IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05015/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 31st March 2016	**On 18th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ON BEHALF OF ECO TIRANA)

Appellant

and

VALBONA VALTERI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr R Ahmed instructed by IAS Birmingham

DECISION AND REASONS

1. Valbona Valteri is a citizen of Albania who was born on 8th December 1988. I will in this decision refer to her as "the claimant". She applied for entry clearance to come to the United Kingdom as the spouse of Alexsander Valteri, whom I will refer to as "the Sponsor". The couple had married in Albania. This was in fact her third application of this nature. The Sponsor holds a British passport but the background to the grant of that passport was that he had arrived in the United Kingdom aged 16 and claimed to be from Prizren in Kosovo, part of the former Republic of Yugoslavia. On that basis he was granted exceptional leave to remain and subsequently indefinite leave to remain (on 19th January 2004) and then naturalisation as a British citizen (on 5th July 2005). He had been born in Albania and had throughout been a citizen of that country.

2. The claimant's application was refused on 1st April 2014. It was accepted that she met the requirements set out in Appendix FM to the Immigration Rules for entry clearance as a partner, save in one respect. The ECO stated that she had submitted a false document (which would include a genuine document which had been fraudulently obtained or genuinely issued on the basis of false information) and the application was refused with regard to paragraph S-EC.2.2 of Appendix FM. So far as Article 8 ECHR was concerned, it was stated that the Sponsor was of Albanian origin and there was nothing to prevent him returning to Albania to enjoy family life there. It was not accepted that the decision constituted interference and in any event would be proportionate. The claimant's second application had been refused on the same basis and an appeal against that refusal dismissed by the First-tier Tribunal following a hearing before Judge of the First-tier Tribunal Buckwell which took place on 29th August 2013.

3. The claimant appealed against the refusal of 1st April 2014 contending that the Sponsor had made full disclosure of his previous nationality and that the discretion under the Rules should have been exercised differently and also that the decision was in breach of Article 8. It was submitted that the Sponsor was entitled to hold himself out as a British citizen whilst the matter of his citizenship was investigated. The appeal was heard before Judge of the First-tier Tribunal Hawden-Beal on 13th July 2015. On that occasion the claimant was represented but there was no appearance on behalf of the then respondent. Judge Hawden-Beal heard oral evidence from the Sponsor who said that he had been returning regularly to Albania. His British passport had been renewed although he had made a full and frank disclosure to the authorities. His wife was now pregnant and the child was expected in September 2015.

4. In her decision (promulgated on 21st July 2015) Judge Hawden-Beal stated that she had taken account of the determination of Judge Buckwell, who had agreed that the discretion should be exercised against the Sponsor, in accordance with the reported decision of **Devaseelan [2002] UKIAT 702.** She said that that was her starting point. She continued (at paragraph 10)

> "However I must take into account the fact that time has passed and the situation which was before Judge Buckwell may well have changed. The position now, as conceded by the Sponsor, is that nothing has changed apart from the fact that he has a son on the way, he has heard nothing further from the Respondent since 2013 and his British passport has been renewed for another ten years without challenge from the Respondent".

She went on to indicate that she could not take account of the pregnancy as she could only consider circumstances appertaining as at the date of decision. She continued (at paragraph 12) that she could however take into account the renewal of the British passport in March 2015 which did concern a matter arising as at the date of decision, namely whether the Sponsor was entitled to rely on and to submit a document which he knew to be false. The evidence before her was that as at April 2014 the Sponsor was still a British citizen and the Respondent had not deprived him of that citizenship even though she was well aware of the circumstances in which it was obtained. To date she had still not done so. By renewing his passport in March 2015 without demur she had effectively given him British citizenship for a further ten years. The judge found that to be a very notable fact which she could take into account in determining whether the Entry Clearance Officer should have exercised discretion differently. There was clear evidence that the Sponsor had corrected his details. The judge commented that the Secretary of State had had since 2012 to make a decision on the matter of the Sponsor's citizenship and had not done so. She continued "I am therefore satisfied that the fact that nothing has been put into motion as at the date of the decision should have been taken into account by the Entry Clearance Officer when deciding whether or not to exercise his discretion".

