SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/***/***
Hearing Date: 4th March 2021
Date of Judgment: 14th April 2021

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE SMITH
MR ROGER GOLLAND

Between:

C11

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

OPEN JUDGMENT

Mr Dan Squires QC and Ms Julianne Kerr Morrison (instructed by Birnberg Peirce Solicitors) appeared on behalf of the Appellant

Mr David Blundell QC and Mr Andrew Byass (instructed by the Government Legal Department) appeared on behalf of the Secretary of State

Mr Tom Forster QC and Ms Rachel Toney (instructed by Special Advocates Support Office) appeared as Special Advocates

Introduction

1. A decision depriving C11 ("the Appellant") of her British citizenship was served on her last-known address on 8th May 2017. The time for appealing to this Commission therefore expired on 5th June 2017. By rule 8(5) of the SIAC Procedure Rules 2003, where an Appellant is out of the UK when the decision to deprive is served (as was the position in the present case), "the Commission may extend the time limits if satisfied that by reason of special circumstances it would be unjust not to do so".

2. This is the hearing of the Appellant's application to extend time under rule 8(5). The essential issues for determination are whether the Appellant can show on the balance of probabilities that she was unaware of the Respondent's deprivation decision in May 2017, and did not become aware of it until late May 2020; and whether it would be fair in all the circumstances for the matter to be determined on the available material when she has been unable to give instructions and the critical material in this case is in CLOSED.

3. The Commission has made an anonymity order in this case and the Appellant may only be referred to by her cipher, C11. Nothing may be published which may lead to her identity being revealed. She is currently living in precarious circumstances in Al-Roj camp in Syria and has a young child.

Essential Factual Background

4. The Appellant was born in the UK in 1978. The Respondent says that she has Pakistani nationality. In 1978 she married a man whom we will designate simply as H.

5. In August 2015 the Appellant and H travelled to Turkey and then to Syria. The Respondent says that they were aligned with ISIL and constitute a risk to the national security of the UK. The Appellant's family were not aware that she had travelled to Syria until 20th August 2015.

6. On 5th September 2015 the Appellant's brother B, and another of her brothers, reported her missing and claimed that she had been coerced into travelling to Syria. B provided a statement to West Midlands CTU. The Respondent does not accept that the Appellant was coerced, and we note that the evidence supporting that proposition is tenuous.

7. In 2016 the Appellant's son was born outside the UK.

8. On 18th April 2017 the Respondent made her deprivation decision in relation to the Appellant. This was sent to the address of the Appellant's parents-in-law on or about 5th May 2017 and appears to have been received on 8th May. A similar letter was sent in relation to H. The deprivation order was made on 8th May.

9. In early 2019 the Appellant was seriously injured following a bomb blast. It appears from x-ray evidence that two pieces of shrapnel became lodged in her neck. This has caused her ongoing physical and cognitive difficulties the extent of which it is unnecessary to set out.

10. On 17th March 2019 H sent a message to B saying that the Appellant had been seriously injured and she and her son had been sent to a Syrian Democratic Forces camp. H told B that should the Appellant leave Syria she must be sent to Pakistan and not to the UK. By May 2019 there is evidence that the Appellant was in Al-Hol camp.

11. In August 2019 the Appellant communicated with B. She told him that she wanted to return to the UK. She did not tell him that she could not return to the UK.

12. Shortly after this, the Appellant's family contacted H's family. Relations between the two families had broken down. H's parents told B for the first time that the Appellant had been deprived of her citizenship, and a copy of the deprivation decision was provided. The Appellant's family were naturally shocked and upset by this revelation, and B does not believe that had the Appellant known about it she would not have shared this information with him when they spoke in August 2019. A decision was made not to communicate this news to the Appellant herself for fear of her personal safety and concern about her mental and physical condition.

13. In September 2019 B sought advice from solicitors. They did not inform him that an out of time appeal was possible and advised that the Appellant should "lay low" until the appeal of Shamima Begum was determined.

