Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00009/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11th June 2019	**On 2nd July 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Pavan [P]
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr P Turner, Imperium Chambers

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless we will refer to the parties as they were described before the First-tier Tribunal, that is Mr [P] as the appellant and the Secretary of State as the respondent.

2. Following a hearing on 1st May 2019 we promulgated a decision on 2nd May 2019 finding an error of law in the determination of the First-tier Tribunal dated 21st February 2019, which had allowed the appeal against the decision of the Secretary of State dated 14th February 2018 to deprive the appellant of British citizenship under Section 40(3) of the Nationality Act 1981. We set aside the decision of the First-tier Tribunal pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) in order to remake the decision under section 12(2) (b) (ii) of the TCE 2007 which we now proceed to do.

3. The full history and background to the appeal is set out in our appended error of law decision. Our reasons for setting aside the decision are contained in that determination.

4. By way of history, the appellant had been granted entry to the United Kingdom as a student in 2002 and applied for subsequent grants of further leave. On 16th July 2010 the he applied for further leave to remain in the United Kingdom as a Tier 1 General migrant. He was required to show an income of at least £40,000 and he declared an income of £43,625. One of the companies from which the appellant derived an income in the relevant period was IT Verticals. The Home Office subsequently mounted an investigation, through an operation named Cudgegong, of a number of companies involved in facilitating self-employment for those who were seeking leave to remain in the United Kingdom. The investigation revealed a scam perpetrated by, *inter alia*, IT Verticals, which recycled money through bogus companies to falsely inflate income for applications for immigration leave purposes.

5. The Secretary of State in the deprivation decision asserted that the appellant had engaged the services of, for example, IT Verticals to inflate his income for the purposes of obtaining leave in 2010 and thus fraudulently. His subsequent grant of Indefinite Leave to Remain on 27th January 2013 on the basis of 10 years lawful residence was also obtained by fraud. Had that information been before the respondent the appellant would not have been granted Indefinite Leave to Remain or following that British nationality by naturalisation on 27th August 2014.

6. The Secretary of State exercised his discretion under section 40 (3)(c) of the British Nationality Act 1981 and the decision, expressly made reference to the Nationality Instructions and confirmed that the appellant failed to disclose previous immigration fraud in his application for naturalisation. The Secretary of State in his deprivation decision recorded at paragraph 10 that the appellant made an application as a Tier 1 Highly Skilled-General Migrant and this application was successful. Finally, on 27th June 2012, the appellant lodged a Long Residency (10 year) application and on 27th January 2013 the appellant was finally granted Indefinite Leave to Remain which

ultimately led to his application for British citizenship which was granted on 27th August 2014. It was concluded at paragraphs 11-30 of the deprivation decision that this was through deception. The assessment was made on the balance of probabilities. The Secretary of State wrote to advise the appellant that he was considering depriving him of his British citizenship because he had used fraud and invited his submissions to which his legal representatives responded on 1st March 2017 and 14th June 2017. In the deprivation decision the Secretary of State referred to 'Chapter 18 and The Good Character Requirements' and noted that

> 'the Secretary of State must be satisfied that an applicant is of good character on the balance of probabilities. To facilitate this, applicants must answer all questions asked of them during the application process honestly and in full'.

The decision noted at paragraph 32

> 'in view of your involvement in immigration fraud, as highlighted in the above paragraphs, it is clear that you were not a person who could be considered of good character and you deliberately withheld information that would have had a bearing on whether or not your application succeeded'.

Further at paragraph 32 the Secretary of State wrote

> 'To support further the view that you were not of good character reference is also made to the document that would have accompanied your naturalisation application form, Guide AN Naturalisation as a British Citizen -A guide for applicants (Annex C -refers). Section 3: Good Character states the following: Sub Section 3.7 – 3.12 states: You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you man(sic) an untruthful declaration. If you are in any doubt about whether you have done something, or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so'.

