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United Kingdom - AS (AP) v. Secretary of State for the Home Department

The case concerns an application for asylum by a Cameroonian national, a single mother with a child born in the UK. The applicant claimed that the child's father was a German national exercising his EEA treaty rights in the UK, and that the child may accordingly be a British citizen. The Court of Session held that the Upper Tribunal erred in not adjudicating an application for directions filed by the applicant to obtain documents to ascertain the father's nationality. In respect of the documents required, the court held that there was no duty to enquire on the part of the Secretary of State, to identify and produce appropriate documents. The court also noted that the applicant's situation as a single mother with a child who would be without family support was a material consideration in assessing her claim for asylum.

Case name (in original language) : AS (AP) v. Secretary of State for the Home Department
Case status: Decided
Case number: XA90/20
Citation: [2022] CSIH 16
Date of decision: 16/03/2022
State: United Kingdom
Court / UN Treaty Body: Court of Session (Scotland)
Language(s) the decision is available in: English
Applicant's country of birth: Cameroon
Applicant's country of residence: United Kingdom
Legal instruments: European Convention on Human Rights (ECHR)
Key aspects: Acquisition of nationality, Burden of proof, Deportation and removal
Relevant Legislative Provisions:

The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules, 2014, Rule 2, Rule 4

The Tribunal Procedure (Upper Tribunal) Rules, 2008, Rule 2, Rule 5

Facts

The appellant is a national of Cameroon who came to the UK as a student in 2013. Her daughter was born in the UK in 2015. Mr. Ekemba, named as the father on the birth certificate, was a national of the Democratic Republic of Congo. The appellant, who had separated from him in 2016, claimed that he had previously acquired German nationality and was exercising his EEA treaty rights in the UK. (Para 1-2)

In 2016, the appellant claimed asylum due to fear of abuse by her father if she were to return to Cameroon. The First Tier Tribunal ('FtT') dismissed the claim, finding, *inter alia,* that there was no reliable evidence to indicate that the appellant could not live safely in a different part of Cameroon to her family home, and that no reliable evidence had been produced of the father's nationality. The FtT, by its decision of 25 August 2017, found that the child was not a British citizen. (Para 3-5)

Permission to appeal to the Upper Tribunal ('UT') was granted on the basis that, *inter alia,* it was unclear whether the child was an EEA national. The UT issued directions to the appellant's agents to gather more information about the nationality of the child and her father, in the best interests of the child. (Para 7-8)

The appellant proposed that various directions should be issued to the respondent and various other governmental departments to secure information held about Mr. Ekemba that might show his nationality, his exercise of EU treaty rights, his occupation, and any benefits claimed. This application was not determined. The UT found that the appellant had not shown that she had exhausted reasonable enquiries and it held that the respondent did not have a duty to investigate the appellant's claims about the child's father's nationality. (Para 9-10)

Despite greater information about the father being available at this stage of the proceedings, the UT did not consider this information. It found instead, that the new information could have been ascertained by the appellant at an earlier stage. The UT held that the FtT's decision was a legally adequate resolution of the claim, as the FtT did not act in error on the basis of the materials before it. (Para 10-11)

Permission was granted to appeal the UT's decision before the Court of Session on the following grounds:

1. The UT was wrong to find that there was no duty on the part of the respondent to investigate or produce evidence of the nationality of the appellant's daughter;
2. The UT acted irrationally and unfairly in declining to consider the evidence put before it on a point which the UT itself had decided was necessary to obtain in the best interests of the child; and
3. The UT was wrong to find that the FtT's decision on internal relocation was accurate. (Para 12)

Legal arguments by the applicant

The appellant argued that her child's father, Mr. Ekemba was a German national exercising free movement rights in the UK at the time of her daughter's birth and depending on how long he had been doing so, the child may be entitled to British citizenship. Even if it could only be established that the father was a German national, the child would have been entitled to German nationality, and would have a human rights claim not to be returned to Cameroon, under Article 8 of the ECHR. (Para 13)

The appellant submitted evidence of Mr. Ekemba being listed as a German national in certain applications to register companies. Addresses in England were provided, and information was available to infer that he had claimed child benefits. In an interview for an oral history project, Mr. Ekemba had identified himself, and described, *inter alia,* his ability to maintain a student loan as a European citizen. (Para 14) The appellant submitted that in these circumstances, the respondent's duty to enquire had been engaged, as she would be able to verify claims by reference to reliable sources. (Para 16)

The appellant submitted that the information to resolve the question of the child's nationality was available before the UT, and it was irrational and procedurally unfair for the tribunal to dispose of the appeal, where the evidence before it might allow that issue to the determined. (Para 17)

