Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00015/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 February 2021 and 27 May 2021

Decision & Reasons Promulgated
On 25 January 2022

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE PITT

Between

KUMARESWARARAJA VARATHARAJ
(ANONYMITY DIRECTION REVOKED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Southey QC, Counsel instructed by Barnes Harrild & Dyer Solicitors

For the Respondent: Mr R Palmer QC and Mrs J Smyth Counsel instructed by Government Legal Department

DECISION AND REASONS

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Direction Regarding Anonymity

An order restricting publication was made earlier in these proceedings. On behalf of the appellant, Mr Southey QC has acknowledged that there is no basis for its continuance and we therefore discharge it.

1. Both members of the panel have contributed substantially to this decision.

Background

2. This matter has already been the subject of extensive litigation and the background has already been set out on a number of occasions. It remains expedient for the key history to be set out again here.

3. The appellant was born on 30 December 1973 in Sri Lanka.

4. On 9 June 1994 he came to the UK and claimed asylum at port. In a decision dated 3 June 1996 the respondent refused the asylum application. He appealed against that decision.

5. On 25 October 1996, using the false identity of Markandu Selvakumaran (MS), a Sri Lankan national born on 1 June 1970, the appellant applied for leave to remain. The respondent was unaware that the application was made in a false identity and on 27 November 1996 granted the application for leave to remain.

6. On 28 October 1997 his appeal against the refusal of his asylum claim was heard. His appeal was allowed in a decision dated 10 November 1997.

7. On 8 July 1998 the appellant was convicted of conspiracy to defraud and was sentenced to two and a half years' imprisonment. The conviction and sentence delayed implementation of the appeal decision but on 12 June 1999 he was recognised as a refugee and granted indefinite leave to remain.

8. The appellant continued to pose as MS, however. In the identity of MS he made an application for ILR and this was granted by the respondent on 16 October 1999. On 17 September 2003 he applied to be naturalised as a British citizen in the identity of MS. The respondent remained unaware of the use of the false identity and on 16 December 2003 the appellant was granted British citizenship in the identity of MS.

9. On 10 July 2007 the appellant applied for British citizenship in his own name. The application asked whether he had engaged in activities that were relevant to the question of his good character and he stated that he had not, making no reference to the use of the MS identity to obtain ILR and citizenship. The respondent, still unaware of the use of the MS identity, granted the appellant British citizenship on 11 December 2007.

10. In 2010 the appellant travelled to Australia using a British passport issued to him in the identity of MS. The Australian authorities became aware of the use of a false identity. The appellant was convicted in Australia of fraud and sentenced to 4 years' imprisonment. The Australian authorities informed the respondent of these matters.

11. After serving his sentence in Australia the appellant returned to the UK. On 17 July 2013 the respondent informed the appellant that consideration was being given to his deprivation of citizenship in his real identity as he had used deception in that application.

12. On 27 May 2015 the respondent informed the appellant that his citizenship in the identity of MS was a nullity. The appellant did not appeal that decision. Following the decision of the Supreme Court in R (on the application of Hysaj) v Secretary of State for the Home Department [2017] UKSC 82, on 3 February 2018 the respondent withdrew the nullity decision made on 27 May 2015. The respondent notified the appellant that further consideration would be given to depriving him of citizenship in the identity of MS. A notice of a decision to deprive was made on 3 July 2019. The appellant did not appeal against that decision and a deprivation order concerning the citizenship granted in the identity of MS was made on 31 July 2020.

13. Also on 27 May 2015, the respondent issued the appellant with a notice of a decision to deprive him of nationality in his real identity under s. 40(3) of the British Nationality Act 1981. It is that decision that led to these proceedings. The notice of 27 May 2015 informed the appellant that:

> "The order under section 40(3) of the British Nationality Act 1981 depriving you of your British citizenship will be made after you have been served with this notice."

The notice of 27 May 2015 also informed the appellant that:

> "… if your appeal is unsuccessful, subject to satisfactory checks, you will be granted 30 months limited leave. This is in recognition of the fact that we cannot remove you at present because there are barriers to removal."

In the event, the order depriving the appellant of his nationality was not made until 13 May 2016 and a grant of 30 months leave made on 25 March 2021. The reason for the delay is set out below.

14. The appellant appealed against the decision of 27 May 2015 depriving him of the citizenship obtained in his own name. On 16 September 2015 First-tier Tribunal Judge Aujla dismissed his appeal brought under the British Nationality Act 1981 and dismissed his Article 8 appeal. The appellant appealed against the decision of First-tier Tribunal Judge Aujla and was granted permission by the First-tier Tribunal on 13 October 2015. One of the grounds of appeal was that the First-tier Tribunal had failed to address the appellant's submission that he ceased to be a Sri Lankan citizen when he was granted British Citizenship on 11 December 2007, could not

resume Sri Lankan citizenship, and so would be stateless if he were deprived of British citizenship.

