Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00019/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2018	**On 12 February 2018**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
UPPER TRIBUNAL JUDGE ALLEN

Between

MR MOSES BUSHIRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Did not attend the hearing and was not represented
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the First-tier Tribunal ("the FtT") with leave of the Upper Tribunal ("the UT") granted on 6 February 2017. The appellant had appealed to the FtT against its decision to dismiss his appeal to it against the decision of the Secretary of State to revoke his British citizenship on the grounds that it had been obtained by material non-disclosure. The UT in its grant of permission to appeal said that four specified grounds "merit[ed] consideration" in the UT.

   (i) The appellant argued that an applicant for British citizenship is not obliged to disclose in his application conduct in respect of which he has not been convicted of any offence even if he is aware of an investigation since he is entitled to regard himself as innocent until proven guilty.

(ii) The appellant had asked for his appeal to be dealt with on the papers. The principle of equality of arms was completely breached with malice when Home Office Presenting Officers were unlawfully invited to present arguments in a case that should be heard on the papers because the appellant was "out of the country for the time being". This showed bias by the FtT. The FtT had colluded with the Secretary of State to the appellant's disadvantage.

(iii) In **Katsonga v Secretary of State for the Home Department [2016] UKUT 228 (IAC)** the UT said that after the enactment of the Immigration Act 2014 and the repeal of some of the provisions in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the FtT appears to have no duty or power to allow to dismiss an appeal.

(iv) The judge erred in refusing to consider the appellant's appeal under Article 8 of the European Convention on Human Rights ("the ECHR").

2. Unhelpfully in our view the Upper Tribunal Judge who granted permission to appeal also said that the appellant's grounds, which are twenty pages long, raised other complaints "each of which the respondent should address in any response to this grant of permission". We do not understand this instruction. We do not interpret it as a grant of permission to appeal because it does not say that that is what it is. If permission to appeal is not granted in respect of a complaint, there is no point in requiring the respondent to address it. We deprecate this approach to the grant of permission to appeal. All grounds on which permission to appeal is granted must be specifically identified. Permission will not be treated as having been granted in respect of any other grounds and the respondent must not be expected, or required, to comment on any such grounds. We have read the documents in the file, in particular the grounds of appeal, and the document dated 3 January 2017 produced by the appellant, which is 61 pages long, and in which the appellant makes many points, some of which, on our interpretation for grant of permission to appeal, he does not have permission to argue. The grounds of appeal summarised the appellant's points on page 20. They overlap to an extent with the four points identified in the grant of permission to appeal and it is on those four points, and those points alone, that we will focus.

3. This appeal has been before the UT on several previous occasions, most materially in May 2017 as we have already mentioned in our decision on preliminary matters, when Mr Justice Lewis sitting with Upper Tribunal Judge Allen decided to adjourn the appeal, the appellant not having appeared and having as on this occasion asked for the appeal to be dealt with on the papers. As we have already indicated in our decisions on the preliminary matters we are satisfied for the reasons given by the UT, on that occasion that we have power both to decide this appeal at a hearing even if the appellant objects to that, and that we should exercise that power by holding a hearing, and that the appellant knows about the time and date of the hearing (as his repeated correspondence with the Tribunal shows) we are satisfied that we have power to hold the hearing in his absence and given, the delays and previous adjournments we have decided that it would further the overriding objective for us

to hear the appeal today, and that it would not further the overriding objective for us to adjourn it again.

