Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00015/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11/01/2016	**On 09/03/2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

KUMARESWARARAJA VARATHARAJ

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Eric Fripp of Counsel, instructed by Barnes Harrild & Dyer

For the respondent: Mr Steven Whitworth, a Senior Home Office Presenting Officer

DECISION AND REASONS

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1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to deprive him of his British citizenship under sections 40(3) and 40(5) with reference to section 40A of the British Nationality Act 1981.

2. The appellant when he came to the United Kingdom was a citizen of Sri Lanka. There is an issue as to whether he has lost, and if so, whether he can resume, his Sri Lankan citizenship.

3. The First-tier Tribunal also dismissed his appeal on human rights grounds with reference to Article 8 ECHR.

Respondent's decision under section 40 (the deprivation decision)

4. The factual matrix relied on by the respondent in her decision letter of 27 May 2015, uncontested by the appellant, was as follows. The appellant came to the United Kingdom from Sri Lanka on or before June 1997, and claimed asylum in his real identity on 9 June 1997. He was granted refugee status on 12 June 1999 with indefinite leave to remain. The timing of his refugee status grant had been disrupted by a conviction on 8 July 1998 for conspiracy to defraud, for which he was sentenced to 2½ years' imprisonment.

5. The appellant was naturalised as a British citizen on 16 December 2003, posing as a Sri Lankan national born on 1 June 1970 with the identity Markandu Selvakumaran. He now says that he used the false identity under duress, to avoid removal to Sri Lanka.

6. On 11 December 2007, he was naturalised again in his true identity of Kumareswararaja Varatharaj, also a Sri Lankan national, but this time born on 30 December 1973. The appellant did not disclose his earlier naturalisation in a fraudulent identity and his representatives advised that he had not used any deception or withheld relevant information.

7. The appellant has children born in the United Kingdom who are British citizens. Their nationality is unaffected by the deprivation of his citizenship and the respondent's decision letter confirms that they will remain British citizens.

8. The decision letter makes it clear that the appellant has a right of appeal. If the appeal is unsuccessful, and subject to satisfactory checks, the respondent indicated that he would be granted 30 months' limited leave, in recognition of the barriers to removal which existed at the date of decision.

9. The grant of naturalisation had ended his refugee status but the decision letter informed the appellant that he could apply to the Sri Lankan authorities if he needed a travel document, or alternatively, it remained open to him to make an asylum claim under the Refugee Convention if he wished to do so. His refugee status would not revive by operation of law.

Appeal to First-tier Tribunal

10. The appellant exercised his right of appeal to the First-tier Tribunal, both under the 1981 Act and Article 8 ECHR, the latter in relation to interference with his ability to work, because his employment involved him travelling to Europe, and in particular Spain. He was employed by European Business Machines Ltd as its Overseas Sales Director, which required him to travel around Europe negotiating the purchase of machinery and oil, which would not be possible without a British passport. If he lost his citizenship he would lose his job and have to take his children out of private school. The appellant contended that the respondent had not applied her own guidance on deprivation of citizenship at Chapter 55 of the IDIs.

First-tier Tribunal decision

11. The First-tier Tribunal found that the appellant had made a false representation in relation to the second citizenship obtained by this appellant and that the respondent's decision to deprive him of his citizenship was lawful.

12. The appellant relied on his high powered and highly paid job: the appellant's employer told the Tribunal in his witness statement that if the appellant lost his citizenship he would also lose his job 'and that is my final decision which will not change'. The appellant would be unable to afford to keep his children in private school without that job.

13. In relation to Article 8 ECHR, the First-tier Tribunal considered that the consequences of the deprivation decision were not to prevent the appellant from working, even if he lost that particular job. It was open to the appellant to find local work not requiring him to travel to Spain and other places, or to get a passport or travel document from Sri Lanka and apply for visas. The risk that he might need to take his children out of private education was not sufficient to make the respondent's decision disproportionate, especially as she had indicated that he would be granted discretionary leave for 30 months so that there was no immediate risk of removal. If he lost his job and could not get work immediately, the appellant could rely on state benefits and the state education system.

