Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23460/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st November 2017	**On 28th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

OLUBUKOLA [A]
(ANONYMITY DIRECTION NOT MADE)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Claimant: Ms N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr A Adetoye, Legal Representative of DPD Legal Services

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Rowlands promulgated on 5th July 2017 in which he allowed the Claimant's appeal against the Respondent's decision to refuse her application for leave to remain in the United Kingdom. Judge Rowlands within his decision noted that the Claimant had a son and that the Claimant's evidence was that [YM] was the father of her son and that she had not had sexual relationships with any of his relatives.

2. The judge noted that there was DNA evidence in the case which had been prepared by a retired haematologist. The Judge found at paragraph 14 that the Claimant was a competent, truthful and compelling witness and he

found that having looked at the DNA report and specifically issues raised by the Respondent, he was not convinced by the validity of the Respondent's points concerning the haematologist being retired and found the fact that someone was retired did not make them any less capable of taking the particular samples, and he found that at the end of the DNA report it was said that from the analysis it was not impossible to exclude other relatives from being the alleged father, i.e. his father, brothers or sons as being the father of the child. However, the judge found that that he had heard evidence from the Claimant whom found him to be a credible witness and accepted that she had never had sexual relations with anyone other than the father of the child and that he was prepared to accept that she was telling the truth in that regard, and that he was satisfied with her evidence and the DNA report and that the evidence pointed to [YM] being the father of the child, Judge Rowlands so found.

3. The judge noted that there did not seem to be any challenge to the fact that [YM] was a British citizen and therefore went on to find that he was satisfied that the child [A] was a qualifying child, but he noted that even if there were doubts about the DNA evidence, there was also evidence of the birth certificate. He accepted the fact that a claimed father has to be present at registration in order for his name to be put on the birth certificate and that can be done either at the time of registration or later, as he found happened in this case. He found that although it was clear that although he was prepared to do the right thing by the child by coming back to complete the registration process, it was difficult for him to be persuaded to come back to do the right thing, as far as the DNA test was concerned. In that respect the Claimant had had to go and pay for him to be brought back for the DNA test to be carried out.

4. The judge found at paragraph 16 that there was a qualifying child who was a child entitled to British citizenship and in the alternative who had resided in the UK for a sufficient length of time.

5. At paragraphs 17 and 18 the First-tier Tribunal Judge went on to consider Section 117B of the 2002 Nationality, Immigration and Asylum Act and found that it would not be reasonable to expect the child to leave the UK to go with his mother to Nigeria and in those circumstances, there being a qualifying child pursuant to Section 117B(6), and it not being reasonable for the child to leave the UK, that the Claimant's appeal should succeed.

6. The Secretary of State has now sought to appeal against that decision for the reasons set out within the Grounds of Appeal. Within the Grounds of Appeal three grounds are argued. Within Ground 1 it is argued that the judge erred by relying upon the birth certificate and failed to have regard, it is said, to Section 9 of the Nationality, Immigration and Asylum Act 2003 which amended the British Nationality Act 1981 regarding the fact that the child's passport had been revoked on the basis of the father's details not being entered within twelve months after the child's birth. It was argued that the judge failed to give weight to that relevant matter, and that given the issue raised by the Respondent regarding the DNA results and revocation of the child's passport it was argued that cumulatively that would have had a material impact upon the hearing and the revocation of

the passport should have been a relevant factor in the proportionality assessment.

7. Within Ground 2 it is argued that the Claimant took no steps to inform the judge that the child's passport had been revoked and reliance was placed upon the case of **R (on the application of Mohammad Shahzad Khan) [2016] EWCA Civ 416**. It was argued that there was a duty upon her to inform the judge that the child's passport had been revoked despite, it was argued, the Claimant had been made aware of the decision of the HM Passport Office to revoke her son's passport, which decision letter was said to have been sent to the same address as the notice of the Tribunal's decision. It is argued that that caused an unfairness in the hearing leading to procedural irregularity, given what is argued to be a lack of candour from the Claimant.

8. In the third Ground of Appeal it is argued that the judge has failed to give any adequate reasons for finding that the Claimant's son would face difficulties upon returning to Nigeria in light of his educational needs (paragraph 18 of the decision). It is argued that the judge has merely allowed the Claimant's appeal on a whim and has failed to give sufficient reasons and adequate reasons for his finding. Reference is also made then to the case of **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00194 (IAC)** and **EV (Philippines) [2014] EWCA Civ 874**. It was argued that the period of seven years from the age of 4 is given weightier consideration than the first seven years of life and that the UK does not have a responsibility to educate the world.