The Facts

4. The significant points in this appeal mean that we do not need to say much about the facts. The appellant was born in 1962. He was formerly a citizen of Burundi. In 2001 his asylum claim was refused but he was given exceptional leave to remain. He applied for naturalisation on 4 March 2008. His application was granted on 23 April 2009. The application form asked him whether he had done anything which "might indicate that you may not be a person of good character" he said "No". In brief the appellant was involved in setting up and running a charity. There was an investigation into the affairs of the charity by the Charity Commission and by the police. According to one of the appellant's written submissions there was a decision by the police to take no further action in 2006 but the prosecution was revived in 2008. According to a document from the Charity Commission (determination paragraph 24) the police told the Charity Commission on 26 January 2006 that the appellant was to be arrested again. He was suspended from being involved in charitable work from 8 September 2005 and removed from such involvement from 8 May 2006 by the Charity Commission because of misconduct or mismanagement in the affairs of the charity. He was indicted on 20 January 2009 (determination, paragraph 49). The FtT found (ibid) that it was likely that the appellant knew before the date of his application for naturalisation that the police were investigating his case and that he was being prosecuted. On 30 June 2010 the appellant was sentenced to three years and seven months' imprisonment on ten counts relating to obtaining a money transfer by deception and false accounting. He had defrauded the charity of at least £20,000 between 2001 and 2004. He pleaded guilty to some of the counts as we shall describe.

5. His case is that he is married to a woman who is a British citizen and that they have four children who are also British citizens.

The Reasoning of the FtT

6. The FtT referred to the relevant provisions of the British Nationality Act 1981 ("the 1981 Act"). The FtT considered whether recent changes to the 1981 Act and to the 2002 Act had any impact on its approach to the appeal. The FtT was aware of problems which had been identified in cases such as **Katsonga**. On their face the FtT said the new provisions did not permit the FtT to consider a human rights ground of appeal. However the effect of the European Communities Act 1972 and of the Human Rights Act 1998 was that the FtT could not make any decision which was contrary to a person's EU rights and could not make any decision which violated the rights protected by the ECHR. The FtT was therefore confident that it should apply the approach in **Deliallisi** to the appeal despite the repeal of the former appeal provisions in the 2002 Act. The FtT also took into account the Secretary of State's Nationality Instructions ("the Instructions") directing itself correctly that if the Secretary of State had acted contrary to her published guidance her decision would be unlawful. The FtT considered the Instructions as they were at the date of the

decision, again, in our view, correctly. The FtT considered rightly that it had to decide whether -

(i) the Appellant had concealed a material fact when he applied for naturalisation; and

(ii) if so, whether deprivation of nationality was the appropriate step.

There was no dispute that the appellant had been convicted in 2010 of a fraud committed between 2001 and 2004 and that the Charity Commission had made an order against him in 2005. Whether or not the Charity Commission had acted fairly, the FtT said, it was concerned with the outcome of that process. The appellant could not have declared his convictions in his application because he had not been convicted when he applied for naturalisation. The FtT said, however, in paragraph 41 of the determination that the good character test is a "self-declaration about a person's good character. The appellant did not declare what he himself knew. I reach the same conclusion from the Charity Commission order against the appellant". In the language of Section 40(3) of the 1981 Act the appellant had obtained naturalisation by concealing a material fact. The issue was whether he should have declared that he was the subject of a police enquiry under subject of an order from the Charity Commission. The FtT referred to the **Queen (Al Fayed) v Secretary of State for the Home Department (No. 3) [2000] EWCA Civ 523** and **2DA (Iran) v Secretary of State for the Home Department [2014] EWCA Civ 654**. The appellant's circumstances, said the FtT, did not fall clearly into any of the examples given in the Instructions. It is clear from the Instructions the FtT said that the list was not exhaustive. The FtT quoted a passage about pending prosecutions from the Instructions. That passage the FtT said made clear that a decision-maker will not normally grant an application when a prosecution is pending against the applicant. In the light of the Instructions and of the findings made in paragraph 49 the FtT held that the appellant's knowledge of the prosecution was information which was material to his application. The respondent would not necessarily have refused to grant naturalisation but would have held the case until the outcome of the trial. The FtT considered and dismissed procedural arguments in paragraphs 53 to 56 of the determination. The appellant's reliance on his residence in the United Kingdom for fourteen years was misplaced since this was no longer relevant under the version of the Instructions which was in force at the date of the deprivation decision (see paragraph 55 of the determination of the FtT). The FtT could find no evidence that the decision would undermine the appellant's rights of free movement. He had never sought to exercise them, on the evidence.

