Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00074/2019**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 16th March 2022	**On the 13th April 2022**

Before

UT JUDGE MACLEMAN & DEPUTY UT JUDGE DOYLE

Between

JAHE KUPA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Blair, Advocate, instructed by Shepherd & Wedderburn, Solicitors
For the Respondent: Mr G MacIver, Advocate, instructed by the Office of the Advocate General

DETERMINATION AND REASONS

1. The appellant arrived in the UK in 1998, identifying himself as Jahe Kupa, a national of Yugoslavia, born on 1 May 1981 in Kosovo. He was naturalised as a British citizen in that identity on 26 May 2004. His true identity is Jahe Kupa, born on 4 May 1979 in Tirana, Albania.

2. The respondent issued the appellant with a "Notice of decision to deprive British citizenship under section 40(3) of the British Nationality Act 1981",

dated 21 June 2019. The decision holds at [55] "that deprivation would be both reasonable and proportionate".

3. Under the sub-heading "Article 8 ECHR", the decision states at [56] that a deprivation decision does not preclude remaining in the UK; at [62] that a decision on whether to grant a limited form of leave will follow once a deprivation order is made; at [63] that the period between service of a deprivation order and a further decision will be "relatively short"; at [66], that the appellant has the right to appeal to the FtT under section 40A(1) ; and at [67], that if an appeal in respect of the notice is dismissed, "the deprivation order … will be served on you".

4. FtT Judge Komorowski allowed the appellant's appeal in a decision promulgated on 3 August 2021. At [44], having reviewed the authorities, including *Begum* [2021] UKSC 7, he says that the questions before him are:

> (i) Is the respondent's decision vitiated by some material error of administrative law? My task is akin to the court's role in an orthodox judicial review, where the judicial body is confined to the material which was or ought to have been considered by the respondent, the assessment of which can only be interfered with on limited grounds.
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> (ii) Is the effect of the respondent's decision contrary to the Human Rights Act 1998, section 6? That is to be assessed by the tribunal *de novo* as of the date of the decision and the entire evidence led, and not just that available to the respondent when the decision under appeal was made.

5. Parties do not dispute that formulation of the issues which the FtT had to decide.

6. The decision concludes:

> [144] I allow the appeal on the basis that the respondent made an administrative error of law in basing her decision to exercise her discretion to deprive partly on a conclusion unsupported by any evidence. As it is not for me to assess how that discretion should be exercised, the result is that the appeal is allowed, and the matter will have to be considered by the respondent.
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> [145] Separately, I also allow the appeal on the basis that the reasonably foreseeable consequence of deprivation will be the indefinite loss of the appellant's right to work in circumstances that would cause a disproportionate interference with his private life in terms of … article 8. Should the circumstances change, such as if the respondent were to undertake not to prohibit the appellant from working as a condition of his bail, this obstacle to deprivation would fall away.
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> [146] Neither basis on which this appeal is allowed necessarily prevents a further decision being made to deprive the appellant of his British nationality. A new decision to that effect could be appealed again to this tribunal. Further, this decision has no implications for whether the appellant should be granted leave following any order for deprivation and if so, on what terms.
>
> NOTICE OF DECISION
>
> The appeal is allowed.

7. The SSHD did not seek permission to appeal to the UT.

8. The appellant, however, on 16 August 2021 filed an application asking that permission to appeal to the UT "is granted and … that the decision … of Judge Komorowski is reversed to the extent that the appeal is allowed outright and his decision to remit the matter to the respondent is reversed". The first of the 8 grounds is that *Begum* is not an authority "that an appeal on the full merits of a human rights argument in which the Judge remakes the human rights decision is not the course to be adopted". The theme of error by "remitting" to the SSHD runs through several of the grounds.

9. On 4 October 2021 FtT Judge Gibbs granted permission, saying that *Begum* "does not preclude a FtT Judge reaching his / her own conclusions … under article 8…".

10. Mr Blair said that the FtT failed to decide the article 8 case on its merits, and that the UT should substitute a decision allowing the appeal "outright with the effect that the nationality of the appellant is not deprived".