9. I am also grateful for the skeleton argument submitted this morning by Mr Adetoye, Legal Representative for the claimant and for the helpful submissions made by Ms Willocks-Briscoe on behalf of the Secretary of State and Mr Adetoye, Legal Representative for the claimant.

10. Together with his skeleton argument Mr Adetoye this morning submitted a further bundle of documents and at this stage only two are relevant for the error of law hearing, given that they are actually documents sought to be relied upon by the Secretary of State, namely two letters from HM Passport Office, the first dated 23rd June 2015, and the second dated 29th July 2015 sent to the Claimant at her address at [ ] Elstree regarding the revocation of [A]'s passport (her son). Within the letter of 23rd June 2015 it was said that evidence of proof of paternity requires the father's details to be registered on the birth certificate within twelve months of the birth, which was said not to have been done and said in that letter that the passport would be revoked within 30 days as there was no evidence that [A] had direct entitlement to British citizenship.

11. Pursuant to Section 9 of the Nationality, Immigration and Asylum Act 2003 a child's father is the husband at the time of the child's birth, or a person who is treated as a father of the child under Section 28 of the Human Fertilisation and Embryology Act 1990, or where neither sub-section (1) or (2) applied, a person who satisfied certain requirements regarding proof of paternity. Under Regulation (3) of the British Nationality (Paternity)

Regulations, paternity is always established where the person is named as the father of a child in a birth certificate issued within one year of the child's birth, or if the person satisfies the Secretary of State that he is the father of the child. For the purposes of (b), where the person satisfies the Secretary of State that he is the father of the child, the Secretary of State may have regard to evidence including DNA test reports and court orders. The letter of 29th July 2015 indicated that the passport for the child had been revoked on HMPO systems.

12. Although the Secretary of State seeks to rely upon those two letters, Ms Willocks-Briscoe cannot actually confirm to me that either of those letters were actually before First-tier Tribunal Judge Rowlands as at the date of the hearing before him. Indeed although certain reference to various documents is made within the Respondent's documentation as to what was before the Tribunal, that did not seemingly include those two letters, and although within the original file there was reference to various e-mails regarding a proposal to cancel the passport from the passport office, Judge Rowlands himself noted at paragraph 11 of the decision that it had been accepted that there was no evidence of the fact that the passport had been revoked. Clearly if those letters had been handed up by the Secretary of State at the hearing, then the judge would not have made that finding, and in light of the evidence that there is no evidence to show that in fact those letters were before Judge Rowlands I find that in fact those letters were not actually before the judge. As Ms Willocks-Briscoe concedes, it appears that they were actually submitted along with the Grounds of Appeal subsequent to the decision before the First-tier Tribunal. In such circumstances I do not accept that the learned First-tier Tribunal Judge could be criticised for having failed to take account of letters which were not before him, and the evidence before him as stated in paragraph 11 of his decision was that there was no evidence the passport had been revoked, although clearly there was e-mail correspondence indicating that it was likely to be.

13. Permission to appeal in this case has been granted by Designated Judge McClure on 21st September 2017. He found that the Respondent had produced documentation to substantiate the child's British status as a British citizen had been revoked and the passport had been revoked and it was also for the Respondent to show that the Claimant was aware of such. However, he found that in light of the case law relied upon, **Mohammed Shahzad Khan**, the Grounds of Appeal could be argued.

14. I am grateful also, as I have said, for all submissions of both parties. Ms Willocks-Briscoe on behalf of the Secretary of State argues that there was a duty of candour upon the Claimant and again relies upon the **Mohammed Shahzad Khan** case in that regard. Although she could not point me to any authority in terms of the points, she argued that the duty of candour extended to all proceedings and not just judicial review proceedings or proceedings for an injunction. But was not able to indicate any authority or support for that submission either within the actual judgment itself or any other case or statute. She says that the Claimant should not be seeking to mislead the Tribunal and has a duty of candour in all cases and sought to argue that the Claimant's case was that her child