7. The FtT considered Article 8 of the ECHR in paragraphs 58 to 60. The FtT referred to the appellant's wife and children. No action was being taken in relation to their citizenship. All were British citizens. The FtT observed that as a result of the naturalisation decision the appellant would now have no lawful immigration status. In order to stay in the United Kingdom he would have to make an immigration application or a protection or human rights claim. The impact on the appellant's Article 8 rights could be significant but the decision letter made it clear that the appellant would be entitled to make a protection or human rights claim if he were

deprived of his citizenship. This had been confirmed to the FtT in the course of the hearing by the Home Office Presenting Officers. The FtT considered whether to, but declined to, decide any such claim at the hearing. There was no cogent evidence on any such issue from the appellant and therefore any decision would be against the appellant as the burden of proof was on him. It was reasonable to infer, the FtT said, that the appellant had provided no such evidence as he had not realised that it might be relevant to the issues on the appeal, that the appellant was entitled to rely on the concession in the decision letter that he could make a human rights or protection claim if the Secretary of State decided to deprive him of his nationality. In that situation the FtT held that it would be contrary to the overriding objective for the FtT to intervene.

Discussion

8. We deal with the grounds on which permission to appeal was granted in turn.

9. We consider that the FtT was right to reject the argument that an applicant for naturalisation is only obliged to declare a conviction and not obliged to declare a pending prosecution, and right to decide that a pending prosecution is a material fact for the purposes of an application for naturalisation. That much is clear from the Instructions, but even without the Instructions, we consider that it is obvious that the fact that a person is under a cloud cast by an official investigation such as an investigation by the Charity Commission, which has resulted in an order against the applicant by them, or by his knowledge that the police are investigating him, is a material fact which must be declared. It is something which in the words of question 3.12 on the application form (see paragraph 5 of the determination) *might* indicate that you *may* not be a person of good character" (our emphasis). The question is a wide question framed to elicit any adverse information of which the applicant is aware so as to enable the Secretary of State, not the applicant, to make the judgement about good character. We go somewhat further. We consider that the conviction is prima facie evidence to the criminal standard that the appellant did commit fraud. He has not appealed against that conviction. Moreover it is clear from paragraph 6 of the decision letter that the appellant pleaded guilty to two of the counts on the indictment. We are therefore satisfied that even though he had not yet been convicted the appellant knew when he made his application that he was guilty of criminal offences in relation to the management of the charity. He also knew that an order had been made against him by the Charity Commission and that he was being investigated by the police. All of those were material facts. He disclosed none of them. There is nothing therefore in this ground of appeal, and we dismiss it.

10. We turn to ground 2 which concerns the hearing held by the FtT in the teeth of the appellant's request that the appeal be decided without a hearing. We are satisfied that the FtT had power to have a hearing in this case. Rule 25 of the FtT Rules requires the FtT to have a hearing unless one of the exceptions in Rule 25(1) applies. Rule 25 is headed "Consideration of decision with or without a hearing".

> "25(1) The Tribunal must hold a hearing before making a decision which disposes of proceedings except where –

(a) each party has consented to, or has not objected to, the matter being decided without a hearing;

(b) the appellant has not consented to the appeal being determined without a hearing but the Lord Chancellor has refused to issue a certificate of fee satisfaction for the fee payable for a hearing;

(c) the appellant is outside the United Kingdom and does not have a representative who has an address for service in the United Kingdom;

(d) it is impracticable to give the appellant notice of the hearing;

(e) a party has failed to comply with the provisions of these Rules, a practice direction or a direction and the Tribunal is satisfied that in all the circumstances including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;

(f) the appeal is one to which Rule 16(2) or 18(2) applies; or

(g) subject to paragraph (2), the Tribunal considers that it can justly determine the matter without a hearing."

