IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00112/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 24 August 2022	**On the 25 October 2022**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DP
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms R Chapman, Counsel instructed by Bates Wells & Braithwaite Solicitors

DECISION AND REASONS

1. Although the appellant is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Albania born in 1977. A decision was made on 23 October 2019 to deprive him of his British citizenship pursuant to Section 40(3) of the British Nationality Act 1981. The decision was made on the basis that he had obtained his citizenship fraudulently, claiming to be from Kosovo rather than Albania.

3. He appealed that decision and his appeal came before First-tier Tribunal Judge Ford ("the FtJ") at a hearing on 21 October 2020 following which the appeal was allowed.

The FtJ's decision

4. It is necessary to set out in detail the FtJ's decision in order to put the appeal before me into context. What could be said to be some repetition in her decision adds to that context.

5. The FtJ summarised the background to the proceedings before her. From that summary the following essential facts emerge. The appellant entered the UK at the age of 20 with his mother. They claimed asylum. The appellant claimed under his correct name but they both falsely claimed to be from Kosovo. That protection claim was allowed. The appellant subsequently obtained indefinite leave to remain ("ILR") on 27 May 1999 and a certificate of naturalisation was issued to him on 7 January 2005. A month later he changed his name by deed poll from his original Kosovan name to [DP].

6. The appellant met his wife in June 2005, she having entered the UK lawfully as a student. They married in November 2005. They had a child, P, born on 7 June 2006. Her application for leave to remain as a spouse was refused. She returned to Albania in 2007 with their, then, two children. An application for entry clearance made on 5 February 2008 was refused almost four years later on the basis of deception in that the appellant's wife had not disclosed her husband's birth identity on her application form. Her appeal to the First-tier Tribunal ("FtT") was successful and she was granted entry clearance. She and the children have British passports.

7. In February 2007 the Secretary of State became aware that the appellant had provided false details to the immigration authorities when he initially claimed asylum. That came to the Secretary of State's attention because the Albanian authorities launched extradition proceedings against the appellant and his father in relation to charges of murder in Albania. The Secretary of State wrote to the appellant on 16 September 2008, telling him that consideration was being given to depriving him of his citizenship due to his deception. That was, it would appear, the first occasion on which the appellant was informed that deprivation action was being considered.

8. On 4 December 2008 the appellant wrote to the Secretary of State and admitted that false representation, claiming that he had feared removal to Albania. He was subsequently informed that a decision on his case would be made at ministerial level.

9. On 2 November 2009 the appellant was further informed by the Secretary of State that the Albanian authorities had a record of him on the civil register in Albania. Thus, he was thought to be Albanian and not Kosovan.

A further ten years elapsed, culminating in the decision made by the respondent in October 2019 to deprive him of his citizenship.

10. The FtJ referred to various authorities on the question of deprivation of citizenship. At [19] she said that in the light of the authorities she would "seek to avoid the proleptic analysis of whether the appellant is likely to be removed". At [20] she rejected a submission made on behalf of the respondent to the effect that it was unlikely that the appellant would be removed, and thus that it was not reasonably foreseeable that he would be removed as a consequence of the deprivation. She concluded that there was no evidence to support the argument that it was unlikely that removal action would be taken if he was deprived of citizenship. At [21], again with reference to authority, she concluded that she needed to look at the reasonably foreseeable consequence of deprivation which may include removal even if removal is too uncertain to feature directly as a consequence. Thus, she said that she would take into account the "possibility" of removal and any period of uncertainty following deprivation in assessing the impact of the decision to deprive him of his citizenship, the impact on him and his family members.

11. She heard evidence from the appellant, his wife and from KL, a paternal cousin of the appellant.

12. The FtJ rejected a contention on behalf of the appellant to the effect that he could rely on an alleged fear of persecution resulting from a blood feud in Albania as part of his appeal. She gave detailed reasons for that decision.

13. The FtJ referred in detail to two experts' reports, one from a social worker, Mr Peter Horrocks, and another from a consultant psychiatrist, Dr Susannah Fairweather.

14. She then made detailed findings of fact. She concluded that the appellant had acquired his British citizenship by knowingly falsely representing himself to be from Kosovo, when he was in fact a citizen of Albania. He did this, she said, in the knowledge that he would gain an immigration status to which he was not entitled, namely protection as an ethnic Albanian from Kosovo.

15. At [65] she stated that the decision of the Secretary of State must be given considerable weight and that no-one should enjoy the benefits of British citizenship obtained through a false and material representation unless the outcome is so extreme as to have a completely imbalanced impact on the private and family lives of an appellant and other members of his family. She rejected the contention that it was mitigating factor that he was told by an interpreter that he should lie about where he was from, and in so doing referred to the respondent's guidance.