11. He said that was supported by the respondent's guidance to decision-makers, *Implementing allowed appeals*, version 1.0, published 4 August 2020, at page 6 of 18:

> Where a deprivation of nationality appeal is allowed and a deprivation order has already been made, you should withdraw the deprivation order which will restore nationality (if no deprivation order has yet been made no further action is required).

12. It was argued that in line with the policy, the respondent should have restored nationality; and that it was not open to the SSHD to make another such decision, unless on new information.

13. Mr MacIver firstly advanced two " overlying issues". The first was that the appeal to the UT was "incompetent" in so far as at grounds 5, 7 and 8 the appellant seeks to challenge the outcome on the "discretion" limb. That was not open to him, as the successful party, simply because he was discontented with the underlying reasoning. Mr MacIver referred to *Devani* [2020] EWCA Civ 612.

14. We are not persuaded by that submission. Section 11(2) of the 2007 Act says that "Any party has a right of appeal" (subject to subsection (8), which does not apply to this case). It would be at least unusual for a party to be granted permission or to succeed in an appeal where the outcome was already all that it could be in that party's favour, but we consider that all the grounds are procedurally before us for resolution. In view of our decision on the merits, however, this matter is academic.

15. Mr MacIver's second overlying point was that the grounds and the grant of permission were both wrong in saying that the FtT had remitted the case on article 8, rather than reaching its own decision. The expression "remit" was not used in the FtT's decision. The appeal was allowed. Consistently

with the scheme of the Act and with *Ciceri* [2021] UKUT 238, it was for the SSHD to decide what to do next, in light of the decision and the known facts. The grounds and the grant were based on the misunderstanding that the FtT did not decide article 8. It did, to the effect that deprivation of nationality *per se* would not be a breach, but the consequences of doing so without permitting the appellant to work would be a breach.

16. Referring to the policy, Mr MacIver pointed out that no deprivation order has yet been made against the appellant, and no withdrawal is required to restore nationality, because it has not been taken away.

17. The submission for the respondent on the second overlying issue discloses a misconception which undermines the appellant's overall challenge.

18. *Macdonald's Immigration Law and Practice*, 10th ed., says at [2.143]:

> When deciding whether **deprivation of citizenship** would be in breach of human rights the assessment to be carried out by the Tribunal is limited to the 'reasonably foreseeable' consequences of deprivation; the Tribunal cannot undertake a 'proleptic' analysis of the prospects of success of any challenge to a future decision to remove or deport the appellant.

19. For that succinct proposition, *Macdonald* cites *Aziz v SSHD* [2018] EWCA Civ 1884. The principle is stated as it was understood before *Begum*.

20. Mr Blair sought to take us on a complex analysis of further jurisprudence, including *Begum* and *Ciceri* [2021] UKUT 38, on the proper scope of the appeal. For purposes of some aspects of his argument, *Ciceri* could be taken as correctly decided; at other stages, he invited us to take another view.

21. We do not consider that any of those theoretical complexities bear on this case, once we look at what the FtT actually had to decide.

22. *Ciceri* aimed to set out, not to vary, the overarching legal framework for cases of this type.

23. As set out in the headnote at 2 – 3 of *Ciceri*, the FtT was to decide for itself whether depriving the appellant of citizenship would constitute a violation of his human rights. In so doing, it was to determine the reasonably foreseeable consequences of deprivation, without conducting a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom. The assessment of proportionality was for the FtT, on the evidence before it, not only on the evidence considered by the Secretary of State.

24. On any view of the case law, the proposition extracted above from *Macdonald* remains correct. That is the approach which the FtT took.

25. The reasonably foreseeable consequences of Mr Kucha being deprived of citizenship were as set out in the SSHD's decision. Following the FtT's decision, the SSHD may or may not make another such decision. If it is

adverse, and if he chooses again to appeal at that stage of the process, any appeal will be on the reasonably foreseeable consequences of deprivation. If he chooses not to appeal, or fails in an appeal, the SDSHD will consider, on the merits, whether to grant leave, and if so, in what form. The outcome may be satisfactory to the appellant. There may never be a decision to remove. Nothing in present information suggests that there may ever be a decision to deport. It was not within the FtT's scope, and is not within our scope, to decide on a speculative and forward-looking basis whether it might ever be proportionate to decline to grant leave. Such issues are premature and detached from present reality.