was a British child despite, she argued, that the mother was aware that the passport had been revoked. She referred me to paragraphs 12 and 13 of the Claimant's statement which dealt with the situation regarding the passport when I asked as to what the actual evidence from the mother was regarding the passport and as to whether or not the Claimant had sought to deceive the Tribunal regarding the status of her son, in respect of the passport application. Ms Willocks-Briscoe further that the judge's findings regarding whether or not the child was a British citizen were not clear. She conceded that if the child was a British citizen then Ground 3 of the Grounds of Appeal did not apply because it was not being argued by the Secretary of State that it would be reasonable to expect a British citizen child to leave and it was only if the judge was looking at it on the basis of a child being here more than seven years, then she argued that the judge's findings regarding whether it was reasonable for the child to leave were not adequate. As I have said above, she conceded that if the judge's reasoning regarding the child being a British citizen was adequate, then she was not seeking to argue that the reasons for whether it was reasonable to expect the child to leave or not had been inadequately argued.

15. In reply Mr Adetoye sought to rely upon his skeleton argument which I have fully taken account of and considered. He argues that there is no material error of law in the case and seeks to argue that the judge gave fully adequate and proper reasons in respect of the consideration of the DNA evidence and for his findings that the child was a British citizen. He sought to argue that the Claimant in her statement had not in any way sought to deceive the Tribunal and was simply putting forward an assertion that the child's passport had been revoked, but had been incorrectly revoked on the basis that the child was a British citizen, which the Claimant argued was being established on the basis of DNA evidence.

16. Judge Rowlands at paragraph 10 of his decision had noted the submissions made by the Secretary of State's representative at the First-tier Tribunal, the reasons in the refusal letter being relied upon and noted there was a challenge to paternity of the Claimant's son, and consequently to his right to British citizenship, and to the fact that it was being argued by the Secretary of State that the DNA analysis was unreliable for various reasons, including the fact it was said to be prepared by a retired person and that a clause in the report did not exclude others from being possible fathers.

17. However, Judge Rowlands at paragraph 14 of his decision went on to find that the Claimant was a competent, truthful and compelling witness. He found that he had looked at the DNA report and specifically the issues raised by the Respondent and found that he was not sure as to what the validity of the point concerning the retired haematologist was and the fact that someone was retired did not make them any less capable of taking the particular sample, whether they were responsible for the analysis or not. Quite clearly that was a finding open to the judge on the evidence. Further, the judge looked at the argument regarding the question of whether or not there were other possible fathers and noted the fact that the DNA report did not exclude other male relatives as being the father,

but the judge found that he had heard evidence from the Claimant who he found to be a credible witness and accepted that she had never had sexual relations with anyone other than [YM], and therefore accepted that on the basis of that evidence and in the light of the DNA report that [YM] was the father of the child.

18. The judge then found that there was no challenge to the fact that [YM] was a British citizen, and therefore was satisfied that [A] was a qualifying child. On that basis the judge when making his initial finding that [A] was a qualifying child in terms of being a British citizen has looked at and relied upon the DNA evidence and I find he has given adequate and sufficient reasons for his findings in that regard. The DNA result gave a chance of paternity of 99.994% compared with a randomly selected individual who was not one of the other potential male relatives of [YM] who may have been the father. However, the judge in that regard accepted the evidence of the Claimant and it is not an error of law for the judge to find a Claimant to be a truthful or credible witness. It is a matter for the judge having heard the evidence before him.

19. The judge went on to find that even if there were doubts about the DNA test there was also evidence of the birth certificate and he accepted that a claimed father has to be present at registration in order for his name to be put on the birth certificate or done at a later time, as he found happened in this case. In this case it appears that although [YM] was actually put on and named on the birth certificate for the child, the argument raised by the Secretary of State was the fact that that had actually not occurred until after twelve months after the birth, and that therefore the father's name had been incorrectly put on the birth certificate at that point in time, because it was outside of the twelve month initial period. This, argued the Secretary of State, was what then led to the child's British passport being revoked.

20. However, the letters from June and July referred to now were not before First-tier Tribunal Judge Rowlands and he specifically noted that it was accepted there was no evidence that in fact the passport had been revoked and the only evidence before him were e-mails at that stage indicating the passport was likely to be revoked. It is not an error of law for a First-tier Tribunal Judge to fail to consider evidence that was not actually placed before him. He could only look at the evidence before him. In that regard I bear in mind the fact that the Secretary of State seemingly had not asked for an adjournment in order for that evidence to be obtained.