15. In a decision issued on 9 March 2016, Upper Tribunal Judge Gleeson found an error of law in the decision of the First-tier Tribunal. She concluded that First-tier Tribunal had erred in law in failing to address the issue of statelessness. She did not set aside the First-tier Tribunal decision, however, as she concluded that the error was not material to the outcome of the appeal as the material before the First-tier Tribunal was not capable of showing that the appellant would stateless if he were deprived of British citizenship.

16. The time limit for an application to permission to appeal to the Court of Appeal against the decision of Upper Tribunal Judge Gleeson was 29 March 2016. The appellant did not lodge an application in time. An application was made out of time on 25 April 2016. In a decision dated 24 June 2016, the Upper Tribunal refused to extend time to admit the application for permission to appeal to the Court of Appeal.

17. The respondent appears to have been unaware that the appellant had made the out of time application and, therefore, as of 29 March 2016, considered that the appellant was "appeal rights exhausted". The Secretary of State proceeded to make an order dated 13 May 2016 depriving him of British citizenship. This was the order that was to follow the decision of 27 May 2015; see paragraph [13] above. On 16 June 2016, the appellant's representatives informed the respondent that the out of time application had been made to the Upper Tribunal. As a result, although the order depriving the appellant of British citizenship had been made, the respondent did not proceed to grant the 30 months' limited leave referred to in the notice of 27 May 2015 but waited until the outcome of the application for permission to appeal to the Court of Appeal. The appellant was eventually granted discretionary leave to remain (DLR) for 30 months on 25 March 2021.

18. After his application had been refused as out of time by the Upper Tribunal, the appellant applied to the Court of Appeal for permission to appeal. Permission was granted and on 8 November 2018 the Court of Appeal allowed the appeal and ordered that it be "remitted to the Upper Tribunal to be redetermined."

19. In its decision, R (KV) (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, the Court of Appeal found that the Upper Tribunal had erred in concluding that the appellant would not be stateless if deprived of his British Citizenship. At [54] Leggatt LJ, with whose judgment the other members of the Court agreed, said this:

> "I conclude that the Upper Tribunal was wrong to treat the failure of the First-tier Tribunal to address the question of statelessness as immaterial. The Upper Tribunal should have found that depriving the appellant of his British citizenship would make him stateless and that, on the evidence before the tribunal, he had no right to resume and no realistic prospect of being able to

resume Sri Lankan citizenship. It was therefore necessary for the tribunal to address the question of whether, given those consequences, a deprivation order should nevertheless be made."

20. The scope of the redetermination before the Upper Tribunal was set out at [63]:

> "I would allow the appeal and remit the case to the Upper Tribunal to determine whether 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 should be exercised differently in the light of the evidence that a deprivation order would make him stateless and that he is not in a position to re-acquire Sri Lankan citizenship."

21. On 25 February 2021 we heard submissions from the parties in line with the terms of the remittal from the Court of Appeal and reserved our decision.

22. The following day, however, the Supreme Court issued its decision in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7. The Supreme Court decided that a decision made under Section 40(2) of the BNA 1981 was an exercise of discretion reserved by statute to the Secretary of State: see [66]. As a consequence, it was not for an appellate body to exercise the discretion itself; see [67]-[68]. Instead, the approach to be taken by the appellate body "in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law"; see [69]-[71].

23. This clearly affected the present proceedings. We had particular concerns because the terms of the remittal from the Court of Appeal stated specifically that the Upper Tribunal was to consider whether 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 should be exercised differently" which appeared to be at odds with the law as set out in Begum.

24. We therefore sought the views of the parties on this matter in writing and convened a further hearing for oral submissions on 27 May 2021.

DECISION

25. Two preliminary issues fall for consideration. The first is to determine precisely what stage the present proceedings have reached. As we have indicated, Judge Gleeson did not set aside the determination of the First-tier Tribunal. As we understand it, the Court of Appeal did not do so either. We take it that the remittal to this Tribunal was therefore intended to encompass the entire task entrusted to the Tribunal by s 12(2) of the Tribunals, Courts and Enforcement Act 2007. The Court of Appeal identified what it took to be a clear error of law which might have affected the decision of the Tribunal: but even that aspect of its judgment is affected in substance by Begum. It does appear to us, however, that

having reached that view, the Court of Appeal's intention must have been either that it had set aside or that this Tribunal would set aside the judgment of the First-tier Tribunal, because that is a necessary implication of the Court of Appeal's decision at the time that that decision was made. We therefore proceed on that basis, and rather than remitting the case to the First-tier Tribunal we remake the decision.