7. In our error of law decision we specifically preserved the findings of the First-tier Tribunal at paragraphs 39 to 45 in relation to deception. The findings of the First-tier Tribunal were not subject to any challenge and are as follows:

> *"[39] I believe I have the following issues before me to determine. Firstly, whether the Respondent had established, on the balance of probabilities and not on a higher standard of proof as suggested by*

the appellant's representatives, that the appellant was knowingly involved in the fraud. If so, secondly, whether he had shown that he had motivated the grant of citizenship and therefore necessarily precluded that grant. In other words, whether the deception had motivated the acquisition of that citizenship. Lastly, whether I am satisfied that the reasonably foreseeable consequence of the deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or there was some exceptional feature of the case which meant the discretion should have been exercised differently. These questions are instilled from the guidance of the Upper Tribunal in the decisions that I have referred to above.

[40] The appellant was born on 24 May 1978. He came to the United Kingdom on 20 July 2002 when he was 24 years old. He was educated in India and came to the UK for further studies. He completed his studies and made the 2010 application for further leave to remain when he was 32 years old. As his academic record had shown, he is a very bright and intelligent man.

[41] On 30 October 2009 and 16 January 2010, the Appellant received a total of £5,000 from IT Verticals which he claimed in respect of services rendered. Immediately before receiving those payments, he had himself paid into the account of IT Verticals £2100 on 27 October 2009 (RBI, F6) and £1500 on 18 January 2010 (AB1, F7). The appellant claimed before me that he had provided services to IT Verticals in terms of training for which he was paid, and he had issued invoices to them. However, he had not explained why he himself had made payments to IT Verticals immediately before they made payments to him in the decision, similar method of recycling money was followed in respect of the other

In the absence of a credible explanation, it is clear to me that the money was recycled to look like the Appellant was earning the money as a self-employed person. As the Respondent noted in the decision, a similar method of recycling money was followed in respect of the other company. The Appellant had made payments to Juluru who was connected with the whole fraud operation. The Appellant would have me believe that Juluru was known to him from India and the payments that he made were to discharge personal debts. He also referred to some monies being transferred from his account into his personal account and yet provided no personal bank accounts for the relevant period'. [41]

[42] It is my finding that the Appellant was clearly involved in the scam set up by those who were running IT Verticals and the other companies. The appellant claimed that he went to IT Verticals as recommended by a friend. I totally discount that. The appellant was known to those who were running the companies. He knew what he was doing. Had his involvement with the scam gone a little

further than simply utilising their illegitimate services of recycling his own money, he too may have been arrested and possibly prosecuted. He was not a naïve person but a highly educated man.

[43] The respondent never suggested that the appellant was himself involved in setting up or running the scam. His role was, and I accept that assertion, to benefit from the scam by circulating his own money around to give the impression that money had been earned by him as a self-employed person. He issued invoices to IT Verticals which in fact were settled with his own money with the result that no money was earned on self-employment basis insofar as those funds were concerned. I find that the appellant was knowingly involved in the scam as the beneficiary of the scam, in order to qualify himself for further leave to remain by showing that his total yearly earnings were at least £40,000. The appellant has provided no innocent explanation of his involvement in the scandal as the beneficiary. I therefore find that the respondent has discharged the burden of proof in that regard.

[44] For the same reasons as mentioned above, I find that there was no evidence before me of an innocent explanation for the appellant's involvement in the scam as one of the beneficiaries.

[45] To summarise, I find that the Respondent has established, on the balance of probabilities, that the Appellant was involved in the scam as a beneficiary which led to the respondent granting him the 2010 leave to remain. He was involved in the scam knowingly and there was no innocent explanation for his involvement."

8. The British Nationality Act 1982 reads as follows

Section 40

…

"(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.

…"

9. The above may apply to a person where the person acquired the citizenship or status as a result of his or her registration or naturalisation on or after 1st January 1983.

10. Chapter 55 of the Nationality Instructions is entitled 'Deprivation and Nullity of British citizenship' and sets out

'55.4 Definitions

55.4.1 "False representation" means a representation which was dishonestly made on the applicant's part i.e. an innocent mistake would not give rise to a power to order deprivation under this provision.