5. The judge continued (at paragraph 14 of her decision) stating that the Secretary of State has still done nothing and could not give a time estimate as to when something, if anything would be done which

> "Indicates to me that she does not consider this to be serious otherwise she would have acted much sooner and deprived the Sponsor of his British citizenship instead of reaffirming it for another ten years. She cannot say that the renewal of the passport is nothing to do with her department because the Passport Office became part of the Home Office in 2014".

The judge went on to state (at paragraph 15)

> "Given that the Sponsor revealed this information in 2012 I am satisfied that it cannot be said in the refusal letter that he has deliberately sought to deceive about his nationality. He has been truthful about it since 2012 and has maintained that information for nearly three years. ...".

She went on to consider that the Secretary of State had not acted with due expedition and that the Sponsor, in an attempt to enjoy family life with his wife, was keeping on trying to bring her over to the UK and in doing so continued to use the British passport which to date he was entitled to do. That she considered should have been taken into account by the ECO. Given the unusual circumstances she found that the ECO should have exercised discretion differently in the light of the information presented and that accordingly the decision was not in accordance with the law.

6. With regard to Article 8 the judge accepted that there was a genuine and subsisting marriage. In the light of the dilatoriness of the Secretary of State in making a decision as to whether or not to deprive the Sponsor of his British citizenship, the decision, she said, was a disproportionate interference with the couple's right to respect for their family life especially bearing in mind that there was a child on the way which was likely to be born a British citizen. The appeal was accordingly allowed.

7. The Secretary of State applied for permission to appeal against that decision. In the grounds it was said that the judge at first instance had given inadequate reasons for going behind the previous determination of the Tribunal and had given irrelevant and incorrect factors in justifying going behind the previous findings. The earlier decision was an unchallenged finding in respect of the serious deception undertaken by the Sponsor, which did not diminish with the passage of time. There had been a failure to consider that whilst the Sponsor might have made a full and frank disclosure, it should not have been held in his favour as he had little choice but to do so. The judge had failed to consider that regardless of the actions of the Secretary of State, the fact that there had been a passage of time since the previous hearing did not change the factual basis of the appeal which was clearly that the Sponsor had deceived and maintained that deceit over a considerable period of time. The judge stated that she was able to take into account a change of circumstances which appeared to be that the Passport Office, which the judge considered to be part of the Home Office, had issued a British passport but the judge had made assumptions on information that was not in fact ever placed before her and was not correct. The Passport Office, which might come under the overall control of the Home Office, was in fact an independent agency and the Home Office had no day-to-day control over whether or not a passport was issued or renewed. The passport agency would have no reason not to issue the Sponsor with a passport unless it had been informed that he had been deprived of his citizenship. The judge had also failed to consider that whilst the passport was renewed, it was done so only with false particulars.

8. As to Article 8 it was contended that the judge had failed to take account of Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and in particular to consider the public interest. The findings under Article 8 were inadequate and had failed to put into the balancing exercise factors adverse to the Sponsor and claimant. Permission was granted on all grounds. In a response under Upper Tribunal Procedure Rule 24 it was

submitted that the judge had not made any material error and had given adequate reasons.

9. At the commencement of the hearing before me, Mr Mills handed in a copy of the judgment of Mr Justice Ouseley in **Kaziu, Bakijasi and Hysaj v SSHD [2014] EWHC 832 (Admin)** and a copy of the judgment of the Court of Appeal in the same cases following appeal by each of the claimants, the citation being **[2015] EWCA Civ 1195**. Those cases concerned the ability of the Secretary of State to declare null and void a grant of British citizenship obtained on the basis of false information. He also put in copies of previously undisclosed Home Office computer records relating to the Sponsor. These showed the opening of records on 1st October 2012 concerning consideration of deprivation of citizenship, which was subsequently amended to consideration of a declaration of nullity of citizenship and incorporating a copy of a letter to the Sponsor's representatives written on 27th September 2012 saying that the policy on recognising a grant of citizenship as null and void was under review and that the writer would revert to the representatives when the review had been completed. The final document put in concerned the status of the Passport Office. Mr Mills continued that the Sponsor had admitted deception in 2012 and had said that he had given wrong details when he had initially claimed asylum, following arrival from Albania. He had requested that the record be corrected. Mr Mills said that the Sponsor would not have received exceptional leave to remain if it had been known that he came from Albania. The 2012 letter showed that review was under way and his case was in a queue of cases for consideration. The judgments before the Administrative Court and Court of Appeal showed that the Secretary of State had been successful in her policy of declaring null and void a citizenship obtained by deception but before matters progressed what was awaited was the outcome of an application for permission to appeal to the Supreme Court.

