Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00043/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*	**Decision & Reasons Promulgated**
On 6 October 2020	**On 16 October 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

ARBEN BURGAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. S Kerr, Counsel, Karis Solicitors
For the Respondent: Mr. D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Albania. His appeal against the respondent's decision to deprive him of British citizenship was initially allowed by the First-tier Tribunal (Judge of the First-tier Tribunal Callow) by means of a decision sent to the parties on 24 May 2019. The respondent was granted permission to appeal to this Tribunal by Upper Tribunal Judge Martin on 10 July 2019. Following a hearing held at Field House, Upper Tribunal Judge Pitt set aside the decision of the First-tier Tribunal by a decision dated 30

August 2019 and decided that the decision would be remade by this Tribunal.

2. Consequent to an application by the appellant, UTJ Pitt stayed further consideration of this appeal pending consideration of related issues by a Presidential panel. The decision in *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 00128 (IAC) was promulgated on 19 March 2020.

3. I issued directions on 3 June 2020 indicating my preliminary view that this was a suitable matter to be conducted by remote hearing. Neither party objected to such approach.

4. The resumed hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the daily list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

5. The parties agreed that all relevant documents were before the Tribunal. The video and audio link were connected between the representatives and the Tribunal throughout the hearing, save for the initial connection to Mr. Kerr being initially subject to a few seconds of interruption. Upon Mr. Kerr removing his earphones the connection improved and all involved were able to see and hear each other. At the conclusion of the hearing both parties confirmed that the hearing had been completed fairly.

6. The appellant attended the hearing remotely. No member of the public attended the hearing, either remotely or in person at Field House.

Anonymity

7. No anonymity direction was issued by the First-tier Tribunal or by UTJ Pitt and no application for such direction was made before me.

Background

8. The appellant was born in Skhoder, Albania and is presently aged 45. He initially entered the United Kingdom on 10 October 1997 and claimed asylum. He falsely asserted that he was a national of the Federal Republic of Yugoslavia, hailing from Gjakova, Kosovo, and provided a date of birth that was 6 days prior to his true date of birth. The United Kingdom recognised the appellant as a refugee fleeing persecution at the hands of the Serbian majority in Yugoslavia and granted him indefinite leave to remain in this country on 11 April 2000. The appellant was subsequently naturalised as a British citizen on 28 January 2003.

9. The appellant married his wife, an Albanian national, in Albania on 17 November 2011. Their marriage certificate correctly details the appellant's true date and place of birth. The appellant wished to support his wife's lawful entry into this country and so instructed his legal representatives to write to the respondent and request that his naturalisation certificate be amended to record his true date and place of birth. A letter detailing the same was sent to the respondent on 22 March 2012. In making such request, by which he identified his true nationality and the untruth as to his purported history of persecution, the appellant asserted that he did not fall for deprivation of his British citizenship consequent to Chapter 55.7.2.5 of the then existing Nationality Instructions, to be read in conjunction with Chapter 55.7.2.6.

10. The respondent issued a decision on 22 February 2013 declaring the appellant's naturalisation to be a nullity because he had falsified elements of his identity when he applied for British citizenship. The appellant challenged this decision by judicial review proceedings initiated on 14 May 2013.

11. By its judgment in *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82, [2018] 1 W.L.R. 221 the Supreme Court confirmed that the gradual developments of the law as to the nullity approach to grants of citizenship following *R. v Secretary of State for the Home Department Ex p. Mahmood (Sultan)* [1981] Q.B. 58 were wrongly decided and that where a person was considered for naturalisation by the respondent in their false identity and granted citizenship in that identity, such grant was valid albeit that the person might later be deprived of it under s.40(3) of the British Nationality Act 1981 ('the 1981 Act').

12. Consequent to the Supreme Court judgment the respondent reviewed her nullity decision in relation to the appellant and notified him on 26 February 2018 that the decision was withdrawn. The respondent decided by means of a decision dated 28 August 2018 to deprive the appellant of his British citizenship.

Application for a stay of proceedings

13. I observe the headnote to the Tribunal decision in *Hysaj*:

    (1) The starting point in any consideration undertaken by the Secretary of State ("the respondent") as to whether to deprive a person of British citizenship must be made by reference to the rules and policy in force at the time the decision is made. Rule of law values indicate that the respondent is entitled to take advice and act in light of the state of law and the circumstances known to her. The benefit of hindsight, post the Supreme Court judgment in *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82, does not lessen the significant public interest in the deprivation of British citizenship acquired through fraud or deception.