14. In February 2020 Ms Marie Forestier, a researcher with Rights and Security International ("RSI"), had two meetings with the Appellant at Al-Hol camp. Her evidence is summarised below.

15. In May 2020 B judged that the Appellant's physical and mental condition had improved somewhat and felt able to inform her of the deprivation decision. It is said that the Appellant on receiving this metaphorical bombshell gave no indication that she was already aware of the decision. She asked B for help to return to the UK.

16. On 27th May 2020 B contacted Burney Legal and provided them with a copy of the deprivation decision. They asked B to make enquiries as to whether H's parents had received any further correspondence. B later told Burney Legal that there was no such correspondence.

17. On 18th June 2020 Burney Legal emailed B to inform him that they would proceed with an out of time appeal. Various documentation was then signed, but on 26th June Burney Legal stated that they needed direct instructions from the Appellant.

18. On 1st July 2020 the Appellant sent a contact number to B, and this was passed to Burney Legal the same day.

19. Ms Lauren Garvey of Burney Legal was not able to speak to the Appellant until 9th July 2020. She discovered from that call – on the Appellant's version of events at least - that the Appellant's family had only very recently informed her of the deprivation decision. Her assessment was that the Appellant was struggling to speak, and that the difficulties facing her at the camp were considerable.

20. On 10th July 2020 Ms Schumacher, then Senior Legal and Policy Officer at RSI, spoke to the Appellant over a very poor line. Ms Schumacher also felt that the Appellant was struggling to communicate.

21. On 14th July 2020 the Appellant sent a message to Ms Schumacher confirming that she did not know about the deprivation decision until two months beforehand.

22. On 16th July 2020 Ms Schumacher, concerned by Burney Legal's apparent lack of experience in this area, contacted Birnberg Peirce. The latter obtained written authority from the Appellant on 21st July and an out of time appeal, and an accompanying application to extend time, were lodged on 22nd July.

23. Birnberg Peirce have had no direct contact with the Appellant since August 2020, when she moved to Al-Roj camp. Very recently, they have been given the number of a mobile phone which the Appellant may have access to. At the time of the hearing, successful contact had not been accomplished. Conditions at this camp may fairly be described as dire.

The Legal Framework

24. This is not substantially in dispute.

25. The burden is on the Appellant to demonstrate that, by reason of special circumstances, it would be unjust not to extend time. Ultimately, though, the question for the Commission is whether it would be fair and just to extend time: see *H2 v SSHD*, 25th July 2013, at para 4.

26. Relevant factors in determining whether to extend time include the length of and reasons for the delay, the merits of the appeal, and the degree of prejudice to the Respondent if the application were granted. National security concerns are not relevant at this stage.

27. The importance of the issue (see *L1 v SSHD* [2013] EWCA Civ 906, para 41 (per McCombe LJ)) and the impact on the Appellant and her son are relevant factors to be placed in the overall balance.

28. The Commission has received voluminous submissions from the parties as to whether considerations of overall fairness should cause us to stay these proceedings or, indeed, to allow the appeal to proceed to a full hearing. We shall be returning to this aspect of the case.

29. Both parties made submissions about the merits of any substantive appeal and the practical consequences of an extension of time being granted. We can deal with those submissions briefly.

30. First of all, we must proceed on the basis that the Appellant has arguable grounds of appeal. It would not be right for us to go further than that, not least because we do not have the material fairly to do so. In any event, we would be fearful about appearing to prejudge the merits of the appeal. Any empathy we may have for the predicament of the Appellant and, in particular her child, must be placed firmly to one side.

31. Secondly, we consider that the practical consequences of granting an extension are legally neutral. The issue must be determined according to its self-contained merits. Mr David Blundell QC for the Respondent submitted that granting an extension of time, or even allowing the substantive appeal, would not grant the Appellant an exit pass from the camp. That in our view raises a practical issue that is well outside the bounds of this application. Mr Dan Squires QC for the Appellant submitted that if an extension of time were granted the appeal could proceed in the relatively near future because it would depend on the application of judicial review principles. That may well be so, but the Appellant is either entitled to an extension of time or she is not.