55.4.2 "Concealment of any material fact" means operative concealment i.e. the concealment practised by the applicant must have had a direct bearing on the decision to register or, as the case may be, to issue a certificate of naturalisation.

55.4.3 "Fraud" encompasses either of the above.

55.4.4 "Conduciveness to the Public Good" means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours.'

11. Paragraph 55.7 reads as follows:

'55.7 Material to the Acquisition of Citizenship

55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.

55.7.2 This will include but is not limited to:

- Undisclosed convictions or other information which would have affected a person's ability to meet the good character requirement

- A marriage/civil partnership which is found to be invalid or void, and so would have affected a person's ability to meet the requirements for section 6(2)

- False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the

residence and/or good character requirements for naturalisation or registration

55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.

…

55.7.7 Deliberate

55.7.7.1 The caseworker should be satisfied that there was an intention to deceive: an innocent error or genuine omission should not lead to deprivation.'

12. The preserved finding at paragraph 45 of the First-tier Tribunal determination above found that the appellant was indeed involved in the scam which led to the grant of the 2010 leave to remain. Thus, the leave granted in 2010 was on the basis of partly false information about the appellant's self-employed earnings which he had submitted to the respondent in support of his 2010 application.

13. The Secretary of State's deprivation decision at paragraph 31 recorded

> "31 At Section 3: Good Character Requirement of the naturalisation application form which you completed (Annex A – Naturalisation Application Form refers) sub section 3.18 it states:
>
> > Have you ever engaged in any other activities which might indicate that you may not be considered a person of good character, you ticked the box marked 'No'. Your application form is dated 23/03/2014, which means you indicated you were of good character even though you have been engaged in immigration fraud prior to lodging your application."

14. As set out above in the Secretary of State deprivation decision at paragraphs 32-33 the Secretary of State found that the applicant had not disclosed his activities and was not of good character. At paragraphs 34 and 36 the Secretary of State noted

> "… it is clear from the guidance that was in place at the time of your application [for naturalisation] that you deliberately withheld your illegal activities in initially obtaining leave to remain in the United Kingdom via immigration fraud. Ultimately this fraud then assisted you in obtaining British citizenship. It is evidence that you are not of good character and if your activities had been known to the nationality caseworker, your application would have failed the good character requirement"

> "For the reasons given above it is not accepted there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship in circumstances where your application(s) would have been unsuccessful if you had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition.
>
> It is acknowledged that the decision to deprive on the grounds of fraud is at the Secretary of State 's discretion."

15. *BA (deprivation of citizenship: appeals)* [2018] UKUT 00085 (IAC) held:

> "*(1) In an appeal under section 40A of the British Nationality Act 1981, the Tribunal must first establish whether the relevant condition precedent in section 40(2) or (3) exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.*
>
> *(2) In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue.*
>
> *(3) In a section 40(3) case, the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) were used by P in order to obtain British citizenship. As held in Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC)* ***the deception must have motivated the acquisition of that citizenship.***"

16. The questions are (i) whether the failure to disclose the fraud in the naturalisation application at question 3.18 was dishonest and (ii) motivated the grant of naturalisation. Bearing in mind the clear findings of the First-tier Tribunal which we preserved and identified above, which found the appellant had been involved in a fraud in order to obtain his 2010 grant of leave, the Secretary of State has shown on the balance of probabilities that the appellant was indeed dishonest in his previous obtaining of leave. In his application for naturalisation the applicant did not disclose that he had engaged in activities which would indicate he was not a person of good character. As found by the First-tier Tribunal the appellant had undertaken a fraud to obtain his previous leave and he chose not to disclose that in his subsequent applications including that for naturalisation. Indeed, the appellant denied that he had undertaken any type of fraud. As set out in detail by the Secretary of State the applicant had engaged in fraud and had failed to disclose and concealed that fact.

17. It is clear that the concealment was material and as set out under the Nationality Instructions: it fell within the last bullet point of 55.7.2

> 'False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration'

18. In effect false details were given in the 2010 application and not disclosed in the later 2014 naturalisation application.

19. The correct interpretation of 'motivated' must be the natural and ordinary meaning, such that the Secretary of State was prompted, lead or influenced to grant the naturalisation on the basis of the information or lack of information provided. Had the true facts been known the decision-maker, that is that the appellant had previously committed fraud, the Secretary of State would not have been 'motivated' to grant the application. Section 40 (3) (c) refers to concealment of a material fact in the naturalisation application itself. It was the absence of information, or rather concealment, as explained by the Secretary of State in his deprivation decision, that influenced the grant.

20. Mr Turner argued that *BA* had made it clear that only acts *directly* related to the acquisition of nationality should be considered and adopted a restrictive approach. We reject that approach. The appellant had originally obtained leave through fraud which was a criminal offence under Section 24 of the Immigration Act 1971. It cannot be argued that this was too remote. In *Sleiman (deprivation of Citizenship; conduct)* [2017] UKUT 00367 it was held that in an appeal against a decision to deprive a person of citizenship because of fraud, false representation of a material fact, the impugned behaviour must be 'directly *material*' to the decision to grant citizenship. In this case, there was a direct material link between the obtaining of the grant of leave in 2010 and the obtaining of the naturalisation was evident. In particular, the deception took place prior to the grant of leave in 2010 and the ongoing reliance on that grant was instrumental in the ultimate naturalisation. The grant of leave in 2010 was axiomatic to the grant of naturalisation and indeed there was ongoing misrepresentation as to the obtaining of the 2010 grant which underpinned the naturalisation and the grant of citizenship.

21. Even if that were not the case the Secretary of State has clearly identified that concealment was deployed in the obtaining the grant and the provisions as to direct materiality apply equally to concealment. Albeit only one subsection is required, we conclude that both Section 40 (3) (b) and (c) apply in this case.

22. *BA (deprivation of citizenship: appeals)* [2018] UKUT 00085 (IAC) also held

> "*(4) In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.*
>
> *(5) As can be seen from AB (British citizenship: deprivation: Deliallisi considered) (Nigeria) [2016] UKUT 451 (IAC), the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation.*
>
> *(6) The appeal is to be determined by reference to the evidence adduced to the Tribunal, whether or not the same evidence was before the Secretary of State when she made her decision to deprive."*

23. At the hearing we permitted Mr Turner to submit further information, under Rule 15(2)A of The Tribunal Procedure (Upper Tribunal) Rules 2008 for the assessment of Article 8 within the compass of reasonably foreseeable circumstances, in particular statelessness. We made clear that we did not accept his evidence in relation to the deception findings which had already been decided by the First-tier Tribunal and which had been preserved.

24. The appellant and his wife adopted their statements. The appellant, aged 41 years, had been in the UK for 17 years and developed personal and social ties here. He was by profession a data analyst with many years of experience. His wife, also a British citizen, had come to the UK in 2010 from India and was settled in her job. She was in the Top 50 for Engineering but she wished at the age of 37 years wished to have children. As a couple they were undergoing fertility treatment which would be difficult to recommence should they have to return to India. The appellant was now however undergoing low moods and financial strain. There was medical evidence from his GP, Dr Shah that he had been suffering with low mood for several months and this was affecting his sleep and he was stressed. It would be an 'uphill struggle' to remake life elsewhere and it would be difficult to obtain work now at the age of 41 years. Furthermore, he no longer had Indian nationality. The appellant and his wife had also bought a home in the United Kingdom.

25. Mr Melvin submitted in a Rule 24 written response that given the marriage to a British citizen, the appellant's application 'would succeed with reference to the Immigration Rules to acquire discretionary leave as the spouse of a British citizen'. He did not wish to give an oral undertaking but it was the Secretary of State's position that the decision

to revoke his British citizenship would not reveal circumstances that demonstrated a breach of the Human Rights Act 1998.

26. Mr Turner countered that the appellant could not fulfil the Immigration Rules owing to the application of the suitability requirements. It was most likely that the Secretary of State would reject any future application on the basis of the presence of the appellant not being conducive to the public good because his conduct or character would be deemed undesirable to allow him to remain in the UK (S-SLTR 1.6) or further to paragraph 322(5) of the Immigration Rules.

27. In relation to statelessness, we were taken through the documentation which showed that the appellant had revoked his Indian passport in 2014 and was no longer an Indian national. Mr Turner resisted Mr Melvin's submission that an Overseas Citizen of India Card ('OCI') was available which entitles the holder to travel to and from India and to reside and work there without restriction. That did not afford Indian citizenship. However, Mr Turner submitted there was no evidence of insurmountable obstacles to the appellant's relocation to India and little by way of exceptional circumstances. The medical factors in the appellant's case would not assist his Article 8 claim.

28. Mr Melvin did not accept that the appellant would not be able to re-acquire Indian citizenship and we were referred to Part V of the India Citizenship Rules 2009 [Renunciation and Deprivation of Citizenship of India], Section 24 which detailed the route to re-acquisition. The Indian Citizenship Act 1955 (as amended) was not produced by either party.

29. *Deliallasi (British citizen: deprivation appeal: Scope)* [2013] UKUT 00439(IAC), recognised that Section 40A of the 1981 Act does not involve any statutory hypotheses that the appellant will be removed from the UK in consequence of the deprivation decision but found that the Tribunal is required to determine the reasonably foreseeable consequences of deprivation which may depending on the facts include removal.

30. In relation to Article 8 following *AB (British Citizenship: deprivation; Deliallisi considered) Nigeria* [2016] UKUT 00451,

> "*(2) Whilst the Tribunal considering a section 40A appeal cannot pre-judge the outcome of any future legal challenge that the appellant might bring against a decision to remove, following deprivation, the Tribunal must nevertheless take a view as to whether, from its present vantage point, there is likely to be force in any future challenge: cf section 94 of the Nationality, Immigration and Asylum Act 2002 and paragraph 353 of the immigration rules. The stronger the potential case, the less likely it will be that the*

> *reasonably foreseeable consequences of deprivation will include removal."*

31. It is clear from the authorities that if the appellant is deprived of British citizenship he would not fall to be treated as someone with Indefinite Leave to Remain. On acquisition of British citizenship, his Indefinite Leave to Remain was extinguished. The provisions of the Immigration Act 1971.

32. According to BA *(deprivation of citizenship: appeals)* the Tribunal can allow the appellant's appeal only if the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom or that there is some other exceptional feature which means that discretion should be exercised differently. In *AB* and prior to this conclusion the Tribunal found that if the appellant had a strongly arguable human rights claim which if rejected by the respondent would have at least a realistic prospect of success before a Tribunal it was not reasonably likely that the appellant would indeed be removed from the UK and thus the appellant's human rights would not be so breached.

33. Mr Turner specifically argued that a weaker Article 8 case would increase the chances of success in the deprivation matter. We were not, however, directed by the representatives to the Court of Appeal authority in *Aziz v Secretary of State for the Home Department* [2018] EWCA Civ 1884 and *KV (R on the application of) Secretary of State* [2018] EWCA Civ 2483. We were surprised as Mr Turner appeared in *KV*. Nonetheless, at paragraph 24 of *Aziz*, and which predated *KV*, Sales LJ held the following in relation to the proleptic analysis of what might ultimately happen

> '24. Conversely, by this reasoning, the weaker the case for the individual, the more likely it will be that the reasonably foreseeable consequences of deprivation will include removal from the UK, which presumably should then be brought into account when considering whether deprivation of citizenship is lawful. The effect is to draw the tribunal into considering on a proleptic basis the legal merits in relation to deportation or removal of an individual, as the FTT did in the present cases under appeal'.
>
> …
>
> In my judgment, the Secretary of State and, in turn, the FTT were entitled to make these assessments. It was unnecessary for the FTT to go further, as it did in each case, and conduct a proleptic analysis of whether each appellant would be likely to be deported or removed at a later stage. The Secretary of State had already been successful in showing that the making of a deprivation order in each case would be lawful and compatible with Convention rights, without needing to go on to establish whether the appellant would or could lawfully be deported later on. It was known that if a

> deportation order was sought to be made after deprivation of citizenship had occurred, the relevant appellant would have the opportunity of making representations and presenting full up-to-date evidence at that stage to contest the making of such an order; and that he would have a full right of appeal to present his arguments and relevant up-to-date evidence to the FTT. Since the rights of the appellants and their children as regards deportation (as distinct from deprivation of citizenship) would be fully protected by the procedures to be followed at that later stage, there was in these cases no possibility that the making of an order of deprivation of citizenship at the earlier stage could itself be assessed to be incompatible with their Article 8 rights or with the duty under section 55 by reason that there might ultimately be a deportation later on'.

34. In this case, we were not persuaded that there would be any violation of the appellant's human rights on the deprivation decision itself. We note that Section 40 (4) of the British Nationality whereby there may be no deprivation if the Secretary of State is satisfied that the order would make a person stateless (with some caveats) does not apply to Section 40(3), that is to a person who has citizenship resulting from his registration or naturalisation. The deprivation must, nonetheless, be compliant with Section 6 of the Human Rights Act 1998.

35. With regard the argument on statelessness, in *KV (R on the application of) Secretary of State* [2018] EWCA Civ 2483 Leggatt LJ said this**:**

> 17. It is a further question whether the exercise of the discretion should be approached on the basis that deprivation of citizenship involves interference with a right and that any such interference should be no greater than is necessary to achieve the legitimate aim of the interference. It is well established that such a test of proportionality is applicable where there is interference with a right protected by the European Convention on Human Rights, such as the right to respect for a person's private and family life guaranteed by article 8. However, although deprivation of citizenship may result in interference with article 8 rights, the right to a nationality is not itself a right protected by the Human Rights Convention.
>
> 18. Although a right not to be made stateless is recognised under other international treaties, no such right applies in a case where a person's nationality has been obtained by fraud. In particular, article 8(1) of the 1961 Convention on the Reduction of Statelessness (which the UK has ratified) prohibits deprivation of nationality which would render a person stateless; but article 8(2)(b) provides an exception where the nationality has been obtained by misrepresentation or fraud. Likewise, article 7(1) and (3) of the 1997 European Convention on Nationality (which the UK has not in fact ratified) does not prohibit a state party from depriving a person of his nationality, even if he thereby becomes stateless, when that nationality was acquired by means of fraudulent conduct, false

> information or concealment of any relevant fact attributable to the applicant. More broadly, article 15 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1951, declares that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality. But as the CJEU recognised in *Rottmann v Friestadt Bayern* (Case C-135/08) [2010] QB 761, para 53, when a state deprives a person of his nationality because of acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.
>
> 19. Where, as in the present case, it is established not only that deception was used but that, without it, an application for naturalisation as a citizen would not have been granted, it seems to me that it will be an unusual case in which the applicant can legitimately complain of the withdrawal of the rights that he acquired as a result of naturalisation. That is because the withdrawal of those rights does no more than place the person concerned in the same position as if he had not been fraudulent and had acted honestly in making the application. The position may be different, however, in a case where, as a result of naturalisation, the individual has lost other rights previously enjoyed which will not or may not be restored if he is now deprived of his citizenship. In such a case depriving the person of citizenship will not simply return him to the *status quo ante* but will place him in a worse position than if he had not been granted citizenship in the first place.
>
> 20. That may occur where a person who was a national of another state has lost that nationality as a result of becoming a British citizen and would not be entitled to resume his former nationality if deprived of his British citizenship. In such a case the decision-maker (whether it be the Secretary of State or the tribunal on an appeal) will need to consider whether deprivation of citizenship is justified having regard to that consequence. Relevant factors in making that determination are likely to include both the nature and circumstances of the deception by means of which naturalisation was obtained but also, on the other side of the scales, the likelihood (if any) that the individual would be able to re-acquire his former citizenship and the extent to which the inability to do so will have practical detrimental consequences for the individual or others. Although it does not seem to me necessary that the assessment should have to be conducted using the formal four stage test of proportionality adopted in cases such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74, it will necessarily involve a balancing exercise and a judgment as to whether in all the circumstances deprivation of citizenship is proportionate.

36. First, although we recognise that the OCI would entitle the appellant to travel, work and residence in India, all of which were significant, we realise that it does not entail citizenship. We were not, however,

persuaded that the appellant, on the evidence provided, would be unable to obtain Indian citizenship because at page 28 of the Appellant's bundle there was specific reference to the acquisition of Indian citizenship at 2 ii by a person of Indian origin who is ordinarily resident in any country or place outside undivided India. There was nothing before us to the effect that having once revoked citizenship it could not be re-acquired. Without specific expert evidence we cannot to conclude that the appellant would be unable to re-acquire citizenship. That said, as Mr Turner argued in his grounds of appeal, the appellant has revoked his Indian citizenship and the Secretary of State would be likely to grant some form of limited leave whilst he attempts to re-acquire citizenship. There is, however, no decision on removal.

37. In effect the burden of proving statelessness lay with the appellant and at it requires evidence of foreign law which, under the general rule can only be done by adducing evidence from an expert witness and as stated at [26] of *KV*

> 'Likewise, I see no reason why, before depriving a person of citizenship on the ground that his naturalisation as a citizen was obtained by fraud, the Secretary of State should be required to investigate whether that person has, or previously had, another nationality. If a person who has been shown to have obtained citizenship by fraud wishes to argue that he should nevertheless not be deprived of his citizenship because this would have further particular adverse consequences in his case over and above the loss of citizenship itself, then it seems to me that the burden must lie on him to identify and prove the further consequences on which he seeks to rely. That includes any assertion that the person will be made stateless'.

38. We considered the questions of whether the appellant could resume citizenship and had a realistic prospect of the same was material.

39. We repeat that we had specifically directed that evidence on statelessness should be provided at the resumed hearing. In the context of Indian law, which in the documentation provided is described as difficult, expert evidence might have been expected to have been provided to confirm that appellant would be rendered statelessness and without prospect of resumption of citizenship. That said, *KV* found the requirement for expert evidence was not *always* required and the documentation provided in this instance pointed to the position that the appellant would not be rendered stateless.

40. We were provided with internet articles and sections from Wikipedia. We were shown a ''Surrender Certificate of Indian Passport dated 24th September 2014' and a copy of the passport of the appellant which the stamp across it 'Acquired British Foreign Nationality'. The evidence provided by the Secretary of State noted at Rule 23 of the Citizenship

Rules 2009 that 'Renunciation of Citizenship' required a declaration under Section 8(1) [of the Citizenship Act 1955] which in turn included formalities. There was no evidence of a declaration to that effect in the bundle. The evidence provided by the appellant at page 29 stated that

> *'… any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.*

There was no suggestion that the appellant had acquired his citizenship by 'voluntary means' or that he was an Indian citizen by anything other than 'descent'. The evidence filed also noted that it was 'generally difficult to have dual citizenship'. It did not say it was impossible, (page 46 of the appellant's bundle).

41. In the Wikipedia article, however, there was a reference to Section 9(1) of the Citizenship Act 1955 which states that 'any citizen' of India who by naturalisation or registration acquires the citizenship of another country shall cease to be a citizen of India.

42. The evidence that was provided however, as we state, indicated that the applicant could indeed resume his citizenship. The Citizenship Rules 2009, which were provided by the Secretary of State, confirmed at Rule 24 that it was possible to resume Indian citizenship and the evidence provided by the appellant identified that the resumption of Citizenship by registration was provided for under Section 5 of the Citizenship Act 1955 (as amended) as follows:

> 'a person of Indian origin who is ordinarily resident in any country or place outside undivided India'.

There appeared to be no requirement for that person to reside in India for any length of time. The applicant was a citizen of India owing to his birth not by acquisition and we conclude that owing to the provisions for the resumption of citizenship he had a realistic prospect of the same even if an official order needed to be made. Nothing produced by the appellant indicated the opposite; rather the reverse.

43. We conclude therefore that the evidence did not demonstrate that the deprivation decision would make the appellant stateless or without the option of resumption of Indian citizenship.

44. Although we are not required to make a proleptic analysis, and the Court of Appeal decision in *Aziz* predates that of *KV*, it is now open to the appellant to make a human rights claim which must be considered by the Secretary of State under the Immigration Rules, and which may well involve the suitability provisions but any decision must comply

with *R (Agyarko)* [2017] UKSC 11 and it is for the Secretary of State to consider whether there would be any unjustifiably harsh consequences on his removal. Owing to the Secretary of State's Policy on Certification it is most unlikely that, as a family case with a British citizen wife, any refusal would be certified, and it is open to the appellant to appeal.

45. There has been no decision to date to remove the appellant and there is a mechanism to examine whether there would be any violation of his Article 8 rights. The Secretary of State made clear in the decision that there would be an intention to remove the appellant within 8 weeks of the deprivation order subject to representations being made. To date, however, those representations on human rights grounds have not been made to the respondent and we repeat it is not for us pre-judge the outcome of any appeal or make an analysis based on the prediction of removal. What the appellant would need to do is to make a human rights claim setting out the factors and appeal any refusal of that claim.

46. Crucially, as Mr Melvin indicated the appellant would be able to raise the factors in relation to his British citizen wife, his length of residence in the UK, and any medical grounds in any human rights claim. Those factors can be argued on the up to date evidence. The point on statelessness would be one which would need to be argued, if necessary, with expert evidence. Mr Turner asserts any claim would not have a prospect of success and thus the deprivation should not be enforced but, we repeat, on the basis of *Aziz* we are not required to undertake a 'proleptic' (forecasting) analysis. There has been no notice of removal yet served and accordingly, we were not satisfied that the deprivation per se, despite his length of residence and his wife being present in the United Kingdom, would violate the obligations of the UK government under the Human Rights Act 1998.

47. The question is whether the decision is proportionate. There is significant weight attached to the public interest as set out at **BA** which held

> '*the tribunal will be required to place significant weight on the fact that the Secretary of State had decided, in the public interest, that a person who is employed deception et cetera to obtain British citizenship should be deprived of that status*".

48. The appellant has been found to have deployed deception to obtain British citizenship and there is a requirement to uphold the public confidence in the system. We have considered the circumstances which included the appellant's length of residence in the United Kingdom and his loss of benefits of British citizenship. In the circumstances although we find the deprivation of citizenship involves interference with a right, that interference is no greater than is necessary to achieve the legitimate aim of protecting and maintaining confidence in the UK immigration

system and the public interest in preserving the legitimacy of British nationality. The system of granting leave and naturalisation is significantly undermined by the use of deception.

49. Considering the evidence as we have done, including the arguments on statelessness and in the absence of some other exceptional feature which means the discretion under Section 40(3) should be exercised differently, we find that the exercise of discretion on deprivation was exercised correctly. We conclude that the discretion of the Secretary of State under section 40(3) of the British Nationality Act 1981 to deprive the appellant of his British citizenship was exercised correctly in the light of the evidence that a deprivation order may make him stateless but that he is in a position to re-acquire Indian citizenship. No expert evidence was provided to the contrary; indeed, the evidence provided indicated that the appellant could resume Indian citizenship without a residence requirement.

50. The appeal is dismissed.

Signed *Helen Rimington* Date 24th June 2019

Upper Tribunal Judge Rimington