    (2) No legitimate expectation arises that consideration as to whether or not to deprive citizenship is to be undertaken by the application of a

historic policy that was in place prior to the judgment of the Supreme Court in Hysaj.

(3) No historic injustice is capable of arising in circumstances where the respondent erroneously declared British citizenship to be a nullity, rather than seek to deprive under section 40(3) of the British Nationality Act 1981, as no prejudice arises because it is not possible to establish that a decision to deprive should have been taken under a specific policy within a specific period of time.

(4) The respondent's 14-year policy under her deprivation of citizenship policy, which was withdrawn on 20 August 2014, applied a continuous residence requirement that was broken by the imposition of a custodial sentence.

(5) A refugee is to meet the requirement of article 1A(2) of the 1951 UN Refugee Convention and a person cannot have enjoyed Convention status if recognition was consequent to an entirely false presentation as to a well-founded fear of persecution.

(6) Upon deprivation of British citizenship, there is no automatic revival of previously held indefinite leave to remain status.

(7) 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. Any effect on day-to-day life that may result from a person being deprived of British citizenship is a consequence of the that person's fraud or deception and, without more, cannot tip the proportionality balance, so as to compel the respondent to grant a period of leave, whether short or otherwise.

14. At the outset of the hearing Mr. Kerr applied for a stay of proceedings pending consideration of an application for permission to appeal to the Court of Appeal by the appellant in *Hysaj*. He relied upon an undated written application for a stay filed with the Tribunal on 23 June 2020 which had not been considered by the Tribunal to date. The application detailed at para. 8:

> '8. It has of course been the intention of the Upper Tribunal to be in a position of legal clarity when considering the appeal of this appellant (and others). It is therefore submitted that it would be beneficial for the Tribunal to wait until the outcome of the application for permission to appeal before proceeding with this appeal.'

15. I was informed that the Tribunal had recently refused the appellant in *Hysaj* permission to appeal to the Court of Appeal and he was in the process of filing an onward appeal. Though no appeal had been lodged to date, Mr. Kerr confirmed that he had been informed by junior counsel to Mr. Hysaj that the relevant time limit for filing a notice of appeal had not yet expired.

16. I refused the application for a stay of proceedings at the hearing. As observed by the Court of Appeal in *R (AB (Sudan)) v. Secretary of State for the Home Department* [2013] EWCA Civ 921 the power to stay immigration cases pending a future appellate decision is to be exercised

cautiously and only when necessary in the interests of justice. The fact that the identification of the true position of the law may possibly change in the near or medium future is not usually an appropriate reason for staying proceedings. I observed at the hearing that the appeal in *Hysaj* was considered by a Presidential panel and the President subsequently refused permission to appeal to the Court of Appeal. Further, an appeal has not yet been filed with the Court of Appeal and this Tribunal remains unaware as to whether a general challenge will be initiated or one in which the purported error of law arises from facts personal to Mr. Hysaj.

Decision

17. By means of his concise and helpful submissions Mr. Kerr accepted on behalf of the appellant that the decision in *Hysaj* was to be followed by this Tribunal, though he confirmed that it was not accepted by the appellant as correctly identifying the law.

18. Mr. Kerr submitted the core of the appellant's case as being that the respondent had known of his deception since March 2012 and there was a delay in failing to consider his matter prior to 21 August 2014 under a previous policy, which the appellant asserts was favourable to him and from which he could have benefitted because he had been present in this country for 14 years by October 2011.

