Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/27714/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 21 February 2019

Decision & Reasons Promulgated
On 27 February 2019

Before

UPPER TRIBUNAL JUDGE FINCH

Between

TEJUMOLA ZAINAB CASSIMORELOPE

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr. E. Pipi of counsel, instructed by Devine Solicitors

For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Nigeria. She entered the United Kingdom in 2009 on a passport which was not her own. Her son was born in the United Kingdom on 4 February 2016 and he was issued with a British passport on 17 February 2016. She applied for leave to remain in the United Kingdom on 22 March 2016 on the basis that her son was a British citizen. However, his British passport was revoked on 1 November 2016 and her application for leave to remain

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was refused on 13 December 2016. She appealed against this decision and First-tier Tribunal Judge Devittie dismissed her appeal in a decision promulgated on 13 April 2018. First-tier Tribunal Judge Birrell granted her permission to appeal on 13 July 2018.

2. The error of law hearing came before me on 3 September 2018 and I adjourned the hearing and made a number of directions.

3. The Appellant's appeal hearing was initially set down for 3 September 2018 and on that date the Home Office Presenting Officer, Ms Fijiwala, conceded that the Respondent may have made an error in so far as it had not taken into account the divorce certificate issued to the Appellant by the Judiciary Department of Ibaden South-East Local Government on 11 August 2015. The Home Office also stated that she would undertake the necessary enquiries about the validity of the divorce certificate. The Appellant was also directed to file and serve any further evidence relating to her divorce. On 14 November 2018, she filed a letter from Ibadan South-East Local Government, dated 21 November 2018, which said that the divorce certificate was genuine and attached a certified copy of the certificate. On 14 December 2018, she also filed and served a Cellmark DNA Test Report, dated 12 July 2016, which confirmed that her son was related to [OB], as claimed.

4. At the adjourned hearing on 17 December 2018, the Respondent was represented by Ms J. Isherwood and she explained that he had not been able to comply with the directions as the previous Home Office Presenting Officer was now on maternity leave. She also explained that, as the Respondent's IT system had malfunctioned last week, she had not been able to access the evidence provided by the Appellant in order to assess it. Therefore, the hearing was adjourned for a second occasion and further directions were made. On 21 January 2019, Ms Isherwood emailed the Upper Tribunal stating that the Respondent had not been able to verify the Appellant's divorce certificate.

ERROR OF LAW HEARING

5. Counsel for the Appellant submitted that it did not matter whether the Appellant was married or not, as section 1 of the British Nationality Act 1981 stated that a person was a British citizen if one of his or her parents was a British citizen or settled in the United Kingdom at the time of his or her birth. The Home Office Presenting Officer responded by referring to other relevant provisions in the British Nationality Act 1981. The Home Office Presenting Officer also clarified her email, stating that the Respondent did not submit that the divorce certificate relied upon by the Appellant was not valid or authentic. He had simply not had to time or resources to verify it.

ERROR OF LAW DECISION

6. The Appellant's son's birth certificate, which was issued on 8 February 2016, names [OB] as his father and the Appellant accepts that she was not married to [OB] at time of her son's birth or subsequently. Section 1(1) of the British Nationality Act 1981 does state that:

> "A person born in the United Kingdom after commencement…shall be a British citizen if at the time of the birth his father or mother is
>
> (a) A British citizen; or
>
> (b) settled in the United Kingdom".

7. At the time of the Appellant's son's birth, [OB] was a British citizen, as is evidenced by his passport.

8. But the Appellant still had to show that as she was not married to him, he qualified as her son's "father" for the purposes of section 50(9A) of the British Nationality Act 1983, which states that:

> "(9A) For the purposes of this Act a child's father is—
>
> (1) the husband, at the time of the child's birth, of the woman who gives birth to the child, or
>
> (2) a person who is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 (father) or
>
> (3) where neither (1) or (2) apply, any person who satisfies prescribed requirements as to proof of paternity."

9. For the purposes of sub-section (3), regulation 2 of The British Nationality (Proof of Paternity) Regulations 2006 states that:

> "The following requirements are prescribed as to proof of paternity for the purposes of section 50(9A) of the British Nationality Act 1981-
>
> (a) the person is named as the father of the child in a birth certificate issued within one year of the date of the child's birth; or
>
> (b) a person satisfies the Secretary of State that he is the father of the child. For the purposes of (b), the Secretary of State may have regard to any evidence including DNA test reports and court orders".

