grammar School are genuine, or that they show that the Claimant was WN.
35. The Claimant next says that she was accepted in 1991 for a pre-degree course at what was then Bendel State University, but she did not take it up as her mother had a stroke.
36. She says that in 1995 she spent time with her parents and three siblings with an Aunt Eno Eka in Lagos before returning with her parents to Benin City as her father found another job there.

37. The Claimant says that her father died in September 1995. She produces his Death Certificate.
38. The Claimant says that she failed when 14 to obtain a passport from the British High Commission. She now understands from Hanson that they had not actually made an application for a British passport as they were turned away from the High Commission. The Home Office records the High Commission faxing on 28 February 2002 that there was no trace of WN in their records.
39. The Claimant contends that in about September 1997 she came to the UK using the passport of a friend which had a right of abode on it. She can only accept that she wrongly used such passport.
40. On 9 November 1997 the Claimant made an application for a passport in the name of WN giving a home address of 51 Green Lane, Ilford. Examined by Mr Malik, the Claimant accepts that a Mr George, a Teacher, who countersigned the application and confirmed friendship with her for 15 years on the application cannot have made a true statement in that latter regard.
41. The Claimant says she made the application and that she then had a copy of the WN Birth Certificate which had by then been obtained for her by Hanson. She says that she obtained Passport Number 029495282.
42. By 1998 she said she was residing at 16 Hobbs Mews, Goodmayes from which she says she made an application for Housing Benefit, a record of which could no longer be obtained.
43. The Claimant says that in 1998 she travelled to Holland and obtained employment there.
44. In 2000 the Claimant obtained a temporary six month Passport Number 39373809 on the basis that Passport Number 029495282 was locked in the premises of an Aunt Mabel who was then away in Nigeria. She says the aunt posted Passport 029495282 to her in Holland.
45. In Holland in 2000 the Claimant says she was stopped by a Policeman when she was driving a friend's car and he found her in possession of both passports. She says they were seized and handed to the British Embassy.
46. The records of the SSHD say that the photograph on Passport Number 029495282 had been damaged, though the SSHD apparently is unable now to produce a copy of that passport.
47. The Embassy returned the six month passport to the Claimant. In 2001 she was then issued with a passport with a year validity (Number 704009712).
48. In December 2001 the Claimant applied for a Certificate of a Right of Abode. That was to be refused the following year by reason of a failure to answer a letter of 25 January 2002.
49. The Claimant moved back to London in 2002 and initially lived with Hanson. She applied to renew her passport on 9 May 2002. Her application was refused on 20 June

2002 (by Mr Jones for the SSHD). The refusal observed that a replacement passport was not issued “without conclusive proof of your identity.” The letter noted that the Claimant (as WN) had said that she had lost the passport on which she came to the UK from Nigeria and stated that contact would be made with the British High Commission in Lagos requesting all information they held on WN’s visa or right of abode application. Mr Jones suggested it would be necessary for WN to supply as many of the following documents as possible, the original Birth Certificate, the aunt’s passport she had travelled on when she had left the United Kingdom to travel to Nigeria as a child and her parents’ passports used at the time of her birth.

