



Upper Tribunal

(Immigration and Asylum Chamber)

SL (Certificate of entitlement – holds a passport) Malaysia [2010] UKUT 164 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 4 May 2010

Before

Mr Justice Blake, President

Senior Immigration Judge Eshun

Between

SL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: No appearance

For the Respondent: Mr Parkinson, Home Office Presenting Officer

For the purposes of the regulations relating to certificate of entitlements, a person who has lost a passport and cannot retrieve or produce it does not “hold” a passport.

DETERMINATION AND REASONS

1.

The appellant is a child born in the United Kingdom on 2 March 2006. On 10 October 2006 she was issued with a five year passport by the UK Passport Agency describing her as a British citizen. It seems that at the time of her birth her parents were settled in the United Kingdom; her mother may herself be a British citizen but her father remains a citizen of Malaysia. The appellant herself is also a citizen of Malaysia. On 5 February 2008 she was issued with a Malaysian passport valid for 5 years.

2.

On 11 July 2009 the appellant's father reported the loss of the appellant's passport on a website called "www.virtualbumblebee.co.uk". The printout supplied of that report indicates that the passport was lost when it was taken to a photocopying shop in Farnham, Surrey. Details of the unique reference number are recorded. From the printout provided at the hearing it appears that the website is a speedy way of identifying whether lost property has been recovered by anyone and if it has not a speedy way of reporting its loss by selecting a police station to whom the loss can be reported. Further investigation of the web site reveals the additional information that it was developed by the Surrey police as a means of reporting lost property to the police. Reporting property stolen requires further formalities.

3.

On 16 July 2009 that is to say some five days after the appellant's passport was reported lost, the appellant's father applied for a certificate of entitlement. Under s. 3(9) of the Immigration Act 1971 (as amended) a certificate of entitlement is one of the five means by which a person seeking to enter the United Kingdom and claiming to have the right of abode there may prove it. Under s. 10(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the Secretary of State may make provision by regulation for the issue of a certificate of entitlement.

4.

On 21 December 2006 the Immigration (Certificate of Entitlement to Right of Abode in the United Kingdom) Regulations 2006 (SI 2006/3145) came into force. Regulation 6 provides as follows:

"The certificate of entitlement will only be issued where the appropriate authority is satisfied that the applicant -

a) has the right of abode in the United Kingdom under Section 21 of the 1971 Act;

b) is not a person who holds:

i) A United Kingdom passport describing him as a British citizen..."

5.

On 28 July 2009 the Home Office UKBA wrote to the appellant and her father stating that on the evidence provided the application had been refused. It pointed out that the Regulations had come into force on 21 December 2006 and concluded:

"As your daughter has a current British passport issued on 10 October 2006 at Peterborough you are ineligible for a certificate of entitlement to right of abode. You should produce your British passport/ID card as evidence of your right of abode."

6.

On 10 August 2009 the appellant appealed this decision through her father pointing out that her UK passport had been lost and been reported lost prior to the submission of the application for a certificate of entitlement and, as she did not intend to reapply for a UK passport, she would not be able to prove her right of abode by the production of such a passport. The appeal was heard before Immigration Judge Bailey on the papers and promulgated on 30 December 2009.

7.

At paragraph 5 of his decision he said he found the Respondent's refusal letter confusing and continued:-

"I construe the refusal letter as being a rejection of the application in the absence of a passport from the appellant describing her as a British citizen. The regulations are unforgiving and do not make provision for passport data from other sources as being adequate.

My interpretation of the situation is supported by the grounds of appeal in which the appellant's father confirms that the appellant's UK passport has been lost. That assertion is supported by a lost property confirmation in which the father apparently reported the loss of his daughter's passport. The appellant's father makes a somewhat strident view in his grounds for appeal or by stating that there is no intention to reapply for a UK passport for the appellant until she is eighteen years of age. I conclude in the absence of the passport the appellant cannot satisfy the requirements for a certificate of entitlement set out in the refusal letter and therefore the application for certificate was refused by the Respondent in accordance with the law and this appeal must fail."