Refinement of the Issues

32. It seems to us that the issues are capable of being refined in the following way.

33. The first question is whether, on the assumption that it would be fair to the parties to determine the issue at this stage, the Appellant has established that she did *not* know of the deprivation decision until late May 2020.

34. If the Appellant did not know of the deprivation decision until late May 2020, the Commission would unhesitatingly hold that she has persuaded us that special circumstances exist such as it would be unjust not to extend time. As is clear from the factual outline we have provided, the Appellant had evident difficulties in instructing solicitors and Burney Legal should have acted more expeditiously in obtaining her signed instructions and lodging the papers at this Commission. In any case, the delay is relatively short and was not the Appellant's fault.

35. The second question is whether it would be fair to the parties to determine the issue at this stage. On the premise that we were satisfied on the available evidence that the Appellant had established that she did *not* know of the deprivation decision until May 2020, we see no reason why the issue could not be determined in the Appellant's favour at this stage. There would be no unfairness to the Respondent. In particular, there is a good explanation for the Appellant not having filed a witness statement in support of her application (she cannot give instructions), and this is not a case where an adverse inference might be drawn from a failure to give evidence.

36. But, on the alternative premise that we were not satisfied on the available evidence that the Appellant had established that she did not know of the deprivation decision, it seems to us that the only fair course would be to adjourn this application and/or to stay the proceedings until the Appellant could give instructions to her lawyers. It would not be fair on the Appellant to determine the extension of time application against her, as Mr Blundell submitted, we should. Whatever one may think about the merits of the Appellant's actions in 2015, her current inability to give instructions should not be held against her.

37. Nor would it be right that the application for an extension of time be granted according to the mandate of fairness, which was the bold submission of Mr Squires for the Appellant.

38. Mr Squires' bold submission had two limbs. The first was that the Appellant's inability to give instructions through no fault of her own meant that the only fair result was for the appeal to proceed. The second was that reliance wholly or mainly on CLOSED material was inherently unfair.

39. We must reject both of these submissions. In a situation where the Respondent is hardly to blame for the Appellant's present difficulties, Mr Squires' first submission has a somewhat unreal, counter-intuitive tenor. The bedrock of Mr Squires' submission was McCombe LJ's robust observations at paras 40-41 of his judgment in *L1*, but in our view these cannot be interpreted as suggesting that in a case where the Commission will not be receiving oral or written evidence because a party is unable to provide it, fairness dictates that the extension of time application be allowed. McCombe LJ's observations were anchored in the particular facts of that case. As for the second submission, however it is advanced it founders on the rock of *W (Algeria) v SSHD* [2010] EWCA Civ 898.

40. Mr Squires also submitted that, even if the Appellant were aware of the deprivation decision in May 2017, she may have good reason for the delay. That may be the case, but evidence would be required to substantiate it.

41. So, the issue for determination at this stage is this: has the Appellant demonstrated to the requisite standard that she was not aware of the deprivation decision until May 2020?

Analysis of the Available Evidence

42. We have already referred to some of the material evidence. We may add reference to the following.

43. On 9th February 2020 the Appellant had a meeting at Al-Hoj camp with Ms Marie Forestier. The Appellant confirmed that she was British. On 12th February there was a further meeting. According to para 19 of Ms Forestier's witness statement:

> *"This time, [C11] explicitly said that she was British, she was born in England and had a British passport. While I did not ask her whether she had been deprived of citizenship, she did not express any doubt that she was a British citizen at the time we spoke. I asked her specifically about what nationality her parents were, and she confirmed they had Pakistani passports. I asked her about her son as well, who did not have a passport. I asked her if she had or had ever had another passport, and she confirmed that she did not. …"*

44. B has given a detailed witness statement. We have to do our best to evaluate it without the benefit of cross-examination by Mr Blundell: none was sought. Our impression is that B has given a balanced witness statement. For example, he accepts that H's family has blamed the Appellant for causing him to go to Syria. It is unnecessary to explore the rights and wrongs of that issue. Moreover, his assertion that H's family did not inform the Appellant's family of the deprivation decision until August 2019 is supported by B instructing solicitors the following month.