16. At [68] she said that the appellant was seeking to blame others for the consequences of his own deception. She rejected the attempt by the

appellant's representatives to downplay his responsibility on the basis of his age at the time of the deception; 20 years old. She concluded that he was fully responsible for his own actions and she rejected the claim that he was acting under his mother's influence. She concluded that the condition precedent for deprivation of citizenship was established, and indeed that that had been acknowledged by the appellant.

17. At [70] she again referred to the great weight that needed to be attached to the views of the Secretary of State in terms of deprivation of citizenship. She went on to state, however, that she, as well as the Secretary of State, was obliged to consider whether the discretion should be exercised differently. Thus, she was required to determine the reasonably foreseeable consequences of deprivation.

18. It is worthwhile quoting in full [71] of the FtJ's decision in terms of reasonably foreseeable consequences, where she said as follows:

> "Mr Swaby repeatedly submitted that it could not be a reasonably foreseeable consequence of deprivation that the Appellant would have to leave the UK. He made this submission while never conceding that leave would be granted to the Appellant on Article 8 grounds. Whilst I do not expect him to make such a concession, he cannot limit the Tribunal's consideration of the reasonably foreseeable consequences as excluding the appellant's removal, if no such concession is made."

19. At [72] the FtJ pointed out that the respondent did not have before her the expert reports of Dr Horrocks and Dr Fairweather and so could not be criticised for not having considered them in terms of the full impact on the appellant's mental health and on his wife and children of the ongoing uncertainty over his immigration status. She said that she needed to consider those reports together with the evidence as a whole in assessing the foreseeable consequences of deprivation.

20. She went on to point out that the appellant's wife and children, being British citizens, would not be removed but it remained "possible" (emphasis as in the original) that the appellant would be the subject of a removal decision. The FtJ concluded that that "continuing possibility" and the ongoing uncertainty over the appellant's status continued to place his family, and the appellant in particular, under considerable mental and emotional strain and impacted adversely on the private and family life of the appellant, his wife and their four minor children.

21. So far as delay is concerned, the FtJ accepted the submission on behalf of the respondent that to a large extent the decision to deprive the appellant of his citizenship was delayed for eleven years by the ongoing litigation on whether citizenship should be revoked or result in deprivation in cases of deception. However, she found that that did not recognise in any way the actual impact of the delay on the appellant or on members of his family.

22. At [76] she again referred to the weight to be attached to the Secretary of State's view but said she was not satisfied that the relevant facts were

considered by the Secretary of State when the decision was made, in particular the impact on the family and private lives of the appellant, his wife and their children, factoring in the delay before the decision was made and considering the best interests of the children.

23. She accepted the view expressed in the expert social worker's report that the best interests of all four children did not lie in deprivation of the appellant's citizenship. Thus, at [78] and [79] she said this:

> "78. I accept that the ongoing uncertainty over the Appellant's immigration status since he was first made aware on 16 September 2008 has placed significant emotional strain on all members of his family. The Appellant must bear the primary responsibility for bringing this decision upon himself and upon his family. But the delay in the taking of a decision to deprive has exacerbated the mental and emotional strain in this family situation and has in the view of Dr Fairweather contributed to the Appellant's current mental health difficulties. Whose fault the delay has been is not really the issue. It is her view that the continuing uncertainty over his status resulting from deprivation of citizenship and the threat of removal hanging over him and his family will lead to further serious mental health issues for this Appellant and ongoing upset for his family members, damage to family relationships and damage to the emotional wellbeing of the children. I accept her assessment and that of Mr Horrocks. I do not accept that in the minds of children or in the mind of a man who is mentally so unwell as this Appellant is, that a detached objective assessment of the kind suggested by Mr Swaby is possible.
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> 79. It is not necessary for this Appellant to show that it is certain or even probable that removal action will follow on from loss of his citizenship. I find that removal action is possible. It is this possibility that continues to place such psychological and emotional strain on each and every one of the family members in this family unit, but particularly so on the Appellant, on [P] and on the Appellant's wife. They have had to cope with the strain of the ongoing uncertainty over the Appellant's status. To deprive him of his citizenship means that the strain not only continues but gets worse, not only because objectively the risk increases but because emotionally and psychologically the Appellant perceived that the risk of his being subject to removal increases. It is the impact on his mental and emotional health and the knock-on effect of this on the Appellant's wife, his children and the relationships in his family unit that needs to be recognised. On the expert evidence that knock on effect will be damaging to each and every family member and to the family relationships."