10. He continued that in the First-tier Tribunal the judge had taken the view that because the Home Office had known since 2012 that the Sponsor had used deception and had apparently done nothing, that meant there was no issue and that the matter should not be held against him. That was factually incorrect. The situation in the cases he had put in was the same as for the Sponsor. The judge at first instance had been wrong in considering that the Sponsor's actions were of no concern to the Secretary of State. It was only because the test cases were going through the courts that no action had been taken at this stage. The judge had inferred a change of position but that was plainly wrong. He submitted that she should have been aware of the cases referred to. Whether that was the case or not if she made a decision on the basis that the Secretary of State had changed her view that was factually incorrect.

11. The other point relied upon by the judge, he said, was that the Sponsor's passport had been renewed in 2015. She had been factually incorrect in considering the relationship between the Passport Office and the UK Border Agency or UK Visas and Immigration. The Passport Office was

obliged to issue a passport on the evidence before them unless the citizenship had been declared null and void. The Home Office view was that it was better to wait until there was certainty about the procedure as settled by the courts before proceeding. If the Passport Office had refused to issue a passport to the Sponsor, he could have taken judicial review proceedings. The judge was reading in factors which were simply not present. It remained the intention of the Secretary of State to declare the Sponsor's citizenship null and void and at that point he would not be a British citizen. The decision on suitability grounds was entirely appropriate. He submitted there was a material error and the matter should be remitted.

12. Mr Ahmed for his part said that documents which were now provided had not been submitted previously. The appeal had been heard on 13th July 2015 but there had been an earlier hearing on 1st December 2014 at which a Presenting Officer had made an application for an adjournment. That had been granted and there had been specific directions made as to steps to be taken by the Secretary of State. An opportunity had been given for the Secretary of State to provide all the information now relied on. At that point Mr Mills referred to a response from the Home Office which he said had been submitted to the Tribunal dated 10th July 2015. He produced a copy. Mr Ahmed continued that that letter had not been sent to the representatives and there was no indication from the judge that it had been received by her. It was clear that there had been no attendance at the hearing on the part of the Home Office and no written submissions. The judge was aware of the earlier decision of the Tribunal and had reached findings open to her. Even if the Home Office submissions had been before the judge it was reasonably open to her to make the decision she did. She gave adequate reasons. She specifically referred to the guidance in **Devaseelan** but commented that time had passed and nothing had been heard from the Home Office since 2013 and the Sponsor's passport had been renewed. Those matters were correct. The passport had been re-issued on the same particulars. The judgment of the Court of Appeal on which reliance was now placed was only handed down after the date of the hearing. The submissions from the Home Office which were now said to have been sent on 10th July did not refer to the cases now relied upon.

13. The judge's findings, he said, were reasonable and factually correct. The Sponsor had said in 2012 that he had previously lied. Until a decision was made that the grant of citizenship was null and void he remained a British citizen. He had sought to correct his details. There could be no material error of fact if the evidence had not been before the judge. In this case the claimant satisfied all of the requirements of Appendix FM and the only issue had been the matter of deception by the Sponsor. At this point the Sponsor's recently issued British passport was produced and I noted that it had been issued on 23rd March 2015 and noted his place of birth as Prizren. Mr Ahmed referred to a letter from Margot James MP and a response from the Home Office. That had been in December 2013 but still nothing had happened about the Sponsor's citizenship. The claimant had

done what was suggested she might do and had made a fresh application. He submitted that the judge could not be faulted. As to Article 8 he asked me to consider that in the context of the whole determination and the fact that the judge had found that the claimant succeeded under Appendix FM. Even if I took the child out of the equation, the decision was sustainable. He accepted that Section 117 of the 2002 Act had not been mentioned but said that even if it had it would have made no difference considering the Sponsor as a British citizen.