50. On 28 June 2002 the British High Commission faxed Mr Jones that they had no trace of WN in their records. The Claimant now explains to me that she is informed by Hanson that they attended the High Commission but did not make applications for new passports as they were turned away.
51. On 11 April 2004 the Claimant’s mother attended the High Commission in Lagos. She identified her seven children which included Hanson and WN, the two who were born in England. She did not present documents for herself or WN. She gave a different address as her home when Hanson and WN were born, to that shown on the birth certificate. She says she and her husband then moved with them to a home in Brixton, after some disputes with the Birmingham foster mother. She dated the return with Aunt Ruth to Nigeria as being 1976. On 12 and 13 April 2004 the SSHD through the Passport Service wrote through Mr Jones to the Claimant who was then living at 60a Sydenham Road, Sydenham, London SE20 5QE under the name WN. He observed that the mother’s interview in the British High Commission had not provided the necessary proof of WN’s identity. He made a number of points in connection the inability to resolve the questions concerning the manner in which the Claimant had obtained her first passport and had claimed the identity of WN. Those matters included, first, a record of a report of Passport Number 029495382 on 1 February 2001 as lost or stolen, but it then being presented on 12 February 2001 in a damaged condition for replacement to the British Consulate General in Amsterdam. It noted that on 25 June 2002 the Claimant having claimed (wrongly) to have lived in the UK continuously since birth and then having said she travelled to Nigeria as a young child with an aunt and returned to the UK in 1996 illegally on a Nigerian passport with either a visitor’s visa or a Right of Abode Certificate from the British High Commission in Lagos. He noted that enquiries then showed that no record of an application in Lagos for either a visa certificate or a Certificate of a Right of Abode was held by the British High Commission in Lagos. Further, he recorded that the mother in the British High Commission was unable to confirm how WN had been able to travel to the UK and could not give an address for her here. She apparently provided to the High Commission a number of photographs including recent photographs which appear to have been taken in Holland. She also referred to one photograph as a picture of WN and noted on the back there was “a girlfriend for Ampusan” which the Claimant says is her youngest brother.
52. The Claimant has made a number of further unsuccessful passport applications in December 2006, June 2010, August 2013, March 2017, August 2017 and July 2018. She did not satisfy the SSHD through Passport Officers that she was WN. The last 2018 application was refused on 15 August 2018. By that letter Ms Noel of the Passport Office stated:

“On review of your current application you have failed to provide robust evidence of your age and identity, or provide significant documentation pertaining to your identity and formative years growing up in Nigeria ... Upon the balance of probabilities judgment, HM Passport Office therefore remains unsatisfied as to your identity and will not be issuing passport facilities to you ... Passports are issued when the SSHD is satisfied as to:

- (i) the identity of an applicant; and
- (ii) the British nationality of applicants in accordance with the relevant nationality legislation; and
- (iii) there being no other reason for refusing a passport.”

53. Hanson explains that he came back to the UK in late 1995. He obtained his Birmingham Birth Certificate and applied for a passport which he obtained. He has since renewed and always held a British passport.
54. On 23 August 2005 a then legal representative of the Claimant obtained a report from a Lecturer in Haematology at Barts London Queen Mary School of Medicine and Dentistry.
55. By letter of 23.08.05 it enclosed letters of genetic tests investigated on samples taken from Hanson and WN. It observed that the most likely situation was that they were full siblings that being about 900,000 times more likely than of them being unrelated and 100 times more likely than them being half siblings. The Lecturer said in her opinion that offered sufficient proof that they were full siblings as claimed and indeed full siblings.
56. On 16 November 2004 legal representatives had written to ask whether a DNA report confirming the relationship between WN and her brother would be sufficient for the purpose of conclusively confirming her identity and therefore facilitating the issue of her British passport. On 24 June 2005 the SSHD (Passport Service) observed:

“Although DNA reports may add strength to [WN’s passport application], it is hard to comment whether it would be sufficient to conclude the case. We are interested in seeing documentary evidence that can confirm the identity of [WN], not that she is a sister of a British passport-holder.”

That letter again set out it was interested in seeing the aunt’s passport when WN left the UK to travel to Nigeria as a child, her vaccination/immunisation certificates issued in the UK, her baby book and any other document that evidences a clear a concise account of her travelling activities prior to 1997.

57. On 27 March 2019 the Claimant and Hanson went for testing in the DNA Diagnostics Center. They understood that the DNA Diagnostics Center was approved by the Defendant for DNA testing. The report on 27 March 2019 referred to testing WN and

Hanson on 21 March 2019. It reported that the likelihood of their full siblingship was 99.999995%.