14. The First-tier Tribunal considered the respondent's decision to be in accordance with law and dismissed the appeal under the Act and the ECHR.

Grounds of appeal

15. The appellant appealed to the Upper Tribunal. He contended that the First-tier Tribunal had not properly considered the best interests of the children; that removal of his British citizenship would render him stateless; and that the judge had not considered whether he could now resume his Sri Lankan citizenship. He relied on the decision of the Supreme Court in *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62, which concerned an Iraqi man who had been able to show that the acquisition of British citizenship meant that under Iraqi law he had lost his Iraqi citizenship, by operation of law and that under section 40(4) the respondent was

required to identify whether another citizenship was available before she could lawfully deprive him of British citizenship. The appeal of Mr Al-Jedda failed thereafter as the evidence showed that he held a genuine Iraqi passport and travel documents with which it was open to him to resume his Iraqi nationality.

16. As regards the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009, the appellant continued to assert that depriving his children of private education was contrary to their best interests and that the First-tier Tribunal had not dealt adequately with that point.

17. As regards Article 8 ECHR, the appellant reminded the Upper Tribunal of his previous successful business, which in the course of time he hoped to re-establish in the United Kingdom. He would lose his present job if he lost his citizenship. The appellant also contended that there was a mistake of fact by the First-tier Tribunal in failing to have regard to the inapplicability of the European Agreement on the Abolition of Visas for Refugees to persons in paid employment.

Permission to appeal

18. Permission to appeal was granted by Designated Judge Murray who considered, in particular, that the statelessness point had not been properly considered by the First-tier Tribunal Judge. She directed that all grounds of appeal were arguable.

Rule 24 Reply

19. The respondent in her Reply said that the grounds of appeal were no more than a disagreement. In relation to the statelessness ground, the respondent noted that the First-tier Tribunal had considered the possibility of the appellant applying for a Sri Lankan passport; that whether or not he could use such a passport was not determinative of his nationality only of his ability to travel; and that the Ceylon Citizenship Act No 18 of 1948 at sections 19(2) and 19(3) provided for the resumption of citizenship when an alternative citizenship was renounced. The appellant had not shown that he would in fact be stateless.

20. The education point regarding the children's best interests was also considered to be a weak point: Article 8 ECHR did not protect the type of schooling available.

21. In relation to the broader Article 8 arguments, the First-tier Tribunal had made clear findings and the grounds were again simply an argument that different findings should have been made. There was no question of removal of the appellant as a result of the deprivation decision as the respondent had stated that she would grant discretionary leave. That would allow the appellant to work, and where he did so, and whether he could travel and on what documents, were a matter for the appellant and not an indicator of the lawfulness of the deprivation decision. European Union community law was not engaged by the deprivation decision: see *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867.

22. The case in question had no cross-border element save the appellant's wish to travel. The risk that the appellant might lose his present job, as stated in evidence by his employer, had been considered in the decision. It was the consequence of the appellant's own actions and the judge had been entitled to consider that the appellant could properly be required to solve that problem by finding a local job in the United Kingdom.

23. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. Mr Fripp produced a skeleton argument and I was also handed by the respondent a copy of the 1948 Ceylon Citizenship Act as amended (most recently in 2003). I have had regard to both of those documents despite the lateness of their production. The appellant's skeleton argument deals at length with statelessness and with the loss of European Union citizenship which is since 1992 a benefit of the acquisition of United Kingdom citizenship.

