Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00050/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 28 August 2019	**on 11 September 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AVDI DIDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms M Sardar, Counsel, instructed by Oliver & Hasani Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (the appellant) against the decision of Judge of the First-tier Tribunal J K Swaney (the judge), promulgated on 31 May 2019, in which she allowed the appeal of Mr A Dida (the respondent) against the appellant's decision dated 10 September 2018 to deprive him of his British nationality under s.40 of the British Nationality Act 1981 (the 1981 Act).

Background

2. The respondent was born in Albania on 15 May 1986 and is a citizen of that country. He entered the UK on 7 April 2004 and made a bogus asylum claim the following day. He said he was born in Kosovo and that his date of birth was 4 April 1988. He claimed his father had been killed by the Kosovan Liberation Army and that he would be at risk on return to the region based on his mixed ethnicity and an imputed political opinion. On 6 May 2004 the respondent refused the asylum claim citing a material change of circumstances in the Kosovan region. The respondent was however granted Discretionary Leave to Remain (DLR) in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave, valid until 5 May 2005.

3. The Respondent made an application for Indefinite Leave to Remain (ILR) on 2 May 2005. In his ILR application the respondent maintained his claim to hail from Kosovo and his claim to have been born on 4 April 1988. A decision in respect of this application was not however made until 28 April 2010. On that date the appellant granted the respondent ILR exceptionally, outside the immigration rules. The grant was issued by "Legacy CRT".

4. On 5 July 2011 the respondent applied for naturalisation as a British citizen. In his application form he maintained that he was born in Kosovo and that his date of birth was 4 April 1988. He was issued with a certificate of naturalisation on 17 October 2011.

5. On 4 July 2018 the appellant informed the respondent of her belief that he was a citizen of Albania born on 15 May 1986, and that she was considering depriving him of his British citizenship pursuant to s.40(3) of the British Nationality Act 1981 (the 1981 Act). On 10 September 2018 the appellant decided to deprive the respondent of his British citizenship. In her deprivation decision (DD) the appellant stated that the respondent was granted DLR because he was an unaccompanied child from Kosovo for whom adequate reception arrangements could not be made in his "own" country. Although the appellant acknowledged that the respondent was still a minor on 6 May 2004 it was "not at all clear" that he would have been granted leave as a minor had his true nationality been known as it "may have been possible to make reception arrangements and remove [him] to Albania" (DD, at paragraphs 14 & 15). The appellant acknowledged that the respondent "may have been granted leave even if [his] true identity and nationality had been known" (DD, at paragraph 17). Due to a "backlog in unresolved asylum cases" the respondent accrued 5 years length of residence in the UK. At paragraph 27 of the DD the appellant stated that if the respondent had told the truth prior to the grant of ILR "it is possible" that he would have been refused further leave and removed to Albania. At paragraph 30 the appellant stated, "as noted previously, the ILR caseworker was not privy all the facts and had she been, it is quite possible you would not have been granted ILR."

6. The appellant concluded that the decision to deprive the respondent of his British citizenship would not render him stateless and that it did not breach Article 8 ECHR. The respondent exercised his right of appeal to the First-tier Tribunal pursuant to s.40A(1) of the 1981 Act.

The decision of the First-tier Tribunal

7. The judge set out the relevant facts, accurately summarised the position of the parties, summarised the representatives' submissions, and correctly directed herself on the relevant law and the burden and standard of proof. The judge had before her a bundle of documents prepared by the appellant and a bundle of documents produced on behalf of the respondent that included witness statements from the respondent and his wife, the appellant's Operational Guidance Notes (OGN) on Albania for 2003 and 2004, and the copies of chapter 55 of the appellant's guidance on deprivation and nullity of British citizenship dating from 2012, 2014 and 2017. The judge heard oral evidence from the respondent and his wife (a British citizen pregnant with twins) and the impact of the deprivation decision on their family (they have two young children) and their private lives.

8. In the section of her decision headed 'Findings and reasons' the judge found that the respondent made a false representation in his application for naturalisation as a British citizen, that he knew the details were not correct and that his false representation was deliberate. The judge then considered whether the representations made by the respondent was material to the grant of citizenship.

9. At [31] the judge noted that the respondent was 17 years old on 6 May 2004 and that he would have been entitled to a grant of leave to remain for 9 days until his 18th birthday in accordance with the appellant's policy at the time. The OGN for Albania dated May 2003 indicated there were no adequate reception arrangements in place for unaccompanied minors in Albania. The judge found that even if the appellant had known the respondent was from Albania he would have been entitled to a grant of leave to remain on 6 May 2004. "The [respondent's] age and place of birth, had he provided genuine details when he claimed asylum, may have affected the duration of the leave to remain he was granted, but on the evidence before me would not have been material to the grant of leave to remain in itself."

10. The judge then considered the circumstances surrounding the grant of ILR. At [33] the judge gave a broad outline of the legacy exercise and referred to Chapter 53 of the Enforcement Instructions and Guidance (EIG) on how caseworkers were to consider cases. The judge noted that, at the date of the decision to grant the respondent ILR, his application had been pending for over

5 years. The judge found that the respondent fell squarely within Chapter 53 of the EIG. At [35] the judge stated,

> The EIG contains guidance about an applicant's personal history including character, conduct and employment history. This section does not suggest that someone who provided false details in respect of an earlier claim would be precluded from a grant leave to remain or that it is even a relevant consideration.

11. At [36] the judge found the fact that the grant of ILR signed by the "Legacy CRT – South 19" supported the respondent's contention that his application was determined under the legacy exercise. The judge found on the balance of probabilities that the respondent was granted ILR under the legacy exercise on application of the guidance in Chapter 53 of the EIG. The judge found that the respondent's false representation regarding his age and place of birth was not material to the decision to grant him ILR.

12. At [37] the judge considered that the appellant had established specific guidance contemplating the respondents' circumstances. She referred to 'Case Study C' contained in Chapter 55 of the Nationality Instructions in which an Albanian impersonating someone from Kosovo was granted ILR under the family ILR concession would not be deprived of their citizenship because their nationality was not relevant to how ILR was granted under that concession. The judge acknowledged that the respondent was not granted ILR under a concession, but that he was granted ILR pursuant to published guidance and not as a refugee. As such, his nationality and date of birth were not sufficiently material to the grant of leave.

13. The judge then considered, in the alternative, whether the deprivation decision was disproportionate under Article 8 or was otherwise unlawful or unfair. The judge considered that the reasonably foreseeable consequences of the deprivation of citizenship were significant as the respondent would not be permitted to work and would fall foul of the measures introduced by the Immigration Act 2014 such as being prohibited from having a bank account or holding a driver's license. At [41] the judge noted that the respondent owned a business and that the deprivation of his citizenship would significantly impair his ability to run the business lawfully. Although the respondent's partner worked in the business she was not a partner and had no experience of running the business. She also had 2 young children and was pregnant with twins, factors that would impede her ability to run the business or even continue to work. This would have a negative and detrimental effect on the family's ability to support itself. It was not desirable or in the public interest to force a previously financially independent family to access social security benefits. At [42] the judge found that, given the strength of the respondent's family life, private life and the length of his residence in the UK, he would have a strongly arguable rights claim which, if refused by the appellant, would have a realistic prospect of success before the First-tier Tribunal. Accordingly, the judge did not consider the respondent's removal was a reasonably foreseeable consequence of

being deprived of his citizenship. At [43] the judge acknowledged a statement by the appellant that she would make a decision on whether to either remove the respondent or grant him leave to remain within 8 weeks of the making of the deportation order, but found there was no guarantee that the appellant would make a decision within that timescale. At [44] the judge concluded that the decision to deprive the respondent of his British citizenship was a disproportionate interference with his Article 8 rights and, as his deception was not material to whether or not he met the statutory criteria for naturalisation, the public interest in deprivation was low. The judge accordingly allowed the respondent's appeal.

The grounds of appeal and the parties' submissions

14. The first ground of appeal contends that the judge mistakenly relied on an out of date version of Chapter 55 of the Nationality Instructions. 'Case Study C' was not contained in the July 2017 guidance, which was published on 14 July 2017. The extract relied on by the judge was taken from the policy in existence between June 2010 and 2014. This ground, somewhat confusingly, referred to the case study as a 'policy' and asserted that statements of executive policy, in the absence of an express provision to the contrary, took affect when they say so. In her oral submissions Ms Cunha accepted that this ground was "somewhat confusing to an extent" and was unable to explain the reference to 'policy'. She ultimately submitted that the judge was wrong to reach her conclusion by reference to a case study that was not contained in the relevant iteration of Chapter 55.

15. The 2nd ground of appeal contends that the judge failed to take into account relevant considerations, made a mistake of fact and failed to give adequate reasons for concluding that the respondent's false representation regarding his age and place of birth were not material to the decision to grant him ILR. This ground relies on the Administrative Court decision in **Hakemi & Ors v Secretary of State for the Home Department** [2012] EWHC 1967 (Admin), a decision that was before the judge. The judge's conclusion at [35] was said to be inconsistent with the version of the policy set out in **Hakemi** at paragraph 36, which stated that "caseworkers must also take account of any evidence of deception practised at any stage in the process, attempts to frustrate the process (for example, failure to attend interviews, supply required documentation), whether the individual has maintained contact with the UK Border Agency, as required, and whether they have been actively pressing for resolution of their immigration status. The caseowner must assess all evidence of compliance and non-compliance in the round. The weight placed on periods of absconsion should be proportionate to the length of compliant residence in the UK. For example, additional weight should be placed on lengthy periods of absconsion which form a significant proportion of the individual's residence in the UK."

16. At paragraph 41 of **Hakemi** the Administrative Court found that the 4th claimant plainly fell within the aforementioned passage of Chapter 53 EIG relating to deception because, had he told the truth he would never have had an arguable asylum claim at all as he was from Albania and not Kosovo. The written grounds contend that the judge failed to engage with **Hakemi**, failed to give any reasons for distinguishing the 4th claimant in that case, and mistakenly found that deception was not a relevant consideration under the legacy programme. At the 'error of law' hearing Ms Cunha adopted the written grounds and submitted that the mere fact that someone lied in their asylum claim constituted deception within the terms of the Chapter 53 extract. Ms Cunha did not however provide a copy of Chapter 53 extant at the date the respondent was granted ILR. I granted her request, made at the end of the hearing, to file a copy of the relevant version of Chapter 53 by 4pm. No such copy was provided to me within the agreed timescale.

17. The 3rd ground contends that the judge made inconsistent findings of fact. On the one hand the judge found that the respondent made a false representation in his application for naturalisation as a British citizen and that this false representation was deliberately made. This was said to be inconsistent with the judge's statement at [39] that "given my decision, it is not strictly necessary to go one and consider whether or not the appellant's] decision was otherwise unlawful or unfair. I have nevertheless done so."

18. The 4th round of appeal challenges the judge's alternative finding that the discretion to remove the respondent's British citizenship should have been exercised differently, that the judge was wrong to find that the respondent had not been involved in criminality as his deception constituted a criminal offence under s.24A of the Immigration Act 1971, and that no due regard had been accorded to the public interest in deprivation. In her oral submissions Ms Cunha submitted that the judge failed to consider the impact of the decision to deprive the respondent of his British nationality on him and his family in the short 'limbo' period before a further decision was made, and that there was insufficient evidence to support the judge's findings.

19. I indicated that I would reserve my decision.

Discussion

20. It was not in dispute between the parties at the 'error of law' hearing that the 4th ground would only need to be determined if the judge's primary finding - that the respondent's citizenship was not obtained by means of fraud - was found to involve the making of an error on a point of law.

21. S.40(3) of the 1981 Act reads,

> 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.

22. In an appeal against a decision to deprive a person of a citizenship status, in assessing whether the person obtained registration or naturalisation "by means of" fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship (**Sleiman (deprivation of citizenship; conduct)** [2017] UKUT 00367 (IAC)).

23. In **BA (deprivation of citizenship: appeals)** [2018] UKUT 00085 (IAC) the Upper Tribunal endorsed the principle established in **Pirzada (Deception of citizenship: general principles)** [2017] UKUT 196 (IAC) that the deception must have motivated the acquisition of citizenship. Chapter 55 of the Nationality Instructions, in its various iterations, makes clear that the question of deprivation only arises where any fraud, false representation or concealment of a material fact had a direct bearing on the grant of citizenship.

24. Although the judge mistakenly referred to 'Case study C' as being contained in the Nationality Instructions at the date of the decision under appeal, the purpose of her reference was to establish a principle that is uncontroversial and which is contained both in **BA** and **Pirzada** (see above at paragraph 23 of this decision) and in the Nationality Instructions that were extant at the date of the decision as well as the previous versions, all of which were in the bundle of documents before the First-tier Tribunal. 55.7.2.3 of the Nationality Instructions dating from 2012 reads, "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." The same appears at 55.7.3 of the 2014 iteration of the Nationality Instructions, and, significantly, at 55.7.3 of the 2017 iteration of the Nationality Instructions which were (and remain) in force at the date of the appellant's decision. 'Case study C' is not a 'policy' but merely a worked example of how the requirement for the deception to have 'a direct bearing' may be applied in practice. I accept the respondent's submission that the appellant has failed to show how the version of Chapter 55 upon which she relied runs contrary to the case study, which merely outlined how the principle of 'direct bearing' may apply in practice. The judge gave cogent and legally sustainable reasons for concluding that the respondent would have been entitled to an initial grant of DLR regardless of his deception because he was, at the relevant date, still a minor. The grounds do not take issue with the judge's reliance on the OGN for Albania which indicated that the country did not have any adequate reception arrangements at the material time. The judge's reasoning in respect of the basis for the grant of DLR is unassailable. Ground 1 is not made out.

25. Ground 2 relies on an extract of Chapter 53 EIG as it appears in **Hakemi** as set out in paragraph 15 above. The version of Chapter 53 that was applicable to the claimants in **Hakemi** would have dated from at least 15 October 2010 (the earliest date of any of the decisions under challenge in those proceedings). The decision to grant the respondent ILR was made 28 April 2010, some 6 months prior to the earliest decision in **Hakemi**. The appellant has not produced the iteration of Chapter 53 applicable at the date the respondent was granted ILR. the appellant's reliance on the extract set out at paragraph 36 of **Hakemi** cannot therefore support her contention that the judge failed to properly consider or apply the relevant policy. As a consequence, the appellant's ground is not made out.

26. However, even if the terms of the policy are the same, the respondent could not have established, on the basis of the particular evidence before the judge, that the respondent's ILR application would have been refused had his real nationality and date of birth been known. Whilst caseowners had to take account of any evidence of deception, this did not preclude a grant of leave to remain, as pointed out by the judge. The guidance did not expand upon the nature or extent of the type of deception that would prevent a person from being granted ILR under the legacy exercise if there had been a delay of over 5 years in dealing with that person's application. In **Sleiman** the Upper Tribunal recognised that grants of leave to remain under the legacy exercise were made in cases where individuals had no right to be in the UK which no doubt included many whose asylum claims were false. The mere fact that there had been deception did not preclude an individual from benefiting from the application of Chapter 53. Mr Sleiman had lied about his age but the Upper Tribunal found that this lie was not directly material to the grant of ILR under the legacy exercise or to the grant of British citizenship. The DD itself only asserts that it was "possible" and "quite possible" that, had the respondent told the truth prior to the grant of ILR, it would not have been granted (see paragraph 5 of this decision). Given that the burden of proof rests on the appellant the judge was unarguably entitled to conclude that the respondent's ILR was granted on the basis of his length of residence and the appellant's delay and that his nationality and date of birth were not material to that grant of leave.

27. The respondent contends that the judge failed to give reasons for distinguishing the 4th claimant in **Hakemi** who was also an Albanian who had pretended to be from Kosovo and who was not granted any leave under the legacy enterprise. **Hakemi** was however a judicial review challenge to the lawfulness of the Secretary of State's decision and not a decision to deprive someone of their British citizenship. The Administrative Court was concerned with judicial review principles and, in particular, whether the Secretary of State's decision was one she was rationally entitled to reach on the evidence before her. The Secretary of State's decision was held to be lawful, but the case was decided on

its own particular facts and it did not establish that all cases that involved a false asylum claim had to be decided in the same way. Ground 2 is not made out.

28. I can deal with the 3rd ground briefly. The judge's finding that the respondent deliberately made a false representation in his application for naturalisation as a British citizen is not inconsistent with her finding that the false representation did not have a direct bearing on the grant of citizenship. The judge gave rationally and legally sustainable reasons for concluding that the grants of DLR and ILR did not depend on the false representations. The judge was entitled to find that the respondent would have been granted DLR, albeit of a shorter duration, as he was a minor from Albania and in the absence of any adequate reception arrangements at that time, and that the grant of ILR was made under the legacy enterprise and based on the Secretary of State's lengthy delay in deciding the respondent's application. The judge was entitled to find that the respondent had exercised deception but that the deception did not motivate the grant of citizenship. There is no inconsistency.

29. Having found no error on a point of law requiring the decision to be set aside in respect of judge's finding that the respondent's citizenship was not obtained by means of fraud, it is not necessary for me to consider the 4th ground.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law.

The Secretary of State's appeal is dismissed.

D. Blum

29 August 2019

Signed
Upper Tribunal Judge Blum

Date