Discussion

58. By the decision of 15 August 2018 that is under challenge by the Claimant, the SSHD again refused her application for a passport. As in relation to previous refused applications dating back to 2002, she had failed to satisfy the SSHD that she is WN. The 2018 decision concluded the Claimant had not provided robust evidence of her alleged identity or significant document pertaining to her identity and formative years growing up in Nigeria.
59. The Claimant has been living here since her return from Holland in 2002.
60. I should note that she has three children born between 2002 and 2007. She has had leave to remain from the SSHD on the basis that the children are British citizens through descent from their father.
61. The SSHD has had reason to question her identity as WN since Passport 029495282 was found damaged when it came into the possession of the British Embassy in Holland in 2000. The Claimant has taken the point that such damaged passport has not been disclosed, but she did not in and after 2001 take issue with its damage. I am satisfied that it was damaged given the constant references made by the SSHD in and since 2000 to its having been damaged.
62. The Claimant did not assist her claim to the SSHD that she was WN (born in Birmingham on 31 December 1973). I have noted various matters adverse to her claim:
 - (1) On 25th June 2002 she initially claimed to Mr Jones (of the SSHD) that she had lived continuously in the UK since childhood. Only then when challenged did she assert that she was taken (with Hanson) to Nigeria with her Aunt Ruth.
 - (2) She had to admit that she had returned to the UK in 1996 illegally on someone else's passport.
 - (3) Her 2002 assertion that she had made an application to the British High Commission in Lagos for a passport was to prove false.
 - (4) She was seeking to renew a damaged passport.
 - (5) The countersignature on the application for that passport had an untrue details of friendship with the Claimant.
63. Further, the Claimant has not been able to provide the SSHD with the original of her birth certificate (she has relied on a copy obtained by Hanson in 1996), a copy of her aunt's passport (which might have confirmed her being taken to Nigeria in 1996 or 1997 as she alleges) or her parents' passports as used at the time of her alleged birth (the copies on which she relies do not confirm her as a child).
64. Yet further, I have noted the need for me to be cautious about whether the school records of WN from Nigeria are genuine or that the Claimant is WN. WN's mother

was interviewed in 2004 in the High Commission in Lagos gave some reasons to question whether the Claimant was in fact WN.

65. Also the Claimant has not produced to the SSHD UK vaccination or immunisation certificates or a baby book from when she was a child in the UK, matters in part explained by her being fostered as a very young infant.
66. Nonetheless, the Claimant claims to be a full sibling of Hanson who was born in January 1973 to their alleged parents. The probability of such siblingship was shown by the letter of 23rd August 2005 from Barts (Paragraphs 54 and 55 above).
67. Mr Fordham QC in giving leave to seek Judicial Review on 17th December 2018 was uncertain what to make of that matter. On 24th June 2005 the SSHD had said that it was interested in documentation confirming the identity of WN, not her position of the sister of a British passport-holder.
68. But on 27th March 2019 the DNA Diagnostic Center reported on the probability of full siblingship between Hanson and the Claimant as being 99.9995% (Paragraph 57 above).
69. Hanson in reliance on his alleged Birmingham birth to the alleged parents in 1973 obtained his British passport which he has since held and renewed without question.
70. It appears to me of some moment that there has been no third party challenge or reason to doubt that Hanson or the Claimant had been the fourth and fifth children of the alleged parents. They are shown on the copy birth certificates.
71. In the light of the points made between Paragraphs 66 and 70 above, the Claimant has satisfied me that she is WN and was born here in Birmingham on 31 December 1973, the name by which she has always been known in the UK. The doubts relating to her childhood records in Nigeria and her credibility to which I have referred, do not, in my judgment, undermine that conclusion. I consider the Nigerian records can be relied upon by the Claimant as consistent with her claim to be WN, albeit they have questionable weight when viewed alone. The Claimant and Hanson appeared to me to be giving their relevant evidence in a straightforward manner, which did not seek to deceive.
72. Accordingly, I consider I should declare the Claimant as a British citizen born in Birmingham, UK on 31 December 1973 and is, on the evidence before me, entitled to a United Kingdom passport.
73. I do not consider that I should quash the decision of 15th August 2018 that involved SSHD not being satisfied that the Claimant was WN. But the Claimant had yet to obtain the confirmatory evidence from the DNA Diagnostic Center which has helped in conclusion on the full siblingship my decisions as a finding of fact on the evidence before me.
74. It appears to me that it would be for the SSHD to take account of this decision on any further application by the Claimant for a new passport.

75. On the handing down of this Judgment, I shall make the declaration I have indicated and I shall direct that the Claimant and the SSHD shall have 14 days to make to me on paper, any consequential applications for costs or permission to appeal.