25. Mr Fripp's skeleton argument summarises the appellant's submissions with helpful brevity:

> "18. The appellant's submissions can be put briefly. There was evidence before the [First-tier Tribunal] to show that at least a prima *facie risk* that the effect of [deprivation of citizenship] by the respondent would be to render the appellant stateless (or effectively stateless/*de facto* stateless). If so this would not engage any statutory bar on [deprivation of citizenship] by the United Kingdom, but it would be very relevant to any analysis going to justification for the action.
>
> To adequately assess the rationality or proportionality of the action (whether the rubric at first instance is factual/legal error, proportionality in re Article 8 ECHR, or European Union law proportionality) it was necessary to understand, so far as the evidence permitted this, its material consequences. The [First-tier Tribunal] failed to address the evidence raised in this regard and the decision should be set aside. The appeal should be reconvened/reheard, ideally with opportunity to the parties to seek to provide any further/updated evidence regarding the nationality point. That resolution also permits adequate attention to the substantial point of law arising here, which the [First-tier Tribunal] has not addressed."

26. The substantial point of law which is identified is that of potential *de jure* or *de facto* statelessness, and the appellant seeks to distinguish the decision of the Upper Tribunal in *Deliallisi* (British citizen: deprivation appeal: scope) Albania [2013] UKUT 439 (IAC) on that point, because the appellant in *Deliallisi* did not contend that the decision would render him stateless.

27. The second question is identified is whether, applying *Rottmann v Freistaat Bayers* [2010] EUECJ C-135/08, European Union law applies to a case such as the present one and if so, what European Union law requires, and how that interacts with the statutory appeal and with Article 8 ECHR.

28. In his oral submissions, Mr Fripp sought to distinguish *KK and others* (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC) alternatively to characterise it as wrong in law. I observed that the decision had been approved by the Court of Appeal. Mr Fripp then contended that the question of statelessness had not been dealt with at all in the decision. Mr Fripp argued that it was open to the appellant to sustain his position of being unwilling to apply to the Sri Lankan Embassy to seek to resume his citizenship, but accepted that without such an application, the inability to resume Sri Lankan citizenship was speculative and conjectural.

29. The primary question was whether the issue had been dealt with adequately by the First-tier Tribunal and he maintained that it was necessary to reopen the decision to deal with the question.

30. For the respondent, Mr Whitwell adopted and relied on the extensive Rule 24 Reply filed by the respondent. He relied on *KK,* in particular at [8] and [10] in the Upper Tribunal's decision.

31. I reserved my decision, which I now give.

Legal framework

32. The material parts of section 40 applicable to this appeal are as follows:

> **"40 Deprivation of citizenship.**
> (1) In this section a reference to a person's "citizenship status" is a reference to his status as— (a) a British citizen ...
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
> (a) fraud,
> (b) false representation, or
> (c) concealment of a material fact.
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
> (a) the citizenship status results from the person's naturalisation, …
> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
> (a) that the Secretary of State has decided to make an order,
> (b) the reasons for the order, and
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)..."

33. Section 40A provides a right of appeal against a deprivation decision under section 40(5), subject to a power for the respondent to remove the right of appeal by certification where the decision was taken wholly or partly in reliance on information

which she considers should not be made public for national security reasons, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest. The deprivation in this appeal is not so certified and the appellant has a right of appeal.

34. The most recent consideration of the operation of that section 40 is in *Hysa & Ors, R.(On the Application of) v Secretary of State for the Home Department* [2015] EWCA Civ 1195. At [24], the court recorded the agreed position of the parties that the question of whether a purported grant of citizenship is a nullity is a question of fact to be determined by the court, rather than a matter for the reasonable judgment of the respondent. At [50]-[52], Lord Justice Sales, giving the only reasoned judgment, examined all the existing authorities and concluded that:

