Neutral Citation No: [2020] NIQB 44 *Judgment: approved by the Court for handing down (subject to editorial corrections)** *Ref:* **KEE11246** *Delivered:* **8 April 2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY FM AND JM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS TAKEN BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND HER MAJESTY'S PASSPORT OFFICE

KEEGAN J

Introduction

[1] This application for leave to apply for judicial review is comprised in an amended Order 53 Statement of 4 March 2020. It is brought by a father and son in relation to decisions made about their nationality/entitlement to a passport. I have anonymised the case as the second named applicant is a child.

[2] Counsel have asked me to deal with the leave application on the papers and I am grateful to them for the written arguments they have provided. Mr Mercer QC and Ms Fionnuala Connolly BL appear on behalf of the applicant and Mr Philip Henry BL on behalf of the proposed respondents.

Background

[3] In broad compass, this case relates to the refusal of the Secretary of State for the Home Department ("SSHD") to provide the applicant, a national of Bangladesh and a holder of a British passport at the date of application, with a formal British citizenship recognition by certificate or formal declaratory correspondence or otherwise. It is claimed that the decision was made in and around 26 April 2019. Subsequently the British passports held by the applicant and his son, the second-named applicant, were revoked by Her Majesty's Passport Office ("HMPO") by decision letters of 10 October 2019. Consequently the judicial review is brought against two proposed respondents in relation to an evolving series of events.

[4] The history of this case is both convoluted and unusual. For the purpose of this leave hearing I will only provide a summary of the relevant facts as follows. The first applicant's case is that he arrived in the United Kingdom from Bangladesh in 1984 on a Bangladeshi passport as a child when he was about 13 years old. He was with a female at the time. The UK authorities were told that he was FM and that his father was a named individual who was a British citizen. By virtue of this the applicant was entitled to British citizenship by descent. The female with him was alleged to be his mother. In 1990 FM moved to Northern Ireland and applied for nationalisation, registration and recognition of British Nationality by descent.

[5] On 27 August 1992 the applicant received a letter from the Home Office confirming that he was in their opinion a British National at the time of the commencement of the British Nationality Act 1981. Therefore on 8 September 1992 he was issued with a British passport valid from 8 September 1992 to 8 September 2002. In 1998 the applicant married his first wife, a Bangladeshi national. In 1999 the applicant was interviewed under caution by Home Office officials on a number of occasions. This was because an allegation was made by his brother about his nationality and so there was a Home Office investigation. The nub of this allegation was that the applicant was not the son of the person he alleged to have the British nationality but the son of another man. This led to a decision which seems to have been reached in and around July 1991 whereby the applicant was advised by letter that his immigration status had been resolved by the Home Office and that in view of his "long term residence in the UK it has been decided to take no further action against him regarding his illegal entry in 1984." The letter confirmed that the applicant was considered to be present and settled in the UK and directed that the relevant authority could proceed with his wife's application to join him in the United Kingdom. In the papers there is also reference to a letter of 28 July 1999 from the Home Office to Murphy Kerr & Co Solicitors, Belfast who were the applicant's former solicitors. From this letter it is apparent that the Home Office returned the British and Bangladeshi passports which had been taken from the applicant during the Home Office investigation and his duplicate British certificate and stated that no further action would be taken in view of his long term residence in the United Kingdom.

[6] The applicant had various children during the years 2002 to 2006 with his first wife. In 2008 the applicant separated from his first wife and married his second wife, again a Bangladeshi national. His son, the second-named applicant, JM was born in Bangladesh in 2012.

[7] On 26 November 2012 the applicant's British passport was renewed for 10 years from 26 November 2012 to 26 November 2022. On 8 October 2014 a British passport was issued to JM on the basis of descent. In 2016 the applicant obtained a divorce decree. Then, in February 2018 the applicant alleges his house was burgled and that the confirmatory letter in relation to his status was stolen. In November

2018 the applicant's second wife entered the UK on a *Zambrano* visa accompanying JM who was a British national.