14. Having looked further into the file I traced the letter of 10th July 2015 from a senior caseworker at the Presenting Officers' Unit which Mr Mills had earlier referred to. That letter had been faxed to the Tribunal on 13th July 2015 (the day of the hearing) and bore the time mark 11.17. A front sheet annexed read "Urgent FAO Sarah clerk for Court 7". Mr Ahmed understood that in fact the case had been called on first on the day of hearing.

15. Finally in reply, Mr Mills said that Counsel for the claimant had not addressed what was incorrect in the decision. The central point was whether the judge had relied on a finding that the ECO and Secretary of State were not concerned about the deception. That was incorrect. There was an ongoing review and that was clear from the letter from the senior caseworker. Even if that letter had only arrived after the hearing it should have been taken into account and the judge should have considered reconvening, but there was no mention of it. The judge had been factually wrong to consider that there had been a change of heart on behalf of the Secretary of State and also to regard the Passport Office as being the same body as UK Visas and Immigration. The passport had been re-issued on the same basis which wrongly showed the Sponsor being born in Prizren. It was therefore a false document. There had been pleading that the mistake was not the fault of the parties but the deceit had only come to light because the Sponsor wanted to bring his wife to this country. The only differences since the date of the earlier decision of Judge Buckwell were the lack of action and the issuing of the passport. Had the judge taken account of the letter from the senior caseworker she would have realised that there was an ongoing intention to remove British citizenship from the Sponsor. As to Article 8 if the claimant had not succeeded under the Rules she could not have qualified under Article 8. There had been no mention of Section 117B and in particular the public interest and the impact of the Sponsor's deception.

16. Having heard those submissions I reserved my decision which I now give. It is highly regrettable that the Secretary of State was not represented at the hearing before Judge of the First-tier Tribunal Hawden-Beal and furthermore, that there had been no prompt response to the detailed directions issued following the hearing on 1st December 2014. The manner in which the proceedings before the First-tier Tribunal were conducted on behalf of the Secretary of State or Entry Clearance Officer was not the proper way to conduct litigation. That said, it is not the function of a judge

to punish a party for inadequate conduct of litigation by reaching a decision which is not a correct decision on the evidence.

17. Judge Hawden-Beal clearly decided the case on the basis that the Secretary of State had no further interest in declaring null and void the Sponsor's British citizenship as evidenced by delay and by the grant of a further British passport document. It is the case that she did have regard as her starting point the decision of Judge Buckwell and she was not bound by his decision, particularly in the matter of the exercise of a discretion, although she was bound to take it into account. In my view she did so. The thrust of the challenge on behalf of the Secretary of State is that she erred factually in her assessment of the Secretary of State as having no substantial or continuing interest in declaring null and void the Sponsor's citizenship, for which she gave the reasons mentioned above. The internal Home Office documents now produced by Mr Mills were not before the judge and she cannot be criticised for failing to take account of them. It is arguable that she should have been aware of the judgment of Mr Justice Ouseley even though this was not brought to her attention but the fact remains that that judgment was handed down on 26th March 2014 and the case before her took place some fifteen months later.

18. What I do find of significance is the approach taken to the letter from the senior caseworker dated 10th July 2015. That letter, which I found upon the Tribunal file, sets out that according to information currently available to the Presenting Officers' Unit a review of the Sponsor's acquisition of British citizenship was still ongoing and a timescale for conclusion of the review could not be given. In the circumstances the Tribunal was requested to consider adjourning the appeal pending the outcome of the review. If the Tribunal was not minded to adjourn the judge was invited to consider representations which followed. A copy was enclosed of the previous determination and reference was made to the fact that the Sponsor admitted informing the authorities that he had been born in Kosovo and accepted that was not correct and the earlier Tribunal had found that deception had been used and that the ECO had been correct to apply the provisions of Appendix FM paragraph S-EC.2.2(a). That Tribunal had also found the decision was proportionate. The earlier decision was the starting point. The ECO again relied upon paragraph S-EC.2.2 of Appendix FM and there was no reason to find differently and the decision was proportionate. That fax as I have stated was timed 11.17. That must be in the morning in the light of the affixed instruction to the clerk for court 7. I have checked the Record of Proceedings, which does include time markings, and it is clear that the hearing began not at 10.00 a.m. but at 12.10 p.m. and ended at 12.35 p.m. on 13th July 2015. The fact that the letter of 10th July 2015 was on the Tribunal file and includes the front sheet referred to above indicates that it was received by the Tribunal as indicated but there is no reference to it in the decision of Judge Hawden-Beal. The letter makes clear that the Sponsor's acquisition of British citizenship was still under review. That was information which either was or should have been before the judge and of which she should have taken account.