10. In this case, [OB] was named as the father on the Appellant's father's birth certificate within one year of his birth. In addition, on 20 December 2016, Fairview Solicitors had forwarded a

copy of a Cellmark DNA Test Report, dated 20 December 2016, which confirmed that [OB] was the Appellant's son's biological father. (This report had been provided to Fairview Solicitors on 11 July 2016 but had not been sent to the Respondent with the application for leave. I have presumed that this was because they had chosen to rely on the fact that her son had been issued with a British passport.) The Respondent now accepts that this is sufficient proof of paternity. Therefore, [OB] is the Appellant's son's father and her son is a British citizen by reason of his birth, unless his mother was married to her previous husband at the time of his birth.

11. By the time of the hearing before First-tier Tribunal Judge Devittie, HM Passport Office had written to [OB] stating that it had come to light that the Appellant was married to someone else and stating that the Appellant's son's passport had been revoked on the basis that he had no entitlement to such a document. At the appeal hearing, counsel for the Appellant tried to draw a distinction between entitlement to British citizenship, which derives from the British Nationality Act 1981, and the issuing of a passport to provide evidence of such citizenship. However, First-tier Tribunal Judge Devittie did not accept that there was such a distinction. Instead, in paragraph 10 of his decision, he found that "in my understanding of the decision of the Secretary of State, the withdrawal of the passport is predicated on the withdrawal of citizenship". In paragraph 11 of his decision he added:

> "I have not had the benefit of fully researched argument … I do not consider it necessary, for present purposes, to reach a definitive opinion on whether the actions of the Secretary of State in purporting to withdraw the child's citizenship are legally valid. I say this because the position as of the date of this decision is that citizenship has been withdrawn".

12. First-tier Tribunal Judge Devittie did not refer himself to the text of the British Nationality Act 1981, which indicated that if his mother was not married at the time of his birth, he acquired British citizenship at birth. He also failed to take into account the letter HM Passport Office, dated 1 November 2016, that clearly stated that "British citizenship is a matter of law and therefore not one which HM Passport Office has any discretion on".

13. I accept that the Respondent does have the power to deprive a person of British citizenship under section 40(3) of the British Nationality Act 1981 if he "is satisfied that the registration or naturalisation was obtained by means of –

    (a) fraud;

(b) false representation, or;

(c) concealment of a material fact".

14. But there is no indication that this has happened. The only action has been that undertaken by HM Passport Office to withdraw his British passport. This action did not impact on whether or not the Appellant's son is a British citizen.

15. For all of these reasons First-tier Tribunal Judge Devittie erred in law when he found that the Appellant's son was no longer a British citizen because his British passport had been revoked.

16. In addition, First-tier Tribunal Judge Devittie relied on the assertion in the letter from HM Passport Office that the Appellant was married to her previous husband at the time of her son's birth. This allegation was not particularised or accompanied by any evidence, First-tier Tribunal Judge Devittie also failed to give any weight to the fact that there was a certified true copy from the Judiciary Department of Ibadan South-East Local Government, dated 11 August 2015, that indicated that the Appellant had been divorced by her former husband on that same day.

17. When considering the authenticity of this document, First-tier Tribunal Judge Devittie should have considered the totality of the evidence, as found in paragraph 35 of *Ahmed (Documents unreliable/forged) Pakistan** [2002] UKIAT 00439 where the Upper Tribunal said that:

> "In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing)".

18. The First-tier Tribunal Judge failed to undertake this exercise but merely relied on an assertion made in a letter from HM Passport Office. This amounted to a further error of law.

19. The Home Office Presenting Officer relied on the fact that in paragraph 15 of his decision, First-tier Tribunal Judge Devittie also found that:

> "Even if it were the case that the Appellant's child is a British citizen, my assessment of proportionality, for the reasons I have mentioned in relation to the adverse immigration history of the Appellant, would mean that the balance would sway against the Appellant … [and] it would be reasonable to expect the

Appellant and her child to leave the United Kingdom, even if her child is a qualifying child on account of his citizenship".

20. First-tier Tribunal Judge Devittie did record the immigration history provided by the Appellant in paragraph 4 of his decision. He also referred to some of her oral evidence in paragraph 5 of his decision. From paragraph 6 he also considered whether she was entitled to leave to remain. However, in paragraph 12 of his decision, when considering the Appellant's son's best interests, he went no further than noting that he was barely two years old and was of an age when there would be very little difficulty in him adjusting to life in his new environment.

21. He did not remind himself of the weight to be given, in the alternative, to British citizenship or the fact that a child should not be held responsible for a parent's poor immigration and criminal history.

22. Therefore, it is arguable that the proportionality assessment was not lawful.

23. As a consequence, I find that First-tier Tribunal Judge Devittie did make errors of law in his decision.

Decision

(1) The Appellant's appeal is allowed.

(2) The decision of First-tier Tribunal Judge Devittie is set aside.

(3) The appeal is remitted to Taylor House for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judges Devittie or Birrell.

Nadine Finch

Upper Tribunal Judge Finch

Signed Date 21 February 2019