26. The second preliminary issue relates to the ambit of our decision. No doubt it is unusual for a Tribunal to have been ordered by an Appeal Court to undertake a task which it has no jurisdiction to undertake. There is no doubt that the Court of Appeal envisaged that the Upper Tribunal would undertake the single task specified in its order, for the reasons given in its judgment. Before us the parties agreed that, although Begum itself was concerned with an appeal to the Special Immigration Appeals Commission, and an appeal against a decision under s 40(2) of the 1981 Act, the principles set out apply equally to an appeal to the Tribunal under s 82 of the 2002 Act, and to an appeal against a decision under s 40(3) of the 1981 Act. Those are conclusions that we should have reached even if the parties had not so agreed.

27. It then follows that we simply had no jurisdiction to do what the order of the Court of Appeal demands. We have considered a number of possible ways forward, but are content with the pragmatic solution proposed by Mr Palmer QC and accepted by Mr Southey QC, which was that we should hear submissions on both the public law aspects and the human rights aspects of (to put it in the neutral way) the appellant's case. Those are both areas of consideration which the Supreme Court expressly identified as proper subjects of an appeal: we look at this in a little more detail below. Whether or not those points (or either of them) are strictly open to the appellant in this appeal, it seemed right to hear the submissions and to consider whether to give a decision on them. We therefore heard submissions from both parties on these issues. We recognise, however, that the Court of Appeal, having no doubt, through Mr Southey, heard all the appellant's best arguments, considered that only the issue of a different exercise of the discretion needed further investigation. In those circumstances it may be that the true position is that the decision of the Supreme Court in Begum effectively brought the present proceedings to an end. We consider this possibility further at the end of this decision.

PUBLIC LAW GROUNDS

28. Having dealt with the non-justiciability of the actual exercise of the Secretary of State's discretion, the Supreme Court in Begum set out at [71] the issues which the Tribunal might consider in an appeal against a deprivation decision as follows. The first is whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or taken into account some irrelevant matter, or disregarded something to which she should have given weight, or whether the Secretary of State had been guilty of some procedural impropriety. In considering these factors, the Tribunal ought to bear in mind the serious

nature of a deprivation of citizenship and the consequences which can follow from it. Secondly, the Tribunal might consider whether the Secretary of State had erred in law, including making a finding of fact unsupported by evidence or based upon a view of evidence which could not reasonably be held. The third issue, which arises if the deprivation decision is made under s 40(2), but not if it is made under s 40(3), is whether the Secretary of State has complied with sub-s (4) and (4A) which prevent or inhibit the Secretary of State from making a deprivation order under s 40(2) if satisfied that the order would make a person stateless. In assessing these issues, although the role of the Tribunal, like that of the Special Immigration Appeals Commission, is appellate, the principles to be applied are "largely the same as those applicable in administrative law" [69]. Fourthly, there may be a question whether the Secretary of State has acted in breach of some other legal principle. The only one mentioned by the Supreme Court is the obligation arising under s 6 of the Human Rights Act. We consider human rights separately below.

29. In this context Mr Southey argues that the Secretary of State erred in a public law sense by failing to take account of the fact that by Sri Lankan law the appellant had lost his Sri Lankan nationality and that he would therefore be stateless if deprived of his British Citizenship. The Secretary of State's simple response to that is that the Secretary of State made no public law error because the appellant did not raise that issue in response to the notice of intention to make the order. Mr Southey replies that the appellant was not invited to raise that issue but that the question of whether an individual will become stateless is one which s 40 implicitly requires to be considered, and which the Secretary of State's international obligations required her to consider in any event.

30. Section 40 permits the Secretary of State to make a decision depriving a person of citizenship in two different circumstances, set out in sub-ss (2) and (3). As we have indicated, sub-ss (4) and (4A) impose a prohibition or inhibition on making such an order if it will result in a person becoming stateless. In our judgment, it is clear from the structure of s 40 that that section is not itself intended to imply a duty to consider statelessness as a possible consequence of a decision made under sub-s (3).