If we assume that the appellant was not in the country, although we pause to observe that that is not the way the case seems to have been put before the FtT, rule 25(1)(c) applied. The consequence was that the FtT was not obliged to have a hearing but it does not follow that it was obliged not to have a hearing. It had an option to have a hearing or not to have one. It was open to the FtT to decide to have a hearing in that situation. We note that the respondent, the Secretary of State, wished there to be a hearing. We cannot see how that begins to show bias or any lack of equality of arms. The appellant chose not to attend, we infer (he does seem to have a correspondence address in England and also communicates by e-mail). But as we have indicated it, does not look as though the appellant was arguing at that stage that the exception in rule 25(1)(c) applied (see paragraph 12 of the FtT's decision). It seems that he relied on rule 25(1)(a) which did not apply. That being the case rule 25 obliged the FtT to have a hearing. The appellant suggests that there was collusion between the Home Office Presenting Officers and the FtT. It seems to us that it would be wrong for us to go behind what is recorded on the face of the decision of the FtT. The determination recites that the Home Office Presenting Officers produced the relevant documents and made submissions "which were in line with the reasons for refusal and added little" (paragraph 22). In our judgment there is nothing in this ground of appeal and we dismiss it.

11. The next ground of appeal relies on the decision in **Katsonga**. If we were to suppose for a moment that this argument is correct we are unable to see how it helps the appellant. If indeed the FtT had no power to allow or dismiss the appeal the decision of the Secretary of State depriving the appellant of his nationality would stand. Moreover if the FtT had no power to allow or dismiss the appeal there would be no

basis for an appeal to the UT. We consider in any event that there is nothing in this argument. The observation of the UT on this point in **Katsonga** was obiter. It was not part of the reasoning which was essential to the decision in **Katsonga**. We are satisfied that on the repeal of the old provisions the powers of the FtT are now contained in the Tribunal, Courts and Enforcement Act 2007 and in the First-tier Tribunal Procedure Rules 2014. In our judgment there is nothing in this ground of appeal and we dismiss it.

12. The final ground of appeal concerns Convention rights and in particular Article 8. The FtT recognised that Section 6 of the Human Rights Act 1998 obliged it not to act incompatibly with the appellant's Convention rights (paragraphs 35 and 36 of the determination). We consider that the FtT's consideration of Article 8 was sufficient in the light of the evidence which was before it, and what that evidence showed. The FtT's reasoning in essence was that the deprivation decision did not affect the citizenship of the members of the appellant's family and that the deprivation decision did not prevent the appellant from making an immigration application or human rights or protection claim. It did not therefore directly interfere with his Article 8 rights because while he is not now lawfully in the United Kingdom he can prevent his removal and therefore an interference with his Article 8 rights by making one of those applications and if he does make one of those applications the question whether there is any interference and whether it is lawful and proportionate will be investigated and decided. We consider that there is nothing in this ground of appeal either, and we dismiss it.

13. Finally before leaving the appeal we should say that we have both read a document from the appellant dated 21 January 2018. In that document he contends that he had applied for Upper Tribunal Judge Allen to recuse himself and that application had been passed to the President and that the application had not been decided. It if it was decided the decision would be appealable then the proceedings must stop until the application is dealt with. We observe that in the course of our decision today we had decided the application for recusal and it together with the rest of our reasoning will be appealable if the appellant obtains leave to appeal.

14. Various other points are made in the letter. It seems to us that it is not necessary for us to deal with them further in the decision. To some extent the points are irrelevant and to some extent they duplicate the points with which we have already dealt. We have taken the representations in the letter into account but they do not in any way change our decision on appeal. We dismiss the appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed ELISABETH LAING Date 8 February 2018
Mrs Justice Elisabeth Laing DBE