19. The appellant posits that the relevant Chapter 55 'Deprivation and nullity of British citizenship' policy existing at such time provided, *inter alia*:

> 55.7.2.5. In general the Secretary of State will not deprive of British citizenship in the following circumstances:
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> …
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> - If a person has been resident in the United Kingdom for more than 14 years we will not normally deprive of citizenship
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> …

20. Consequently, Mr. Kerr submitted that two features of satisfying the test for a historic injustice were met; that there has been a legally flawed prior decision, and that there is a casual connection between that decision and the historic injustice. He noted that at the time the respondent was erroneously considering the appellant's matter on nullity grounds she should have been considering her powers and attendant policies under section 40(3) of the 1981 Act. I am satisfied that this submission lacks merit upon consideration of paras. 61 and 63 of *Hysaj*:

> '61. We are satisfied that the adoption of such an approach to limit the application of the public interest based on delay alone is unsustainable as it seeks to deny any true engagement with the facts that arise. The respondent was clearly permitted to rely upon legal advice. The starting point in any consideration undertaken by the respondent as to whether to deprive the appellant of British citizenship must be made by reference to the rules and policy in force at the time the decision was taken, and

> such rules and policy will abide with relevant precedent, as understood. The respondent was entitled to rely upon the then favourable judgment in *Kadria* from which permission to appeal to the Court of Appeal had been subsequently refused at an oral hearing, and indeed did so rely before both the High Court and the Court of Appeal. Though *Akhtar* and subsequent Court of Appeal judgments that relied upon it cannot, with the benefit of hindsight post- the Supreme Court judgment in *Hysaj*, be considered to have finally and definitively settled the law the respondent and her legal advisors were entitled to observe the application of the doctrine of precedent. The respondent needs to have means of assessing the legality of her actions at a particular time, in order to know what her legal duty is. Rule of law values indicate that the respondent should be entitled to take advice and act in light of the circumstances known to her, and the state of the law, as then known: *R. (on the application of MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin), per Sales J, at [105]; approved *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931, at [42] per Lord Thomas CJ. When defending her decision before the Court of Appeal the respondent was reasonably permitted to place reliance upon the principle that the Court of Appeal is obliged to follow one of its previous decisions unless specific exceptions arise, such as the judgment being per incuriam: *Young v. Bristol Aeroplane Co. Ltd* [1946] AC 163.'
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> …
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> 63. We are satisfied that whilst the respondent had knowledge of the fraud in 2007 and a decision to deprive under section 40(3) was only taken in 2018, such delay did not arise from illegality on behalf of the respondent nor did it arise from a dysfunctional system yielding unpredictable and inconsistent outcomes. …'

21. Mr. Kerr asserted at the hearing that the respondent was required to make a decision as to deprivation within a 'reasonable period' of time and that such time should be relatively short. However, Mr. Kerr candidly accepted that he could not point to any authority supporting such position and further acknowledged that the decision of Collins J in *R (FH) v. Secretary of State for the Home Department* [2007] EWHC 1571 (Admin) was not supportive of such approach. As observed by the Tribunal in *Hysaj*, at [74], the respondent was lawfully permitted to rely upon a favourable High Court judgment as well as previous Court of Appeal precedent when considering whether to declare the appellant's naturalisation a nullity rather than consider whether to deprive him of such citizenship under the 1981 Act and attendant policy.

22. Observing [74] of the Tribunal's decision in *Hysaj* Mr. Kerr submits that the appellant is not seeking to disapply a current policy. Rather the appellant wants recognition that he could, and Mr. Kerr suggests 'possibly should', have benefitted from the previous policy and that this can amount to an exceptional feature entitling a judge to decide that discretion should be

exercised differently. This submission was unsuccessfully argued by the appellant in *Hysaj* with the Tribunal observing at [67}:

> '67. Lord Hoffman confirmed in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453, at [60], that a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification.' We observe the use of the qualifying words 'in general' and 'normally' within Chapter 55.7.2.5 [later renumbered Chapter 55.7.5] and the additional qualification that the public interest may still require deprivation even if the identified circumstances militating against deprivation are established. We are satisfied that the provisions in Chapter 55 relied upon by the appellant do not establish a clear and unambiguous promise that by reaching the fourteenth year of residence a person will not be deprived of their citizenship because it is clear that the respondent qualified the identified exceptions where deprivation will not normally occur so as to permit her to weigh the public interest in proceeding to deprive with the individual facts arising. The only legitimate expectation enjoyed by the appellant is that his case would be treated in accordance with the law and policy in place at the time the relevant decision was made. Consequently, the appellant's submission that he enjoyed a legitimate expectation to be treated in a particular way under an earlier policy must fail.'