> "50. … Where does this leave the law so far as material for present purposes? In my judgment, … this court is bound by its decisions in *Sultan Mahmood*, *Parvaz Akhtar* and *Tohura Bibi* to hold that there is an implied limitation upon the powers of the Secretary of State to grant citizenship under the 1948 Act and under the equivalent provisions in the 1981 Act which are applicable in this case. …In my view, the principles of statutory interpretation reviewed in that decision ought also to be taken to provide guidance as to the ambit of the implied limitation. They require that in interpreting the 1981 Act the different public interests in issue have to be taken into account, that is to say both the usual public interest to ensure that a criminal fraudster should not benefit from his crime and the public interest regarding the desirability of innocent third parties having stable and certain citizenship status conferred upon them pursuant to the 1981 Act.
>
> 51. This is not a process of interpretation which is particularly easy to undertake. Apart from the question of authority, it may also be noted that, notwithstanding the difficulties which might arise in relation to the citizenship status of third parties, there is significant force in the argument based on the interpretive presumptions referred to in *Welwyn Hatfield BC* by reason of the gap in time that will exist between the grant of citizenship on the basis of a successful fraudulent application and the Secretary of State discovering the fraud, that being the earliest time at which she would be able to make a deprivation order under section 40(3) which would only have prospective effect. During the gap period the fraudster may have secured advantages for himself or his family which he ought never to have had which cannot be undone by the making of a prospective deprivation order under section 40(3), and it is not unreasonable to think that Parliament would not have intended him to be able to have those benefits as a result of his fraud. ..."

The respondent in the present appeal has not sought to argue in detail the implied limitation point. The appellant has secured advantages for his children, in that they are British citizens. Those advantages will not be lost, whatever the outcome of this appeal.

Discussion

35. I do not understand it to be the appellant's case that he disputes the fraud in the first application for citizenship or the failure to disclose that earlier 'naturalisation' when applying later in his own name.

36. This case raises three questions: the first is whether, if the appellant has lost his Sri Lankan citizenship, he is now stateless; the second, whether even if he is not, the loss of his European Union citizenship with the free movement rights which that comprises makes the decision to remove his citizenship disproportionate; and the third, whether the effect on the appellant's employment and his children's education is sufficient to render the decision disproportionate and/or to make the decision unlawful having regard to the children's section 55 best interests.

37. Applying *Hysa,* the deprivation decision operates prospectively. The respondent has now deprived the appellant of British citizenship. As the respondent has stated, the British citizen status of the appellant's children is unaffected. The decision in *Deliallisi* sets out the correct approach to deprivation decision appeals. The guidance given in the Upper Tribunal's judicial headnote was as follows:

> *"(1) An appeal under section 40A of the British Nationality Act 1981 against a decision to deprive a person of British citizenship requires the Tribunal to consider whether the Secretary of State's discretionary decision to deprive should be exercised differently. This will involve (but not be limited to) ECHR Article 8 issues, as well as the question whether deprivation would be a disproportionate interference with a person's EU rights.*
>
> *(2) Although, unlike section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002, section 40A of the 1981 Act does not involve any statutory hypothesis that the appellant will be removed from the United Kingdom in consequence of the deprivation decision, the Tribunal is required to determine the reasonably foreseeable consequences of deprivation, which may, depending on the facts, include removal.*
>
> *(3) A person who, immediately before becoming a British citizen, had indefinite leave to remain in the United Kingdom, does not automatically become entitled to such leave, upon being deprived of such citizenship."*

38. The obvious and reasonably foreseeable consequences of the deprivation decision are that the appellant may well lose his well-paid job and have more difficulty travelling (depending on his travel documents); and that his financial position may mean that he has to access state benefits and use the state education system for his children.

39. There remain the questions of the loss of European Union citizen benefits from no longer having British citizen status. The Court of Justice of the European Union in *Rottmann* took a robust line on that point*:*

> "55. In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law.

> 56. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.
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> 57. With regard, in particular, to that last aspect, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin.
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> 58. It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.
>
> **59. Having regard to the foregoing, the answer to the first question and to the first part of the second question must be that it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality."**

40. The appellant will be given discretionary leave for 30 months if this appeal fails. He will therefore have had more than a reasonable period of time in order to try to recover his Sri Lankan citizenship, if indeed he has lost it. The deprivation decision was in May 2015: the earliest that the appellant's discretionary leave could end would be September 2018, a period of well over 3 years to enable him to clarify the question of his Sri Lankan citizenship.