8.

Reconsideration of this decision was granted on 19 January 2010 following grounds of appeal asserting that the appellant did comply with the Regulations because her previous British passport was lost. For the reasons that follow we find a material error of law, will set aside the decision and remake it on the evidence before us.

9.

In our judgment the IJ has misunderstood the issue in question and has focused his attention on the wrong part of the Regulations. The application was not refused because the appellant had failed to provide a British passport but because she had already been issued with one. The application form reveals that the appellant's Malaysian passport had been submitted and that was a sufficient compliance with reg 4(a) of the 2006 Regulations, which the IJ may have had in mind when making the comments he did. What should have been the focus of the decision is whether on the facts of the case the appellant held a British passport at the time of the refusal.

10.

Mr Parkinson for the Home Office submitted first that the appellant held a passport because it had been issued to her. Alternatively, if the mere fact of issue was not enough to constitute holding it at the material time, the evidence that the passport had been lost was not satisfactory.

11.

As to the first submission, the ordinary meaning of the word 'hold' is to have possession or control of something. The fact that one may be entitled to a document is, in our judgment, plainly not sufficient to result in the conclusion that a person so entitled already holds it. We conclude that there is no material difference in principle between not applying for the passport that one was entitled to in the first place, and not applying for a replacement passport where such a passport has been lost. In neither case can a passport be produced on demand to the Immigration Officer and therefore a person in the appellant's position is incapable of proving the right of abode by a document other than a certificate of entitlement.

12.

There is no obligation on a dual national to apply for a British passport if travel can be conducted on another passport. Equally there is no obligation to apply for an identity card under the Identity Cards Act 2006, which is another mode of proof, the wording of which would prevent issue of a certificate of entitlement under reg 6 (b).

13.

We see no reason within the statutory context of the purpose of certificates of entitlement, or the construction of regulations made under s. 10 of the 2002 Act, to conclude that “hold” has anything other than its ordinary meaning. If it was intended to confine the issue of a certificate of entitlement merely to Commonwealth nationals with the right of abode this could be stated.

14.

Accordingly we conclude that a person who is not in possession of a passport does not hold it. On well established principles a person may be in possession of a document, even if it is not immediately to hand, if he or she has control of it, but a person who has lost a document and cannot retrieve it or produce it cannot said to hold what they do not have.

15.

We therefore reject Mr Parkinson’s first submission and turn to his second one. In our judgment no point was taken in the original refusal letter that it was not accepted as a matter of fact that the British passport had been lost in the manner set out in the internet report. There has been no indication hitherto before the hearing of this appeal that the point was to be taken. This is an appeal which was determined at first instance on the papers and the appellant’s father relies on his written grounds and has not appeared before us today. It would be wrong to take a new point against him without any notice.

16.

Moreover, from the passages cited from the IJ’s decision it appears he accepted that the passport had been lost and that was a finding reasonably open to him and one that we would not disturb without good reason. No good reason has been provided to us. There is no right of appeal on points of pure fact.

17.

Finally, since internet sites are publicly available we observe that if the Respondent had been more curious about the virtual bumblebee website he could have ascertained (as we have) that this was a website that Surrey police had promoted as a means of reporting lost property. We therefore consider that to adjourn this appeal simply to require the appellant’s father to confirm that he reported the loss to the police would serve no useful purpose.

18.

In these circumstances, we conclude that the Respondent’s decision was not in accordance with the law because it ignored the fact that the appellant no longer held the passport that had previously been issued to her. No other reason exists as to why she should not be issued with a certificate of entitlement. Contrary to the IJ’s findings it was not disputed that she was eligible for it by reason of having the right of abode. She satisfied that requirement when her British passport had been issued in 2006 and there had been no material change of circumstances.

19.

We therefore allow this appeal and direct that the certificate of entitlement be issued.

Signed

Mr Justice Blake

President of the Upper Tribunal, Immigration and Asylum Chamber