23. In such circumstances the appellant's appeal on historic injustice grounds must fail.

24. The appellant further asserts that the decision to deprive him of his British citizenship disproportionately interferes with both his and his family's protected article 8 rights. Mr. Kerr details by his skeleton argument, dated 22 June 2020, at paras. 30-31:

> '30. Without leave, [the appellant] would not be entitled to work and this would have the disproportionate effect of preventing the appellant from providing for his family and maintaining the well-being of his children. It is in the gift of the SSHD to make simultaneous decisions (a deprivation order and a grant/removal decision) as she had in other cases, which in turn would militate against the appellant's rights under article 8 ECHR being breached. However, the SSHD has not given such an indication in this case, thereby exposing the appellant and his family to a position where they cannot support themselves.
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> 31. The SSHD cannot provide any good or justifiable reason for allowing this period between a deprivation order and subsequent immigration decision to emerge. The SSHD has given clear representation in other cases that this so-called period of 'limbo' can be prevented by simultaneous decisions. The current procedure in this appeal therefore breaches the appellant's rights protected by article 8 ECHR.'

25. The appellant's family matrix shares many of the characteristics enjoyed by Mr. Hysaj with his family. The appellant's wife unlawfully entered this country in 2014 with their eldest child who was born in Albania but is a British citizen by descent. That child is presently aged 7. The appellant's

wife was granted leave to remain for 30 months from 12 June 2018 and so she is lawfully entitled to work. Two further children were born in the United Kingdom and are British citizens. They are presently aged 5 and 3.

26. I agree with Mr. Clarke as to the paucity of evidence provided by the appellant as to his business and present accommodation. The asserted impact of the claimed deprivation upon the family is wholly unparticularised with no cogent evidence as to whether the appellant owns the family home or is renting, what savings the family enjoy, whether his wife works, the value of the business and whether there are staff who can run the business on behalf of the appellant. Further, as the Tribunal held in *Hysaj* upon considering a very similar factual scenario, at [108] to [110]

> '108. 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: *R. (on the application of SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615; [2019] 1 W.L.R. 5687, at [28]-[38]. The State is not required to grant leave to an individual so that they can work and provide their family with material support.
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> 109. The time period between deprivation and the issuing of a decision is identified by the respondent as being between six to eight weeks. During such time the appellant's wife is permitted to work. She accepted before us that she could seek employment. She expressed concern as to the impact her limited English language skills may have on securing employment but confirmed that she could secure unskilled employment. She confirmed that her husband could remain at home and look after their children. The appellant accepted that his wife is named on the joint tenancy and will continue to be able to lawfully rent their home upon his loss of citizenship and status. In addition, the children can access certain benefits through their citizenship. Two safety nets exist for the family. If there is an immediate and significant downturn in the family's finances such as to impact upon the health and development of the children, they can seek support under section 17 of the Children Act 1989. If the family become destitute, or there are particularly compelling reasons relating to the welfare of the children on account of very low income, the appellant's wife may apply for a change to her No Recourse to Public Funds (NRPF) condition.
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> 110. 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 is the essence of what the appellant seeks through securing limited leave pending consideration by the respondent as to whether he

> should be deported. Although the appellant's family members are not culpable, their interests are not such, either individually or cumulatively, as to outweigh the strong public interest in this case.'

27. Whilst Mr. Kerr sought with his usual skill and good humour to advance a meritorious case on article 8 grounds, it simply cannot succeed at the present time. This is not only because of the decision in *Hysaj* upon very similar facts but also because of the dearth of cogent evidence filed in this matter that comes nowhere near establishing the purported concerns advanced as being likely to arise in the short period of time the respondent acknowledged in *Hysaj*, at [102], that it would take for a decision to be made upon a grant of leave or a decision to remove following deprivation. Such time was identified as 8 weeks, subject to any representations received.

28. In the circumstances the appellant's appeal against the respondent's decision to deprive him of his British citizenship is dismissed.

Notice of decision

29. By means of a decision sent to the parties on 30 August 2019 this Tribunal set aside the Judge's decision promulgated on 24 May 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

30. The decision is re-made, and the appellant's appeal against a decision of the respondent to deprive him of British citizenship is dismissed.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 9 October 2020

TO THE RESPONDENT
FEE AWARD

The appellant did not pay a fee, and the appeal has been dismissed. No fee award is made.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 9 October 2020