19. In the light of that statement on behalf of the Secretary of State it was not open to the judge to find, as she did at paragraph 14 of her decision, that the Secretary of State did not consider the matter of the declaration of the Sponsor's citizenship as null and void as being serious. The judge erred in law in that regard. She was obliged to take account of all of the evidence before her. She had also stated at paragraph 15 of her decision that given that the Sponsor had revealed his previous deception in 2012 "I am satisfied that it cannot be said in the refusal letter that he has deliberately sought to deceive about his nationality". I did not regard that as a rationally sustainable finding. The whole issue of a British passport to the Sponsor had been on the basis of a deception. Whilst one can understand that the judge was surprised that the British passport had been renewed, given that at the point of application the Sponsor still had a grant of British citizenship, that is less surprising. Given all of these factors, but most particularly the fact that the judge did not take account of the letter which either was or should have been before her from the senior caseworker, I find that she erred in law in a potentially material way in reaching the conclusion she did. It goes without saying that it is highly regrettable that there was no Presenting Officer at the hearing to assist the judge. If that had been the case it is unlikely that these errors would have occurred. I therefore set aside the decision made under the Immigration Rules.

20. With regard to the decision under Article 8 ECHR this too falls to be set aside. The judge failed to consider Section 117A and B of the 2002 Act in considering proportionality as she should have done. This has been made clear in various cases including **Dube (Ss117A-117D) [2015] UKUT 00090 (IAC)**. Of potentially more significance, although not pleaded by the Secretary of State, was the fact that the judge did not consider whether it would have been reasonable for the Sponsor to return to Albania to enjoy family life there with his wife, the claimant. It was for the claimant to show that that would not have been reasonable (see amongst other cases **PG (USA) v SSHD [2015] EWCA Civ 118** at paragraph 23). If the claimant failed to show that such a reunion in Albania was unreasonable, then family life was not subject to sufficient impact under Article 8 for the Article to be engaged at all.

21. The appropriate course is for me to set aside the decision on both grounds and to remit the appeal to the First-tier Tribunal for a complete rehearing, in accordance with Statement 7.2(b) of the Practice Statements of the Immigration and Asylum Chamber of the Upper Tribunal, and under the provisions of Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, the appeal is remitted accordingly and I make the directions below.

Notice of Decisions

The making of the decision by the First-tier Tribunal involved a material error on a point of law and that decision is set aside. The appeal is remitted to the First-tier Tribunal for rehearing in accordance with the directions below.

The fee award made at first instance necessarily falls away also.

There was no request for an anonymity order and none is made.

Signed Date 14 April 2016

Deputy Upper Tribunal Judge French

DIRECTIONS PURSUANT TO SECTIONS 12(3)(a) AND 12(3)(b) OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

(1) The decision of Judge of the First-tier Tribunal Hawden-Beal is set aside with no findings preserved and the appeal is to be heard afresh.

(2) The members of the First-tier Tribunal chosen to reconsider the appeal should not include Judge of the First-tier Tribunal Hawden-Beal.

(3) The appropriate hearing centre is Birmingham. The time estimate is two hours. No interpreter has been requested.

(4) Each party shall serve upon the other and upon the Tribunal copies of all witness statements and other documents sought to be relied upon at least seven days before the hearing.

Signed Date 14 April 2016

Deputy Upper Tribunal Judge French