[8] On 30 January 2019 the applicant's solicitor lodged an application for a duplicate British Nationality Certificate of his British citizenship. On 20 February 2019 the Home Office responded stating that they could not locate the grant of citizenship for the applicant and advised that as he was naturalised prior to 1986 he should contact the National Archives Office. The National Archives Office could find no trace for the applicant. On 22 March 2019 the applicant's solicitor wrote updating the authorities of the outcome of the contact with the National Archives and requesting a certificate or open declaration of the British nationality. No response was received. The applicant's wife applied for an extension to the *Zambrano* visa and thereafter pre-action protocol correspondence was sent in relation to that.

[9] On 2 August 2019 the applicant's wife's *Zambrano* extension was refused. On 11 October 2019 both the applicants FM and JM received letters from the HMPO stating that their British passports had been revoked.

[10] Flowing from the above the applicants claim relief under a number of headings namely irrationality, error as to facts, material considerations, legitimate expectation, illegality, procedural fairness, breach of EU law and breach of human rights. Against that the proposed respondents make the case that there is an effective alternative remedy which is that the applicants should apply for naturalisation. The proposed respondents' skeleton argument also points out that the impugned decision dated 26 April 2019 which is referred to by the applicants is actually the date of a letter from the applicants' solicitor to the authorities which followed a series of *inter partes* letters back and forth. In this argument the proposed respondents defend all of the grounds of challenge and rely on the application that can be made pursuant to the British Nationality Act 1981 which is the naturalisation process.

Conclusion

[11] I bear in mind in dealing with this application that the case is at the leave stage. This represents a modest threshold of arguability. The facts of this case are highly unusual and complex as illustrated by the papers that I have received. I accept the point raised by Mr Henry that there is a lack of clarity about the actual decision made by the SSHD which is alleged to have been on 26 April 2019. That can no doubt be resolved by SSHD. The other more recent aspect of the case revolves around information sent by the Home Office to HMPO which led to the revocation of the British passports of this applicant and his son. It is clear that that process was undertaken after information was shared but there was no opportunity to the applicants to make any representations in relation to that. This is a significant issue given that passports had been issued to these applicants and certainly in the case of

the first applicant he had enjoyed the benefits of a British passport for some time, notwithstanding his immigration history.

[12] I have carefully considered Mr Henry's argument in relation to an alternative remedy and I can certainly see that an application for naturalisation may be a potential remedy. However, given the fact that I am considering leave on the various grounds that I have set out I do not consider at the moment that the case should simply await a naturalisation application. It may be that upon full hearing this is the course that is taken by the court but it seems that there are matters for consideration particularly in relation to the procedural aspects of this case prior to a naturalisation application. Therefore, the issue of alternative remedy will be reserved to the full hearing of this matter. In my view matters will become much clearer once evidence is filed by the proposed respondents in relation to the steps that were taken in this case and the rationale for same.

[13] Taking into account all of the above it is my view that the first named applicant has satisfied the test of arguability in relation to the claims of legitimate expectation given that he was provided with a status letter in 1992 and he was issued with a passport after interviews and investigation by the Home Office. Also, it seems to me that the leave threshold has been reached in relation to claims of procedural unfairness. This applies to both applicants given that there was no opportunity for a response from the applicants prior to adverse decisions (refusal of status/revocation of passport) being made against them. I am also of a mind to grant leave on the basis of an Article 8 claim against both proposed respondents because of the effect of this decision making. Finally I will grant leave in relation to the overarching irrationality challenge given the overall circumstances of this case.

[14] I am not so convinced that many of the other heads of claim are established on the basis of the current pleadings. The breach of EU law is effectively a repeat of the procedural fairness ground. There is no clarity in relation to the claim made upon section 55 of the Borders, Citizenship and Immigration Act 2009 which is the duty to promote and safeguard the welfare of children. I am similarly not convinced in relation to the ground which is stylised as error as to fact/material considerations. The evidence should clarify these issues given the current fog that surrounds the sequence and substance of decision making. If there are points they can be revitalised at an appropriate stage.

[15] I require an amended, focussed Order 53 Statement to be lodged within 4 weeks. I propose to allow 8 weeks for replying affidavits and a further 2 weeks for any response by the applicants. At that stage the judicial review judge will review the case with a view to listing. At this stage I do not propose to issue any interim relief however there is liberty to apply. Finally, I would like to say that this ruling should not militate against the proposed respondents and the applicants engaging in some further discussions in relation to these matters, a course which was recommended by the previous Judicial Review Judge.