21. Although within the Grounds of Appeal it is argued that the judge wrongly relied upon the birth certificate and that the judge failed to give weight to the relevant matter of the fact that the child's father's details were not correctly entered within twelve months of the child's birth, the situation appears to be that the child's father's name had been entered on the birth certificate outside of that twelve month period but he was named on that birth certificate. However, the judge's primary findings in respect of the parent was based upon the DNA evidence and the acceptance of the

Claimant's evidence. The reference to the birth certificate was simply an additional factor, but was not the reason for the judge's finding.

22. Although it is argued by the Secretary of State within Ground 2 of the Grounds of Appeal that the Claimant took no steps to inform the judge that the child's passport had been revoked and reliance was placed upon the case of **R (on the application of Mohammad Shahzad Khan) [2016] EWCA Civ 416** he said that there was a duty of candour and there was a lack of candour from the Claimant, which is argued because all was expected to be given to the Tribunal. The case of **R (on the application of Mohammad Shahzad Khan) v Secretary of State for the Home Department [2016] EWCA Civ 416** was in that case actually dealing with a judicial review application and was a consideration as to whether or not the duty of candour which applied in applications for an injunction extended to claimants to assist the courts for an accurate explanation as to all factors in respect of a judicial review application. Reference was made in the judgment to the fact that in the previous case of **R (on the application of Bilal Mahmood) v Secretary of State for the Home Department [2014] UKUT 00439** in the decision of Mr Justice McCloskey that the duty of candour is a duty to disclose all material facts in judicial review proceedings applies to all parties in those proceedings. That again was a reference to the situation of a judicial review application.

23. The current appeal before the First-tier Tribunal was not a judicial review case and clearly judicial review cases as with injunctions do have special considerations applying to them, with special duties on candour on the parties making the applications. I therefore do not accept that that is an authority that a duty of candour to that same extent or nature applies to every single case before the Immigration Tribunal of the First-tier, although quite clearly Claimants should not be seeking to deceive or to mislead the Tribunal in their considerations, but the extent to which every single possible negative feature of a case needs to be brought out and pointed out specifically to a Tribunal Judge in what is an adversarial process in respect of a statutory appeal.

24. However, in any event, when one looks at the statement of the Claimant before the First-tier Tribunal, at paragraphs 12 and 13 of the witness statement she concedes within that statement that the father's details were not included on the birth register within twelve months of birth, but goes on to argue that her son's biological father is [YM] who was a British citizen at the time of the birth, and that he was therefore born to a British citizen. In paragraph 13 she comments specifically that although her son's British passport was, she argues, incorrectly revoked by HM Passport Office at the instance of the Respondent, on the basis that the father's details were not included on the birth register within twelve months, she asserts that subsequent DNA paternity testing indicates that [YM] is the father of her son. That in that regard is effectively a submission which his also a concession that the passport had been revoked, although she argues incorrectly revoked on the basis that the father was actually a British citizen.

25. In light of those paragraphs I do not find, in any event that the Claimant has in any way sought to deceive or mislead the First-tier Tribunal in any way, or even if there was a duty of candour upon her as to the extent argued by the Secretary of State, I fail to see how any such duty could be breached in this case where she correctly has conceded within her statement that the father's details were not included on the birth certificate within twelve months and that the passport had been revoked as a result. It was simply her argument that the revocation was incorrect, given that there was a British citizen father.

26. In such circumstances I find that the First-tier Tribunal Judge, on the basis of the evidence before him, has given clear, adequate and sufficient reasons for his finding that the Claimant's child was a British citizen and that [A] was a qualifying child on the basis of being a child of a British citizen, [YM].

27. I therefore find that there is no merit in the Secretary of State's first and second Grounds of Appeal and simply amounts to a disagreement with the conclusions reached by the Judge.

28. As quite properly conceded by Ms Willocks-Briscoe on behalf of the Secretary of State, if I was to find that the judge properly found that the child was a British citizen, then it was not being sought to be argued by the Secretary of State that it would be reasonable to expect the British child to leave. For the reasons set out above I have found that the judge was entitled to find that the child is a British citizen and that was a finding open to him on the evidence. In such circumstances the third ground of appeal lacks merit. There is no material error in the decision of First-tier Tribunal Judge Rowlands and I therefore maintain the decision. I therefore dismiss the Secretary of State's appeal against that decision.

Notice of Decision

29. The decision of First-tier Tribunal Judge Rowlands does not contain any material error of law and is maintained.

30. I make no order in respect of anonymity. No such order having been made by the First-tier Tribunal and no such order having been sought before me today.

Signed Date 22nd December 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty