



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00008/2019

THE IMMIGRATION ACTS

Heard at Field House Remotely by Skype
On 23rd October 2020

Decision & Reasons Promulgated
On 24th November 2020

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr CEN BAJRAMAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Cunha, Home Office Presenting Officer

For the Respondent: Ms H Foot instructed by Oliver & Hasani Solicitors (Queensbury)

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Bajramaj as the appellant and the Secretary of State as the respondent.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Swaney who allowed the appeal of the appellant against the decision

to deprive his British citizenship under Section 40(3) of the British Nationality Act 1981.

3. The appellant had before the First-tier Tribunal accepted that he had committed fraud, namely claiming asylum on 8th January 1999 on the basis of being born in Kosovo on 6th June 1955 whereas in fact he was born in Albania on 3rd June 1955. The appellant presented these false details in subsequent applications for indefinite leave to remain (IRL) and citizenship in 2002 and 2005 respectively. He was granted British citizenship in 2005. On 27th June 2018 the respondent wrote to the appellant stating that the action to deprive him that citizenship was being considered and invited him to make representations as to why he should not deprive the appellant of his citizenship. Following representations his claim was refused and the appellant appealed, and First-tier Tribunal Judge Swaney allowed his appeal.

4. It was submitted that the appeal involved the application of **Hysaj (Deprivation of Citizenship: Delay)** [2020] UKUT 00128 (IAC) and the judge erred on the following grounds:

- “(1) It appears from the flow of the determination that the appeal was allowed under Article 8 ECHR only. The judge clearly stated at paragraph 33 that there was a material misrepresentation and that the respondent was entitled to exercise power to deprive the appellant on his British citizenship but the judge did not materially or specifically engage with this issue.
- (2) Although it appears the Presenting Officer consented to the procedure there was clear procedural impropriety at the hearing in that the appellant’s daughter interpreted and acted as the court interpreter which was procedurally wrong. The judge made findings with respect to the appellant’s wife’s mental health issues but there was no evidence whatsoever in the form of medical reports of any type and the judge relied on oral evidence interpreted by the appellant’s daughter and evidence given by his daughter and the appellant. It was trite law that where documents could be reasonably produced they should be.
- (3) There was no consideration or application of **Hysaj** anywhere in the determination and that guidance had clearly been ignored which was a clear error of law.
- (4) Even if the judge’s findings were correctly made on the application of **Hysaj** it was submitted that the appellant could not succeed.

First-tier Tribunal Judge Saffer granted permission on the basis that it was arguable even though the Presenting Officer consented, that there was a material error of law in the Tribunal using the appellant’s daughter who was a witness and gave evidence and therefore plainly not independent as the interpreter but there was no indication that the judge or either representative had the linguistic ability to ensure that [what] was being translated was accurate and there was no independent interpreter to

ensure that it was. It was also arguable that the assessment of the hardship caused by the deprivation was inadequate for the reasons set out in the grounds.

5. At the hearing before me Ms Foot who represented the appellant at the First-tier Tribunal confirmed that the daughter had assisted in a pre-hearing conference and that her evidence on benefits was not in dispute. The Home Office Presenting Officer had taken a pragmatic view and had effectively conceded the point. It may be an unusual state of affairs but had the appellant been aware that the Secretary of State would object she would have agreed to an adjournment. Ms Foot referred to **AM (Iran)** [2018] EWCA Civ 2706 and **AK (Sierra Leone)** [2016] EWCA Civ 999. This was an issue of fairness with a belated challenge. At the hearing before the First-tier Tribunal having heard the evidence from the appellant there was no challenge. Article 8 was a matter in question and highly pertinent to the decision.
6. The complaint was now made in relation to the approach of how the judge determined the appeal but the arguments were clearly made in the skeleton argument. As set out in **Hysaj** it was not impossible to win an appeal on Article 8 grounds.
7. The facts in **Hysaj** were very different and there the wife was able to work. Here the facts were unusual and exceptional. The wife was unable to work. The oral evidence was not incredible. Other judges may reach different conclusions but it was open to the judge on the facts and Ms Foot referred to **AA (Nigeria)** [2020] EWCA Civ 1296. It was not fair on the appellant to raise the issue at this juncture. Had the Secretary of State been successful she would not have objected.
8. Ms Cunha referred to **NR (Jamaica) v Secretary of State for the Home Department** [2009] EWCA Civ 856 at paragraphs 11 to 13 as being the key judgment and authority in relation to concessions. She submitted that the procedural irregularity did have an effect on the findings and the findings of fact in relation to this appeal were central and fundamental to the decision. She added there was no reference to **Hysaj** in the decision and the judge tasked herself only with deciding whether the outcome of the deprivation itself was disproportionate. Here the judge had considered the 'limbo' which was not relevant.
9. Ms Foot rejoined that that list of issues as set out at paragraph 6 of **KV (Sri Lanka) v. Secretary of State for the Home Department** [2018] EWCA Civ 2483 was approved in **Hysaj** and there was no dispute regarding the condition precedent in this case, the only dispute to the Article 8 and discretionary factors. That was applied. There was no proleptic analysis as prohibited in **Aziz v SSHD** [2018] EWCA 1884. The judge looked at the facts and now it was the case that the appellant was losing the opportunity of favourable factual findings.

Analysis

10. The relevant legal approach to adopt is set out in **KV (Sri Lanka)**. **Hysaj (Deprivation of Citizenship: Delay)**, adopts that approach and paragraphs 115 and 116 explain the Tribunal's task in relation to an appeal under Section 40(3)

'115. An appeal against a decision to deprive under section 40(3) may succeed either because a reasonably foreseeable consequence of deprivation would be contrary to article 8 or because of some exceptional feature which means that the respondent's discretion should have been exercised differently having proper regard to the significant public interest in deprivation and the grounds for the same.

116. The Tribunal is tasked with forming a view, not just as to whether it would be rational to make such a deprivation order, but to decide whether it is right to do so. This involves an evaluation of the relative weight to be accorded to the significant public interest in depriving the person concerned of citizenship and any competing interests and considerations, including the impact of deprivation on the legal status of the individual concerned. This was an appeal under Section 40A(1) of the British Nationality Act 1981 against the decision of the respondent Secretary of State dated 11th January 2019 to deprive the appellant of his British citizenship pursuant to Section 40(3) of the 1981 Act'.

11. Although it had been accepted that the appellant had committed deception, the analysis by the Tribunal included an assessment of the impact of the deprivation on the individual. Underpinning the correct legal approach is the establishment of the correct facts.
12. Regrettably there is no Record of Proceedings of 5th June 2020 before the First-tier Tribunal Judge on file, possibly because the matter took place remotely. On 3rd February 2020 there had been a Case Management hearing and directions were set which included a direction that there should be an Albanian interpreter for the forthcoming substantive hearing. At that substantive hearing, as the judge recorded in her determination at paragraph 14, although the Tribunal had booked an independent interpreter for the hearing one was not available on the day of the hearing.
13. The judge recorded at paragraph 15 as follows:
 - "15. The appellant's daughter was present and was able to assist by interpreting the appellant's evidence. This is generally undesirable, as a family member is not independent. I asked Mr Blennerhassett whether he would have any objection to the appellant's daughter interpreting if given suitable guidance about the role of an interpreter. Mr Blennerhassett confirmed that he did not, given the appellant's admission as to the misrepresentation (see below). He also confirmed that he had no objection to her also giving evidence and stated that he did not wish to cross-examine her.
 16. I was satisfied that the appellant's daughter understood the need to interpret exactly what was said without any gloss or alteration and that she did so to the best of her ability. There was no objection by Mr Blennerhassett during the evidence that it was in any way unfair or otherwise tainted by the appellant's daughter acting as interpreter".

14. As recorded at paragraph 18 the appellant adopted his witness statement and also gave brief supplementary oral evidence about his health and the impact on him of losing his British citizenship.
15. At this point, as recorded at paragraph 19, the appellant appears to have been cross-examined, with the assistance of his daughter as interpreter, about his current circumstances "and those of his family",. The appellant gave evidence about his wife having

"never worked in the United Kingdom because she has suffered from mental health problems. He worked previously but stopped in 2017 after suffering a heart attack. He stated that he is now in receipt of Universal Credit which pays a sum for rent and a sum for living expenses".
16. The judge further recorded at paragraphs 20 and 21:
 - "20. The appellant confirmed that he suffered a heart attack and had surgery in Albania. He has not had any other surgery but takes medication regularly. He stated that he receives his medication free of charge and that he receives it two months at a time. He said that he had been assessed as not fit to work.
 21. In re-examination the appellant confirmed that the assessment about his fitness to work was in connection with his benefits".
17. The appellant's daughter then adopted her own witness statement and gave supplementary oral evidence about her family. There is no detail as to mother's poor mental health.
18. At paragraph 26 the submission from Ms Foot included that

"she accepted there was no medical evidence of the appellant's wife's poor mental health but invited me to find the oral evidence credible on that point".

The thrust of the claim was that the deprivation of citizenship would mean that the appellant would lose his entitlement to claim benefits which may cause difficulty and in accessing his essential medicines and thus the appellant's circumstances outweighed the public interest.
19. At paragraph 35 the judge found

"the appellant and his daughter to be credible witnesses. There was no challenge to the credibility of their evidence and it was consistent".
20. The assessment of whether the consequences of the deprivation of the appellant and his citizenship rested on an analysis of the facts of the effect on the family and particularly the appellant and his wife. It is correct to state that the appellant submitted a signed witness statement but that made little reference to the wife's medical complaints and concentrated on those of his own. As pointed out there was

no documentary medical evidence relating to the wife and merely the evidence from the appellant and from the daughter. The judge specifically stated at paragraph 35 that she accepted the evidence in part because it was consistent. The wife did not attend the hearing and although she submitted a witness statement which stated in generalised terms that she and her husband suffered from serious health conditions this was not signed nor dated. The appellant's daughters' statements on file were neither signed nor dated, and indeed I note in fact that there are two daughters, one named Mirjeta and the other Alsida, both of whom asserted that they would be attending to give evidence.

21. As set out in CD (Jamaica) [2010] EWCA Civ 768 when referring to NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856 the Tribunal

“can allow a concession to be withdrawn if there is good reason in all the circumstances to do so and if it can be done in the absence of prejudice. No principle will govern every case, but the most important of any decision is that the Tribunal must put itself in the position in which the real issues of dispute on the merits can be decided, so long as that can be done without prejudice to one side or the other”.

22. In SSHD v Davoodipanh [2004] EWCA Civ 106 at paragraph 22 the court held :

“It is clear from the authorities that where a concession has been made before an adjudicator by either party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course...Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the Tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a presenting officer has made a concession which appears in retrospect to be a concession which he should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal. But, as I have said, **everything depends on the circumstances, and each case must be considered on its own merits**”.

23. The Tribunal must conduct proceedings in a fair and just manner. The Tribunal's discretion is wide, and its exercise will depend on the particular circumstances of the case.

24. I am not persuaded, however, that where there is a principle of fairness in procedure at stake that there can be a concession made. Whether or not the Secretary of State objected to the daughter as interpreter, the judge acknowledged and recognised herself in her own determination that the daughter as interpreter was not independent. I accept that prejudice is a significant feature, although its absence does not necessarily permit a concession to be withdrawn, but in this instance the overriding objective is that the interests of justice be served. At present the

appellant's appeal against the deprivation of his citizenship is ongoing and his citizenship has not yet been removed.

25. I also note from **TS (interpreters) Eritrea [2019] UKUT 352** that an Appellate Tribunal should be slow to overturn a judge's decision on the basis of alleged errors in it or other problems with interpretation at the hearing before that judge that weight should be given to the judge's own assessment of whether the interpreter and the appellant or witness understood each other. That, however, was in relation to whether the professional interpreter who was required to be independent.
26. In this case the interpreter was clearly not independent despite the judge having explained to her the importance of interpreting exactly what was said "without any gloss or alteration and that she did so to the best of her ability". She was not a professional interpreter and indeed apparently had attended the pre-conference with counsel although that was seemingly unknown to the judge and does not factor in my deliberations. It is not clear from the decision particularly at paragraph 15 what the intention was at the outset of the hearing bearing in mind that the Home Office Presenting Officer accepted the appellant's admission as to the representation and had no objection to "her also giving evidence" and stated that he did not wish to cross-examine her.
27. Clearly the appellant's daughter, and it is not clear from the decision which daughter this was, was able to give her evidence in English and adopt her statement. It is evident that she did give some form of evidence about her mother's health but it was the appellant's evidence that was interpreted by his own daughter in relation to his wife's health problem which is the real issue. As stated by the judge she accepted that evidence because she found it consistent. It was on those facts as found that the effect of the deprivation would need to be assessed.
28. I note that there was no mention of **Hysaj** in the assessment of the judge but at paragraph 40 the judge found as follows:

"40. I find on the balance of probabilities that the reasonably foreseeable consequences of deprivation for this appellant are the immediate and complete loss of income. I find that his wife would be unable to work to support them both and even if she was, I find that her lack of employment history, age and the likelihood that she would only be able to do unskilled or low skilled work, the prospects of her being able to earn sufficient to support them both are very limited. Her chances of finding work quickly are in my view almost non-existent. She would be entitled to seek benefits; however, it is highly likely that there would be a gap between the appellant's benefits stopping and payment of any new benefit claimed starting. In addition, she will only be able to claim what she would be entitled to as a single person; no additional amount will be payable for the appellant.

41. I find that the lack of income is likely to have a significant impact on the appellant and his wife. I find that the loss of income would cause considerable stress to both the appellant and his wife and that this is reasonably likely to have a negative impact on their health and well-being”.
29. The judge therefore whether or not properly applying Hysaj did not approach the garnering or establishing the facts in a procedurally fair manner. Those facts were critical to the decision.
30. Part of the reason that the judge found the appellant and his daughter to be credible witnesses was because there was no challenge to the credibility of their evidence, and it was consistent.
31. The judge noted at paragraph 44
- “there was no evidence to suggest he has any criminal convictions or that he has engaged in any kind of conduct that would otherwise call his good character into question”.

The judge completely failed, having accepted his evidence as being credible, to identify that the appellant had been convicted for conspiring to dishonestly made false representation to make gain – undertaking driving theory tests for other and conspiring with them and others - and sentenced to a six month custodial sentence, albeit this was said to have taken place post-2005. I accept entirely that this was not a part of the grounds of appeal, but the judge needed to ascertain the actual facts and arrive at those facts by ensuring that the conduct of the proceedings was fair.

32. I realise that it was asserted that the challenge to the ‘withdrawal of the concession’ was a belated argument but it is clear that events unfolded and although no objection was taken to this course of action by the respondent representative at the hearing that does not relieve the judge from the burden and obligation of the fair conduct of the hearing. The Secretary of State promptly applied for permission to appeal and in AK (Sierra Leone), where the application to withdraw the concession was belated and ultimately the challenge successful, Jackson LJ did not hold that such a challenge could never be made and held at paragraph 49 ‘I do not need to go so far as to say that in such circumstances the Secretary of State could never appeal to the Upper Tribunal’. The authorities explored were essentially those relating to facts. Nonetheless, I find the question of procedural fairness is a matter of law which I am not persuaded can be conceded. Under the Tribunal Procedure (Upper Tribunal) Rules 2008 the overriding objective is clearly set out at Rule 2 and emphasises the importance of dealing with cases fairly and justly.

2. – (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it –

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

33. It may be that the judge was attempting to seek flexibility in the proceedings and to avoid delay, but the approach sacrificed fairness and failed to avoid delay.

34. The Rule 24 response from the appellant acknowledged the significance of the oral evidence in order to make good the lack of documentary evidence when stating

“in the circumstances and in the light of the FTTJ’s finding that the witnesses gave credible oral evidence an arguable no material error of law arises from the lack of documentary evidence as to the wife’s mental health problems”.

The findings made particularly in relation to the wife’s health during the ‘limbo’ period of deprivation were important to the proper determination of this matter.

35. In relation to the approach to **Hysaj** and with regard the ‘limbo’ point, at paragraph 108 of **Hysaj** the Upper Tribunal explained

‘The Court of Appeal has confirmed that article 8 does not impose any obligation upon the State to provide financial support for family life. The ECHR is not aimed at securing social and economic rights, with the rights defined being predominantly civil and political in nature’.

36. The head note of **Hysaj** at paragraph 7 reads as follows:

‘There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant’s own actions and **without more**, such as the loss of rights previously enjoyed, **cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured**’.

That, however, does not negate a careful assessment of the effects of the deprivation in each individual case, and I note the reference to 'without more'. Nonetheless, I have found a material error in the approach to interpretation, and I therefore find that the decision should be set aside and the matter remitted to the First-tier Tribunal.

37. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

No anonymity direction is made.

Signed *Helen Rymington*

Date 18th November 2020

Upper Tribunal Judge Rymington