26. In one passage of the appellant's submissions it was suggested that if there had been clear evidence that the SSHD would give the appellant a right to work which would not disrupt his business then "there may have been no breach of article 8". That proposition is less ambitious but more accurate on the true scope of the case. That is exactly the extent of interference with article 8 rights which led the FtT to allow the appeal. The appellant could expect no more.

27. The FtT made observations ancillary to its conclusions at [144 – 146]. While there is no error in those observations, the effect of the decision, resolving the agreed questions, would be the same if they had not appeared.

28. Putting the matter another way, all the FtT did at [144 - 146] was to answer the questions which the appellant accepts as correctly framed at [44].

29. The FtT would have had no justification for resolving the case on a projection that the SSHD would decide again to deprive of citizenship, and would further decide to refuse leave and to remove the appellant. If it had done so, the SSHD would have had unanswerable grounds to appeal.

30. On any view of the statutory scheme for deprivation of citizenship, the case law, the decision actually made by the respondent in this case, and the evidence before the FtT, we are unable to see that the FtT might have arrived at a decision any more generous to the appellant than it did; still less that it fell into any error on a point of law which rebounds against the successful appellant.

31. The grounds and submissions for the appellant do not persuade us that the FtT erred on any point of law. Its decision shall stand.

32. The FtT's "notice of decision" is followed by an anonymity direction based on "a significant risk of significantly damaging" the appellant's business interests. At the beginning of the hearing, we raised with the parties whether there was justification for ongoing anonymity, given that the presumption is in favour of open justice; the facts are undisputed; and it is common for allegations, more serious and embarrassing in nature, to be in the public domain, even while unproven. We were advised that the FtT's

direction was made on the application of the appellant, and that the respondent had taken a neutral stance. Mr Blair moved for anonymity, based again on the proposition that the appellant's commercial interests might be compromised, as the appeal bears on his ability to continue in business in the UK. He said further that the appellant has two children at secondary school, and that it would be easy from their surname to associate them with the proceedings, which would be adverse to their interests. Mr McIver had no observations to make and left the matter to us.

33. Due to technical difficulties, the materials before us at the hearing, either in paper or in electronic form, were incomplete. We have noted since the hearing that the appellant's solicitors applied to the UT on 25 January 2022 for anonymity, based on the same two features, citing possible impairment of business interests, and the risk of the children facing comment from their peers at school.

34. The UT's approach to this matter is set out in the President's *Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private,* dated 4 February 2022.

35. Exceptions to the rule of open justice must be justified "by some more important principle, most often where the circumstances are such that that openness would put at risk the achievement of justice which is the very purpose of the proceedings".

36. Rule 14 (2) of the UT Procedure Rules provides that the UT may give a direction prohibiting the disclosure of a document or information to a person if the Tribunal is satisfied that disclosure 'would be likely to cause that person or some other person serious harm' and that it is proportionate having regard to the interests of justice to give such a direction.

37. It is difficult to see that a risk to an appellant's commercial interests, based only on disclosure of plain facts, might trump the principle of open justice. Even if there might be a case at some exceptional extreme, we do not think this is such an instance. We find the proposition of business risk rather speculative. We do not find anonymity is justified on the basis of the direction made by the FtT.

38. The children know the issue affecting the appellant. (It was mentioned in passing at the hearing that a similar issue affects their mother, and presumably they are also aware of that.) We accept that it is not likely to benefit the children, rather the reverse, if this matter becomes known among their peers, assuming it has been kept secret from them so far. However, that is only one aspect of the concern which the overall situation must inevitably cause to the children.

39. While there is a little more force in this aspect of the anonymity application, we consider that publication of these proceedings would be

marginally adverse to the welfare of the children, and not to an extent which justifies anonymity.

H Macleman

18 March 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.