24. She concluded at [81] that it is a foreseeable consequence of the decision to deprive the appellant of his citizenship that the respondent would not then grant discretionary status to the appellant and the uncertainty over his status including the possibility of his removal would remain a reality for this family and impact adversely on the best interests of the four children, but in particular P.

25. She also referred to the adverse impact on the relationship between the appellant and his wife and his children as he is unable fully to engage with those relationships due to the ongoing strain and his mental health difficulties. She went on to state that delay must be considered because it weakens the argument that he cannot be permitted to continue to enjoy the benefits of citizenship that was obtained by deception. She pointed out that eleven years had passed after the appellant acknowledged his deception before action was finally taken to deprive him of his citizenship. The Secretary of State had informed the appellant twelve years ago that deprivation action was being considered. She said that there had been no explanation as to why in this particular case it took so long for action to be taken. The Secretary of State knew, she said, that there were children involved and the appellant had pursued the matter repeatedly through his legal representatives and through his MP and cannot be criticised for failing to follow up on the situation.

26. The FtJ found that it was a reasonably foreseeable consequence of deprivation, even if removal was too uncertain to feature directly as a consequence, that the appellant would have to face the ongoing possibility of removal action. The respondent, she said, had given no indication that the appellant would be granted a period of discretionary leave based on his family and private life, including his mental health difficulties. She concluded that the uncertainty for him over his status would only increase if he is deprived of his citizenship and that the impact on his mental health must be factored into the decision to deprive him of his citizenship.

27. She found that it was more likely than not that if the appellant is deprived of his citizenship he would suffer a psychotic relapse and that it was the ongoing presence of the stressor in his life of the possibility of removal and the continuing uncertainty over his status following deprivation of citizenship that was so important in this case. She found that that had not been factored into the assessment on him and on his family members of the impact of the decision to deprive him of his citizenship. She went on to conclude at [84] that those factors would more likely than not result in family breakdown and would, accordingly, be contrary to the best interests of the appellant's four minor children.

28. She went on to find that the deprivation decision did not comply with the respondent's own guidance in that the consideration of the impact on the protected family and private life rights was carried out only after the decision was made and not as part of the decision. She further concluded that there was inadequate consideration of the impact of delay and no consideration of the impact of the possibility of removal action (as opposed to the certainty of it) on the family.

29. She found that the public interest in immigration control and maintaining its integrity was weakened by the extended delay in making the decision to deprive.

The grounds and submissions

30. The Secretary of State's grounds of appeal are twofold. Firstly, it is argued that the FtJ's reasoning in allowing the appeal "was based upon a presumption that the appellant would face removal action following deprivation and that this in turn would engender a disproportionate interference in the family's Article 8 rights". The grounds contend that the conclusion that the appellant "would face removal action" is inadequately reasoned. It is said that the FtJ failed to identify any legal means by which the appellant could be removed from the UK in the light of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

31. In that context reference is made in the grounds to the decision letter at paragraph 21 that a decision as to whether or not to grant leave would be made within eight weeks of deprivation based upon representations by the appellant. It is argued that that was not taken into account by the FtJ and "there is nothing on the facts of this case that could possibly give rise to a conclusion that A would be removed".

32. The second ground takes issue with the FtJ's approach to delay in terms of the reasoning and understanding of the effect of delay. The decision of *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 00128 (IAC) is relied on and the need for the respondent to have awaited the outcome of the *Hysaj*/nullity litigation. It is argued that it was encumbent on the FtJ to identify exactly how the deprivation notice (which was served after judgment *Hysaj* was handed down by the Supreme Court) arose out of a dysfunctional system that yielded unpredictable and inconsistent outcomes (per *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41).

33. Mr Tufan in oral submissions relied on the grounds of appeal. It was emphasised that no removal decision had been made in this case and what is said in the decision letter at paragraph 21 was reiterated (within eight weeks a further decision to remove, commence deportation action, or issue leave).

34. In answer to a question from me Mr Tufan contended that the FtJ should not have taken into account the possibility of removal, as no such decision had been made.

35. I was referred to the decision in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC), in particular [3] and [6] of the headnote. It was further submitted that it was not clear why at [15] the FtJ said that care needed to be taken in considering the guidance given in *Hysaj*.

36. In her submissions Ms Chapman relied on her skeleton argument. It was submitted that although the FtJ did not specifically refer to paragraph 21 of the decision on deprivation, she was obviously aware of the fact that a further decision would be made. This was not a case in which it could be said that the appellant could not possibly be removed.

37. So far as the caution that the FtJ expressed at [15] of her decision in relation to *Hysaj*, it was proper for a distinction to be made between that case and this because *Hysaj* also involved criminality, as well as deception.

38. It was submitted that the FtJ's understanding of the law was correct. She looked at the reasonably foreseeable consequences of deprivation and avoided a proleptic test. Those reasonably foreseeable consequences included removal.

39. I was referred to what the FtJ said at [71], namely that whilst she did not expect any concession to be made on the part of the respondent at the hearing before her in terms of the grant of any leave, the absence of any concession must leave open that a reasonably foreseeable consequence of deprivation would be the appellant's removal.

40. I was also referred to the FtJ's conclusions in terms of the impact of the continuing uncertainty on the appellant's health and the wider impact on the family.

41. So far as ground 2 is concerned, although arising post the FtJ's decision, reliance was placed on *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769 in various respects to which I make further reference below.

42. In the context of the decision in *Laci*, Ms Chapman outlined aspects of the chronology in this case in terms of the issue of delay, from when in 2008 the Secretary of State wrote to the appellant informing him that she was considering depriving him of his citizenship until the decision was finally made more than ten years later and despite the matter having been chased by the appellant's representatives.

Assessment and conclusions

43. The respondent's ground 1 is misconceived. It is asserted that the FtJ's reason for allowing the appeal was "based upon a presumption that the appellant would face removal action following deprivation" and that the conclusion that the appellant "would face removal action" is inadequately reasoned. The grounds go on to argue that having regard to paragraph 21 of the decision letter, "there is nothing on the facts of this case that could possibly give rise to a conclusion that A would be removed".

44. It is simply not the case that the FtJ decided the appeal on the basis that the appellant *would* face removal action. What she repeatedly said was that she needed to take into account the *possibility* of removal and any period of uncertainty following deprivation. At [19] she expressly stated that she would avoid the proleptic analysis of whether the appellant was likely to be removed. At [73] she stated that it remained "possible" that the appellant would be the subject of a removal decision, that that was a continuing possibility and it gave rise to ongoing uncertainty for the

appellant and his family, with all the consequences that that involved and to which she referred in detail.

45. Indeed, paragraph 21 of the decision letter expressly leaves open the possibility of the appellant being removed. It states that

> "within eight weeks from the deprivation order being made, subject to any representations you may make, a further decision will be made either to remove you from the United Kingdom, commence deportation action (only if you have less than 18 months of a custodial sentence to serve or have already been released from prison), or issue leave".

46. The FtJ was entitled to take into account the possibility of the appellant's removal in the assessment of the reasonably foreseeable consequences of deprivation, but also the uncertainty in relation to his immigration status that that would engender, as explained in detail in her decision.

47. As regards the delay point (ground 2), even accepting that the respondent was entitled to wait until the *Hysaj* litigation was resolved before making a decision on deprivation, the FtJ was herself still entitled to take into account the delay in terms of its impact on the appellant and members of his family. At [74] she accepted the submission on behalf of the respondent that to a large extent the decision to deprive was delayed for eleven years by the ongoing litigation but she pointed out that that did not recognise in any way the actual impact of delay on the appellant or on members of his family. She further said at [81] that this was never a case in which there was a dispute as to whether revocation or deprivation was the more appropriate course of action. She referred to the respondent having informed the appellant twelve years earlier that deportation action was being considered but there had been no explanation as to why in the particular case it took so long for action to be taken. She said that the Secretary of State knew that there were children involved and the appellant had pursued the matter repeatedly through his legal representatives and through his MP and could not, therefore, be criticised for failing to follow up on the situation.

48. The respondent relies on what was said in *EB (Kosovo)* at [16] in terms of one of the three ways in which delay may be relevant, namely in "reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes".

49. However, at [76] of *Laci* the Court said this:

> "I do not think it is necessary to treat [Lord Bingham's] reference to the delay being 'the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes' as definitive of the kinds of case in which delay may be relevant: he clearly had in mind the facts of *EB (Kosovo)* itself. Lady Hale put it rather more generally: the delay in this case was, in Lady Hale's words, prolonged and (on the case as presented before the FTT) inexcusable."

50. In *Laci*, it is clear from [49] that there was a lack of explanation offered to the appellant in that case in relation to a nine year period of delay. The Court regarded that as important. Similarly, the FtJ in the appeal before me was entitled to take into account the delay on the part of the Secretary of State in this case, notwithstanding the ongoing *Hysaj* litigation.

51. In summary, I am not satisfied that the errors of law contended for by the respondent in this case are made out. I am satisfied that the FtJ was entitled to come to the conclusions she did in allowing the appeal for the very detailed reasons she gave, and that she did so without legal error. Accordingly, the decision to allow the appeal must stand.

Decision

52. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, the decision to allow the appeal stands. The Secretary of State's appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A.M. Kopieczek
Upper Tribunal Judge Kopieczek 17/10/2022