31. The question whether a person will be rendered stateless is, as the history of the present appeal shows, a matter which may require consideration of foreign law, possibly involving expert opinion on foreign law, and the Secretary of State cannot be expected to take such matters into account unless required to do so. In relation to a decision made under sub-s (2), the consideration of the issue is clearly obligatory. In relation to sub-s (3), however, there is no sense in which the consequence of the decision enters into the existence of the power to make it. The consequence of the decision is, rather, a matter which could go only to the question whether to exercise the discretion. It was for the appellant to put forward any reasons why a discretion which could properly be exercised even if it rendered him stateless, should not in his case be exercised, because it would render him stateless. Because we are looking at the matter on

ordinary public law principles, as indicated in Begum, the assessment of any error by the Secretary of State falls to be undertaken on the basis of the material before the Secretary of State at the date of the decision. At that date, the appellant had not raised the issue that the decision ought not to be made because it would render him stateless; there was no evidence that he would be stateless; and there was no obligation on the Secretary of State to investigate the matter for herself. There was no public law error.

32. The Secretary of State argues in addition that if she had been aware of the position in relation to Sri Lankan citizenship, she would have made the same decision. That may be so, but it does not appear to us that the outcome of the decision-making process on the alternative facts is so clear that a Court applying public law principles ought to say that no other outcome was possible.

33. There is, however, a further difficulty in Mr Southey's attempt to argue this matter now. The decision of the Supreme Court in Begum restricted the grounds of challenge available to a person appealing against a decision to deprive him of a nationality: it did not add to them. As this Tribunal observed in Walile v SSHD [2022] UKUT 00017 (IAC) at [37], "The ability to bring an appeal based on what is a public law challenge to the Respondent's decision has, however, always been present". In that decision the Tribunal refused to allow an appellant to add public law grounds at the stage of an appeal before the Upper Tribunal. The same principle applies here. If the appellant wished to raise the public law issue, he should have done so (if so advised, in addition to the question whether the discretion should have been exercised differently) in his original grounds of appeal. He did not do so. So far as we can see, even in the Court of Appeal, the appellant did not assert that the Secretary of State had made a public law error in concluding that she had sufficient material before her to exercise the s 40(3) discretion. It is, we think, too late to add it now.

34. For those reasons we conclude that the appellant is not entitled to rely on the public law grounds available (and always available) to him; but that if he had been able to rely on those grounds, they would not have sufficed to enable him to succeed in his appeal.

HUMAN RIGHTS

35. The position following Begum is that an appeal on human rights grounds lies against a deprivation decision. "If a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, [the appellate body] has to determine that matter objectively on the basis of its own assessment" [69] (and repeated at [71]).

36. Mr Southey makes his argument based on article 8 by particular reference to the decision of the European Court of Human Rights in Usmanov v

Russia (application no. 43936/18). That decision was published on 22 December 2020, after the Supreme Court heard argument in Begum. The issues dealt with in Usmanov, and more generally the impact of the deprivation of citizenship on an assessment of whether the individual concerned had been made subject to a decision breaching his rights under the Convention, were, however, the subject of the following paragraph of summary in the Court's decision at [64] (we omit a sentence relevant only to appeals to the Special Immigration Appeals Commission.):

> "It is also necessary to bear in mind that the appellate process must enable the procedural requirements of the ECHR to be satisfied, since many appeals will raise issues under the Human Rights Act. Those requirements will vary, depending on the context of the case in question. In the context of immigration control, including the exclusion of aliens, the case law of the European Court of Human Rights establishes that they generally include, in particular, that the appellant must be able to challenge the legality of the measure taken against him, its compatibility with absolute right such as those arising under articles 2 and 3 of the ECHR, and the proportionality of any interference with qualified rights such as those arising under article 8. … A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may in certain circumstances raise an issue under article 8. In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the appellant. In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, K2 v United Kingdom (2017) 64 EHRR SE18, paras 49-50 and 54-61."

37. In Usmanov itself, on which Mr Southey particularly relied, the appellant was deprived of his Russian citizenship after it was discovered that, in making his application for citizenship, he had not disclosed the existence of some of his siblings. At the time of the deprivation he had been living in Russia for about 10 years, and had been a Russian citizen for about 9 years. He had family members in Russia. The position of the Russian authorities was that, under Russian law, the decision to deprive him of his nationality was inevitable given that he did not dispute the nondisclosure of some of his siblings. The immediate result of the decision was that he was left without any valid identity documents. In a second decision he was made subject to a ban preventing him from entering Russia until April 2053. It was said, without elaboration, that he posed a threat to national security and public order.

38. The Court dealt with the two decisions separately. In relation to the deprivation of nationality, the Court set out at paras 52 to 56 the legal principles in similar terms to those we have already cited from Begum. The Court noted that in some of the decisions, including K2, the Court had "accepted" that the revocation of citizenship amounted to an interference. The Court then considered, firstly, the consequences of the decision and

secondly, whether the measure was arbitrary. In relation to consequences, the court noted first, that the decision to annul citizenship left the appellant without any legal status in Russia. Secondly, leaving him without any valid identity documents, had prevented him from undertaking such mundane tasks as exchanging currency or buying train tickets, as well as more crucial needs, such as finding employment or receiving medical care. Thirdly, the deprivation of citizenship was a precondition to the entry ban. For these reasons the court concluded that the deprivation of citizenship had been an interference with the applicant's article 8 rights. The Court then went on to consider whether the interference was lawful. At paragraph 65, having reminded itself of the general principles of law, the Court continued as follows:

> "The Court observes that the revocation or annulment of citizenship as such is not incompatible with the Convention. To assess whether article 8 has been breached in the present case, the Court will examine the lawfulness of the impugned measure, accompanying procedural guarantees and the manner in which domestic authorities acted."

39. The Court's examination of Russian law led it to conclude that the process adopted by the authorities in Mr Usmanov's case was based on provisions of Russian law, but that the relevant provisions of the law, and the procedural safeguards in force at the material time, were not sufficient. In particular, there was no requirement to set out the reasons why, in the particular circumstances of the case, it was appropriate to make the decision: on the contrary, the decision was essentially automatic, taking no account of the factors applicable in individual cases. The available process of challenge gave no room for a meaningful application even of the basis of the decision.

40. For these reasons the Court concluded that the decision was arbitrary in nature, that it failed to comply with the procedural requirements of article 8, and that the interference with article 8 was accordingly not lawful. Mr Southey argued that in the present case there was, similarly, an interference with article 8, and, similarly, it was not justified because it was arbitrary in that circumstances such as the consequences of being stateless, including the ability to travel internationally, and the ability to undertake certain employment, the effects on the appellant's family, the length of time the appellant had been in the United Kingdom, and the length of time the Secretary of State had taken to take action against him were not considered.

41. In our judgment it would be difficult to imagine a greater contrast than that between the process examined in Usmanov and the process to which the appellant was subject. We must, however, make our own assessment, based on the evidence before us now, which for these purposes can include post-decision evidence, whether the Secretary of State's decision was unlawful by reason of a breach of s 6 of the Human Rights Act 1998.

42. The consequences for Mr Usmanov were extreme and serious. The consequences for the appellant are at nowhere near the same level. It was always envisaged that the second decision to deprive him of citizenship obtained by deception would be followed by the grant of leave to remain (the delay arose only from the appellant's failure to comply with the time limits for an appeal to the Court of Appeal). There was no intention that he should have been at any time without identity papers: that he was without identity papers for a time was a consequence not of the decision but of his delay. The mere fact that the identity papers are not what he would have chosen them to be, but are those provided to a stateless person with limited leave to remain, is not the point. Secondly, the appellant has not been deprived the ability to travel within the United Kingdom, or to change money, or to undertake any of the other ordinary activities of daily life. He has not been deprived of access to health or emergency services, or of access to the employment market. Some jobs may not be available to him, either because of his criminal record or because of his immigration status.

43. The Court in Usmanov gives no guidance on what lesser consequences than those that applied in that case might amount to an interference with article 8 rights. It is, however, clear, that whether there has been an interference requires assessment on the facts of the individual case: it cannot be assumed that the deprivation of nationality of itself involves such an interference. In the present case it appears to us that the actual consequences of the deprivation of citizenship were barely significant. In these circumstances we would be inclined to hold that there was no interference with the appellant's article 8 rights. But, if there was in law an interference with the article 8 rights, it is perfectly clear to us that that interference lacked the attributes of arbitrariness which, for a decision of this sort, are the test of legality. The Secretary of State set out from the first the facts upon which her decision was based. She invited the appellant to indicate his reasons why the decision should not be made. The decision was not an automatic decision, but a discretionary one. In making her decision, the Secretary of State took into account all the material available to her. The appellant had an opportunity to challenge the decision by an appeal on public law grounds and on human rights grounds. Even if this decision was an interference with his article 8 rights, it was not arbitrary. It was therefore not unlawful.

44. It follows that the appellant fails on both grounds.

45. We pointed out earlier in this decision, that it may be the case that, as the only matter before us was that which Begum prevents us from considering, Begum has resolved this appeal. It is clear from the consideration we have given to the matters raised before us that they do not assist the appellant. Whether as a result of considering those issues, or because we are not permitted to consider them, therefore, the appellant's appeal is dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 January 2022