41. There is no free movement issue here: the appellant, unlike the appellant in *Rottmann* has never lived in another European Union member state, although he travels between member states for work. At 19.2 of Fransman's *British Nationality Law* (3rd Edition) the author observed that the *Rottmann* case "did not test the proposition of whether the acquisition by deception and subsequent loss of the nationality of another Member State is within the scope of EU law in circumstances where the person remains within the Member State of origin during the period of acquisition and loss and does not move to that other state." That is the factual position here: the appellant in this case has remained resident in the United Kingdom throughout, although he travels to other Member States in the course of his work.

42. It is right that the issue of statelessness was raised in the appellant's written submissions to the First-tier Tribunal and is not the subject of any findings in the decision. The question which the Tribunal should have considered is whether the

appellant had shown that he was now stateless. There is no expert evidence before the Tribunal dealing with the point.

43. The Upper Tribunal decision in *KK (Korea)* analysed the question of citizenship in the first part of the judicial headnote:

> *"(a) For the purposes of determining whether a person is "of" or "has" a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (i) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.*
>
> *(b) Cases within (i) and (ii) are cases where the person is "of" or "has" the nationality in question; cases within (iii) are not.*
>
> *(c) For these purposes there is no separate concept of "effective" nationality; the issue is the availability of protection in the country in question.*
>
> *(d) Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.*
>
> *(e) As eligibility for Refugee Convention protection is not a matter of choice, evidence going to a person's status within cases (i) and (ii) has to be on "best efforts" basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance."*

44. The appellant, upon whom rests the burden of proof of citizenship, must show which category applies to him. There is no evidence before me which assists in that exercise. In particular, there is no evidence that the appellant has renounced his Sri Lankan citizenship or that he has lost it by operation of law: the appellant is Sri Lankan by birth. The 1948 Ceylon Citizenship Act, on which the appellant relies, does not as Mr Fripp asserts provide for automatic deprivation of citizenship for those who are Sri Lankan citizens by birth: instead, at section 19, it provides that they may, if they choose, make a formal declaration of renunciation of Sri Lankan citizenship, and the statute also provides a process for resumption of citizenship where such a declaration of renunciation has been made.

45. At sections 20 and 21, the statute deals with those whose Sri Lankan citizenship is acquired by registration or by descent. In that case, there is automatic loss of such citizenship on the acquisition of another nationality, again subject to provisions for resumption. The appellant has made no attempt to discover what the position is by applying to the Sri Lankan Embassy in London to clarify his status and if appropriate, resume his Sri Lankan citizenship.

46. I am satisfied that, although the First-tier Tribunal erred in law in failing to make an express finding as to whether this appellant is now stateless, such error is immaterial, since there was no evidence before the First-tier Tribunal and is none before me on which such a finding could rationally be made. The burden of proving statelessness is on the party asserting it, the appellant, and he has not discharged that burden.

47. There remains the question of his job loss and his children's education. As regards the job loss, if it occurs, that is a consequence of the appellant's own fraud, deception, and failure to disclose material facts. The First-tier Tribunal dealt properly with that element of the consequences of the deprivation decision.

48. As regards his children's education, the ECHR does not give an absolute right to any particular type of education and the First-tier Tribunal did not err in law or in fact in observing that free state education remains available to the children, who are British citizens, and that in the light of that provision, there is no breach either of Article 8 ECHR or of Article 2 of the 1952 Protocol to that Convention, which provides for a right to education.

49. In conclusion, the First-tier Tribunal did err in law in failing to consider statelessness and European Union citizenship in its decision but those matters are, on the facts, immaterial to the outcome of the appeal, which was bound to fail. I decline to reopen the First-tier Tribunal decision.

DECISION

50. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 1 March 2016 Signed *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson