Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00032/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral Decision given immediately following hearing	**On 9 April 2019**
On 26 March 2019	

Before

THE HONOURABLE MRS JUSTICE JEFFORD
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ELTON ZACE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant (Secretary of State): Mr D Clarke
Senior Home Office Presenting Officer
For the Respondent (Mr Zace): Mr R Wilcox
Counsel, instructed by Connaughts

DECISION AND REASONS

This is the Secretary of State's appeal against the decision of the First-tier Tribunal promulgated on 7 December 2018, in which Mr Elton Zace was the appellant, or claimant, and the Secretary of State was the respondent. For

ease of reference, I shall in the course of this judgment refer to them respectively as “the claimant” and “the Secretary of State” rather than as they appear today.

The appeal to the First-tier Tribunal arose out of the decision of the Secretary of State to deprive Mr Zace, the claimant, of his British citizenship on the grounds that it had been obtained by false representation so that the Secretary of State was empowered to deprive him of his citizenship pursuant to section 40(3)(b) of the British Nationality Act 1981.

The background facts are set out in the decision of the First-tier Tribunal. They were that in August of 1999 the claimant first arrived in the United Kingdom. He made an asylum claim in which he gave (i) his nationality as Kosovan, when he was in fact Albanian, and (ii) a date of birth of 8 March 1984, which made him appear to be four and a half years younger than he actually was. His asylum claim was refused but he obtained exceptional leave to remain for a period of four years because of his apparent age, that is, under the age of 16.

He then applied for indefinite leave to remain, which was granted on 24 April 2005, and received his certificate of naturalisation on 24 June 2006. On each of those occasions he repeated or perpetuated the lie that he was Kosovan, not Albanian, and that he was significantly younger than he in fact was. The true facts emerged in 2007 or 2008 when he sought clearance for his wife, also Albanian, to enter the United Kingdom. He then provided his birth certificate, which showed his true date of birth, being 8 September 1978, and that he was Albanian and not Kosovan as he had claimed.

There was then a relatively lengthy period over which various steps were taken. Initially on 28 July 2008, the Nationality Directorate wrote to the claimant, advising that the Secretary of State had reason to believe he had obtained his status as a British citizen by fraud and that consideration was being given to depriving him of his citizenship.

However, no further action was taken. One of the reasons for that appears to have been a series of appeals that had been lodged in October 2009 and related to the issue of whether British citizenship that had been given in such circumstances was a nullity or whether it was rather a question of deprivation of citizenship. That matter was not resolved until the Supreme Court’s judgment in **Hysaj v Secretary of State for the Home Department [2017] UKSC 82**. In the meantime, so far as the claimant is concerned, he was told, but not until 19 August 2013, that his citizenship was null and void. He was still given indefinite leave to remain.

For the purposes of this decision, it is not necessary for us to canvas further the issues which have been considered in argument on this appeal as to the precise effect of what happened in terms of indefinite leave to remain and citizenship but the end result was that the claimant remained in this country pursuant to that indefinite leave to remain and that it was not until February 2018 that he was advised that the decision to nullify his citizenship had been withdrawn as a consequence of the decision in **Hysaj**. He was sent a new letter

on 30 March 2018 advising that deprivation of his citizenship was being considered and a further decision letter, dated 25 June 2018, in which the Secretary of State made his decision to deprive the claimant of his citizenship. That was the subject matter of the appeal to the First-tier Tribunal, which decided that, whilst section 40(3)(b) of the British Nationality Act, was engaged the deprivation of the claimant's citizenship would violate his human rights and in particular his Article 8 rights.

What is submitted on behalf of the Secretary of State on this appeal is that that decision was wrong in principle and in law, primarily relying on the decision of the Upper Tribunal in the case of **BA [2018] UKUT 00085**. In that case, the court said this:

> "42. In the case of Section 40(2), the matter on which the respondent must be satisfied - involving 'the public good' - is one in respect of which the respondent's conclusion will almost inevitably be determinative. In other words, it is very hard to see how, on a particular set of facts, the Tribunal could find that deprivation would not be conducive to the public good if, on those facts, the Secretary of State has decided that it would.
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> 43. Nevertheless, as with criminal deportation, a finding that something may be in the public interest or conducive to the public good will not be necessarily dispositive of the overall appeal. The Tribunal will be required to allow the appeal, notwithstanding such a finding, if to do otherwise would violate the United Kingdom's obligations under the ECHR. The Tribunal would also have to exercise its discretion differently from that of the respondent, if some particular (we would venture to say, exceptional) feature of the case necessitated it.
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> 44. In the case of Section 40(3) [which is the Section, I observe, that we are concerned with on this occasion] the matter of which the Secretary of State must be satisfied is much more hard-edged. The fact that the subSection speaks of the Secretary of State being 'satisfied' that fraud etc. was employed does not mean the question for the Tribunal is merely whether the Secretary of State was rationally entitled to conclude as she did."

The Upper Tribunal then referred to the Supreme Court's decision in **The Secretary of State for the Home Department v Al-Jedda [2013] UKSC 62** and continued:

> "The Supreme Court was not disposed to say more than that the use of the word 'satisfied' in section 40(2) and (3) 'may afford some slight significance', although the court found it difficult to articulate what that significance might be. We consider the Tribunal is in a position to take its own view of whether the requirements of sub-section (3) are satisfied. If they are, then the points made in paragraph 43 above will apply in this class of case also. The Tribunal will be required to place significant weight on the fact that the Secretary of State has decided, in the public interest, that a person who has employed deception to obtain British citizenship should be deprived of that status. Where statelessness is not in issue, it is likely to be only in a rare case that

the ECHR or some very compelling feature will require the Tribunal to allow the appeal."

The Tribunal then summarised the position at paragraph 45 as follows:

"(1) The Tribunal must first establish whether the relevant condition precedent 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 sub-section (3)(a), (b) and (c) were used by P in order to obtain British citizenship.

(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**, 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."

It is not in issue here that section 40(3)(b) is engaged and that the claimant did obtain his British citizenship by making a false representation as to his original nationality. Therefore, the Secretary of State plainly had a discretion to exercise under Section 40(3) and the principles summarised in the **BA** case are applicable.

What is submitted on behalf of the Secretary of State is twofold. The first submission is that the Judge of the First-tier Tribunal did not give significant weight to the decision of the Secretary of State. It is for that reason that we have set out the entirety of paragraphs 42 to 44 of the decision in **BA** because they make it plain that the significant weight to be given to the Secretary of State's decision is to be given both in the case of a section 40(2) deprivation and in the case of a section 40(3) deprivation.

We agree with that submission. It is difficult, if not impossible, to see from the First-tier decision how any weight was given to the decision of the Secretary of State.

The second point made by the Secretary of State is that the First-tier Judge did not deal appropriately with the Article 8 claim which the claimant may have. During his time in the United Kingdom, the claimant has had two children, both of whom are British citizens and are aged, at this time, 7 and 10; he has worked; and he has a painting and decorating business. The decision records that it is a successful business and that he has been paying tax over many years.

The point made in the **BA** case is that the stronger the Article 8 claim may be, the less foreseeable it is that the claimant would be removed such that his Article 8 rights would be violated. That does not appear to have been the approach taken by the First-tier Judge, who found at paragraph 19 of the decision that the appellant had a strong Article 8 claim. He recited:

> "He has lived in the UK for almost twenty years and would be able to apply for indefinite leave to remain on private life grounds in August 2019. The appellant has established family life in the UK with his wife and two young children, all of whom are British citizens. Whilst the deprivation of his citizenship would not necessarily lead to his removal from the UK, the foreseeable consequences are that the appellant would have a lack of settled status, affecting his ability to continue to work and provide for his family. He would also be liable to administrative removal."

What is argued on his behalf is that that is a properly reasoned approach to the Article 8 claim because it places the emphasis, as does Mr Wilcox on behalf of the claimant, not on the risk of removal but on the impact on family life, in particular or solely on the ability of the claimant to continue to work and provide for his family. That seems to us to be the natural consequence of any deprivation of citizenship but not a disproportionate interference with the claimant's Article 8 rights and not an unusual or exceptional feature. The position appears to be that if he is deprived of his citizenship he may still apply for indefinite leave to remain and he would then be entitled to work. There may well be some period of disruption to his family life that may have a negative impact on his family but that is all that there would be.

A comparison was drawn in the course of the argument before us of the position if the claimant was to be prosecuted for the offence that he has, on these facts, committed and subject to a sentence of imprisonment as a result. In those circumstances too, there would be an effect on his ability to continue to work and provide for his family.

In other words, as we have said, the consequences of the deprivation of his citizenship in terms of the effect on his family life are entirely commonplace. They do not, it seems to us, fall within the sort of circumstances which the Upper Tribunal had in mind in **AB** and they do not amount to sufficient reasons why the Secretary of State's decision was not proportionate and was open to challenge.

For those reasons, we would allow the appeal of the Secretary of State.

We set aside the decision of the First-tier Tribunal. We remake the decision so that the claimant is deprived of his citizenship in accordance with the decision of the Secretary of State dated 25 June 2018 and we dismiss the claimant's appeal against that decision.

Notice of Decision

We set aside the decision of the First-tier Tribunal and remake the decision as follows:
The claimant's appeal against the Secretary of State's decision, revoking his British citizenship, is dismissed.

No anonymity direction is made.

Signed:

pp. Mrs Justice Jefford Date: 2 April 2019