45. According to B:

> *"I do not know if they [H's family] told [H] that he and [the Appellant] were deprived of citizenship. Even if they did, I do not know if [H] would have told [the Appellant] that she had been deprived of citizenship or not. From what I have observed of their relationship it is possible that [H] might not have told [the Appellant] even if he knew about it. [H] was in control in their relationship and made the decisions so he might have decided not to tell [the Appellant] …"*

46. B is confident that had the Appellant told him that she had been deprived of her citizenship when they communicated in 2019, he would not have overlooked or forgotten that. It is submitted by Mr Squires that had the Appellant been aware of the position in May 2017, there is no reason why she would not have told her brother.

47. It was in May 2020, according to B, that he felt able to explain to the Appellant "in a message" that she had been deprived. A copy of this message has not been made available, but Mr Blundell did not advance a submission about that omission. According to B, the Appellant did not give any indication that she was already aware of the deprivation decision.

48. On 14th July 2020 Ms Schumacher received a message from the Appellant, "I did not know I was deprived of citizenship until 2 months ago. My brother told me it was done in 2017". There is a message to similar effect dated 21st July. It is submitted by Mr Squires that the Appellant would have to be very devious to compose these messages in order to bolster this application.

49. Mr Squires made a number of further submissions on the available material, but these either carried the matter forward no further or amounted to speculation.

50. Mr Blundell was content to base his client's case more on the CLOSED material. He submitted, correctly in our view, that there was no medical evidence of cognitive impairment and that the evidence of coercion was exiguous.

51. Both counsels made submissions on other material which in our view were only of marginal relevance.

Conclusions

52. The available evidence in OPEN must be weighed in the balance against the CLOSED. Neither body of evidence is more important than the other. The assessment must be a holistic one, applying basic common sense and the Commission's experience of human nature to the extent appropriate.

53. There is no direct evidence to show that the Appellant was aware of the deprivation decision in May 2017. There is force in Mr Squires' submission that had she been so aware it is probable, other things being equal, that she would have told Ms Forestier and in particular B. She might not have understood all the legal ramifications but keeping quiet held no obvious advantages from her perspective and would have lacked openness. Given that Ms Forestier was there to help, it would have been odd not to have provided a complete picture.

54. B's evidence is detailed and comprehensive. There is no proper basis for concluding that he has given untruthful evidence to the Commission. It is possible that the Appellant deceived her brother about her state of knowledge, but we have to conclude that this is unlikely.

55. It is possible that the Appellant, or those sending messages on her behalf, was intent on misleading Ms Schumacher or setting up a false "audit trail" for subsequent deployment in legal proceedings. Mr Blundell did not submit that this was the position, and we have to say that it is unlikely.

56. It is possible that the Appellant had forgotten that she had been aware of the deprivation decision in May 2017. The only way she could have forgotten something so important was that she suffered some sort of injury in the bomb blast that impacted on her cognitive function or memory. Even if she had done, that would not help the Appellant because she was free of any such injury between May 2017 and early 2019. Mr Blundell did not submit that the Appellant's messages to Ms Schumacher and her discussion with her then solicitor in July 2020 can be explained by memory loss: such a submission would not happily co-exist with the Respondent's primary case that there is no medical evidence to support that proposition. The reality is, in our judgment, that the Appellant was either being deliberately deceptive or she was being truthful.

57. So, the direct evidence, the circumstantial evidence, and the inherent probabilities point in the Appellant's favour. All this evidence must be weighed against the material in CLOSED that we have addressed in our companion judgment.

58. Overall, albeit recognising that the issue is not clear-cut, we have concluded on the balance of probabilities that the Appellant was not aware of the deprivation decision until May 2020. It follows that her application for an extension of time must be granted.