The appellant further submitted that the FtT failed to take account of the risks she faced in Cameroon, and that the objective evidence available could not have supported the FtT's conclusion. The UT failed to address the submission that the

evidence available was in relation to lone women rather than single mothers and repeated the mistake made by the FtT by characterising the appellant as an independent educated woman. (Para 18)

Legal arguments by the opposing party

In respect of the duty to enquire, the respondent (the Secretary of State for the Home Department) submitted *inter alia* that in the present case, the appellant sought that the documents be identified and produced by the respondent rather than verified. The documents concerned were not intended to advance a claim under Article 3 ECHR, but bore upon the appellant's daughter's nationality, a matter engaging Article 8 ECHR. The duty to make enquires identified in the case law relied upon was a limited one which could only arise where an appellant sought protection on the basis of Article 3 ECHR. The respondent conceded that the UT's failure to engage with the application to propose directions, prior to disposing of the case constituted a material error of law. She did not concede that she should be directed to make any or all of the enquiries identified. The respondent also acknowledged that there was an apparent contradiction between the decision in July 2019 that findings in relation to the child's nationality might be necessary, and the decision in November to take no account of the evidence then available on that subject. In relation to the third ground of appeal, the respondent submitted that the FtT had taken account of the appellant's personal circumstances and had found that it was possible for her to establish herself as an independent educated woman. This was an assessment of fact which the FtT was entitled to reach. (Paras 18-25)

Decision & Reasoning

The court examined the rules concerning the FtT and UT to find that either Tribunal possesses the power, on application made to it, to require the Secretary of State (as a party) to provide information or evidence. The power is a discretionary, case management power that imposes a limited duty of disclosure on the Secretary of State. The court relied on *NA v. Secretary of State,* and *CM (Zimbabwe) v. Secretary of State for the Home Department* [2013] EWCA Civ 1303.

The court further relied on *Singh v. Belgium* (ECHR, 2013), *Tanveer Ahmed* [2002] UKIAT 00439, and *PJ (Sri Lanka) v Secretary of State for the Home Department* [2015] 1 WLR 1322 to elaborate on the scope of the duty to enquire. The case law makes it clear that an obligation can arise exceptionally, requiring the Secretary of

State to make pro-active enquiries of an institution, organisation or individual, about the nature or content of a document which has been provided by the applicant. This is an obligation which is different in nature and scope from any duty to provide disclosure of material held by the Secretary of State in her records and which might be of assistance to an applicant's claim.

The court noted that the decision in *AR v Secretary of State for the Home Department* [2017] CSIH 52 was not in conflict with the scope of the duty described above. (Para 36)

The court further noted that the *Singh v. Belgium* line of authority had only thus far been applied in the context of Article 3 of the Convention, while the present case concerned Article 8. The court held that while there may be some situations involving a claim under Article 8 in which an appellant seeks to rely on a document which he or she produces, which goes to the heart of the claim, the present appellant's case could not be seen as meeting that threshold. (Para 37)

The court held that no duty of enquiry into the nationality of the appellant's daughter arises as a consequence of the jurisprudence relied upon. (Para 39)

The court accepted the concessions of the respondent that the UT erred in law by proceeding upon the view that the appellant had failed to pursue reasonable enquiries of her own, and in not determining the appellant's application for directions. (Para 42)

The court noted that the appellant's situation as a single mother with a child who would be without family support was a material consideration in assessing whether she would find herself destitute on return, and accordingly was material to the determination of the Article 3 assessment required to be carried out. The court therefore accepted the submission that the FtT erred in law by failing to give adequate reasons for its finding on this material matter and that the UT subsequently erred in law by failing to recognise this. (Para 47)

Decision documents

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Outcome

The appeal was allowed and the decision of the UT was set aside. The case was remitted to the UT to determine the application made to it in terms of the UT Rules and to reconsider the appeal against the FtT's decision in light of this opinion, and

any material which may emerge in the event of the application being granted. The court also directed that the UT which determines the application and reconsiders the appeal should not include the judge who had previously adjudicated the case. (Para 48)

Caselaw cited

MST & Others [2016] UKUT (IAC) 337

CM (Zimbabwe) v. Secretary of State for the Home Department [2013] EWCA Civ 1303

Singh & Ors. v. Belgium, No. 33210/11 (ECHR, 2013)

Tanveer Ahmed [2002] UKIAT 00439

PJ (Sri Lanka) v Secretary of State for the Home Department [2015] 1 WLR 1322