Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00143/2019**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 25 January 2022	**On 10 February 2022**

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR ARI JALAL KHORSHED
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Sadiq

DECISION AND REASONS

1. Although the Secretary of State for the Home Department is referred to as the Appellant in these proceedings, due to the fact he is the party appealing the First-tier decision, we intend hereafter to refer to the parties as they were in the First-tier Tribunal with Mr Khorshed being referred to as the Appellant and the Secretary of State for the Home Department as the respondent.

© CROWN COPYRIGHT 2022

2. This appeal follows on from an initial hearing on 15 November 2021. Following that hearing, the Upper Tribunal made the following decision:

> 2. The respondent has decided to deprive the appellant of his British nationality pursuant to section 40(3) of the British Nationality Act 1981:
>
> The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> 3. The appellant had claimed that he had been born in Kirkuk, Iraq whereas he had been born in Ranya. The respondent states in the decision letter that it had only been because the appellant had been born in Kirkuk that he had been granted leave to remain which, in due course, had enabled the appellant to apply for citizenship. At the material time, the respondent claims that there had been no possibility of removing the appellant to Kirkuk, which had been a disputed area during the conflict with ISIS. The decision letter explicitly states that the appellant's use of a false name whilst in the United Kingdom had not been a 'material fraud' because it had not led to a grant of leave to remain .
>
> 4. The First-tier Tribunal recorded that the appellant does not contend that he will be rendered stateless by reason of the Secretary of State's decision (First-tier Tribunal, [23]).
>
> 5. The grounds assert that the judge failed to apply the dicta of the judgment of the Supreme Court in *Begum* [2021] UKSC 7, in particular at [66-67]:
>
>> 66. In relation to the nature of the decision under appeal, section 40(2) provides:
>>
>> "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."
>>
>> The opening words ("The Secretary of State may …") indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.
>>
>> 67. The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the

> public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.
>
> By extension, the Supreme Court's comments regarding SIAC apply equally to the First-tier Tribunal. The respondent asserts that the First-tier Tribunal misunderstood the need to confine its consideration of the Secretary of State's decision to Wednesbury principles. Moreover, the Secretary of State complains that the judge considered only part of her decision, thereby vitiating his conclusion that the decision had been Wednesbury unreasonable. Significantly, the judge has failed to engage at all with those parts of the decision letter which draw attention to the 'good character' requirements of any application for naturalisation. This argument goes beyond that linking the grant of leave to remain to the appellant's deception as to his place of birth. The respondent argues that the naturalisation application would not have been successful because the appellant would have failed the 'good character' test had the extent of his deception been known at the time of application.

6. In my opinion, that argument has merit. The judge makes a rather oblique reference to this part of the respondent's decision at [60] but only in the context of the appellant's use of a false identity and not the fact that he lied as to his place of birth. This part of the decision is used by the judge to repeat his finding that the respondent had been inconsistent as to the relevance of the appellant's use of a false identity. He fails to engage with the separate argument that the appellant obtained citizenship by falsely presenting as a individual of good character which would not have been possible had the true extent of his deception of the authorities been apparent at the time of his application. That is a valid criticism of the judge's analysis and I find that his conclusion that the decision of the Secretary of State was Wednesbury unreasonable is vitiated accordingly. Whatever the merits of the judge's findings on the birthplace/grant of leave issue, his analysis fails to address all the matters upon which the Secretary of State relies. Those matters may have been sufficient to render the decision reasonable and lawful

7. There is merit in the Secretary of State's other grounds. The parties are agreed that, at the time the appellant was granted leave to remain, there was no 'blanket' policy that no individual could be returned to Kirkuk; each case was considered on its own merits. However, the judge's focus on what he considered the respondent's failure to establish a causal link between Kirkuk as the appellant's place of birth and the grant of leave to remain led him to pay inadequate attention to converse argument that, had it been known that the appellant was from Ranya which is in what was called at the time the KAZ (Kurdish Autonomous Zone), he could have been returned (see grounds [10-

> 11]). For the judge to reach a conclusion that the decision of the Secretary of State was unlawful, he needed to address all aspects of that decision. In my opinion, he failed to do so.
>
> 8. In the light of what I have said above, I set aside the decision of the First-tier Tribunal. The decision will be remade in the Upper Tribunal following a resumed hearing. That hearing will proceed on the basis that the appellant was born in Ranya.
>
> **Notice of Decision**
>
> The decision of the First-tier Tribunal is set aside. The decision will be remade in the Upper Tribunal following a resumed hearing.

3. Since the initial hearing, no further documents have been filed by either party. In his last witness statement, dated 12 February 2021, the Appellant stated he was remorseful, ashamed, embarrassed and upset by his actions and dishonesty.

4. At the beginning of the hearing Mr Sadiq tentatively suggested that the Tribunal may wish to hear evidence about where the Appellant claimed to have been born, but we made it clear that issue had been dealt with at the error of law hearing and we did not intend to revisit that issue again. The hearing would, as previously directed, proceed on the basis that the appellant had been born in Ranya.

5. We are dealing with the Appellant's appeal against the respondent's decision, taken on 5 December 2019, to deprive the Appellant of his British citizenship pursuant to section 40(2) and 40(3) of the British Nationality Act 1981.

6. In her decision letter, the respondent concluded that the Appellant had falsely claimed he was born in Kirkuk, Iraq whereas he had in fact been born in Ranya. The respondent stated that the only reason the Appellant had been granted indefinite leave to remain was because there had been no possibility of removing him to Kirkuk at the material time because Kirkuk was in a contested area. The respondent submitted this false representation was integral to the granting of leave.

7. The respondent noted, in reaching her decision, that the Appellant had also used false details but made it clear this was not a factor in her decision under section 40(3) of the 1981 Act. We confirm we have not taken this into account when considering this appeal.

8. Whilst the decision letter (paragraph [12]) suggested the respondent's policy at the material time (when indefinite leave to remain was granted) was that all persons from the government controlled area of Iraq would have been at risk and although not impossible it would be difficult to relocate to the Kurdish Autonomous Zone both Mr Sadiq and Mr McVeety agreed that at the material time there was no blanket policy that no individual could be returned to Iraq and that each case had to be considered on its own merits.

9. Mr McVeety referred the Tribunal to the decision of *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 in which the Tribunal made it clear that the Tribunal had "to establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held."

10. Mr McVeety submitted that by claiming to come from Kirkuk, rather than Ranya, the Appellant had sought to gain an immigration advantage because at the material time the respondent was almost certain to grant someone from Kirkuk leave as evidenced by the caseworker's note (page G1 of the bundle) which stated, "… no prospect of removal as from Kirkuk, Iraq. Generally compliant during time in UK thus a grant if ILR under the latest 395C guidance" whereas if the Appellant had admitted to the respondent he came from Ranya then it was less likely he would have received a grant of ILR given Ranya was in the safe area of the Kurdish Autonomous Region. He argued that case law, at the relevant time, suggested that the Kurdish Autonomous Region was a safe area and that it followed that the respondent was entitled to find that the Appellant had gained an advantage by stating he came from Kirkuk. Mr McVeety pointed out the Appellant had continued to lie about coming from Kirkuk despite his travel history, since obtaining ILR, showing that he had repeatedly returned to the Kurdish Autonomous Region and that his wife came from Ranya and his children were born there. Mr McVeety submitted this supported the respondent's decision to deprive the Appellant of his citizenship.

11. Finally, Mr McVeety submitted that the respondent had acted lawfully in revoking the Appellant's British citizenship and that the respondent was entitled to find that the deprivation of the Appellant's citizenship was conducive to the public good applying the test set out in *Begum*.

12. Mr Sadiq invited the Tribunal to allow the appeal. He submitted that the approach set out in paragraphs [14] and [24] of the decision letter was correct and the respondent had taken the decision to deprive the Appellant of his citizenship due to his false claim to come from Kirkuk.

13. Mr Sadiq questioned whether the material fraud (claim to come from Kirkuk) actually led to the grant of indefinite leave to remain given the respondent's policy at the time was to treat each case on its merits. It had been accepted there was no blanket policy and Mr Sadiq submitted regardless of where the Appellant came from the policy was the same namely each application was to be decided on its merits and he submitted

that even if there had been a deception the Appellant would still have been entitled to have a claim for indefinite leave considered. Mr Sadiq submitted that historically people from Ranya had been granted legacy leave in 2010/2011.

14. Both representatives agreed that the approach to be adopted this appeal was that set out by the Supreme Court in *Begum*. The Supreme Court stated at paragraphs 66, 67 (see paragraph [2] above) and 71:

> "71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

15. The respondent's minute (G1 in the bundle) shows the Appellant was granted indefinite leave due to the fact he had spent over six years here, he had never been in trouble with the police and because there was no prospect of removal as he was from Kirkuk. The note also referred to the "395C situation" existing in that area at the time.

16. We find Mr Sadiq's submission that the Appellant's actual area of birth was not material overlooks the fact that at the material time the respondent almost without exception was granting leave to people from Kirkuk due to the paragraph 395C situation affecting the area at the time whereas people from the Kurdish Autonomous Region did not have the same guarantee with each case being considered on its merits. The material difference was that, if the Appellant had claimed to come from Kirkuk, he would inevitably to be granted legacy leave whereas if he came from Ranya the same could not definitively be said. Whilst he *may* have been granted legacy leave, the outcome was not definitive as with Kirkuk.

17. When considering whether the respondent acted unreasonably in reaching her decision, we take into account that the respondent gave him leave because at the time she believed he came from Kirkuk and because there was a 395C situation leave was granted.

18. The Supreme Court guidance in *Begum* has made the Appellant's appeal more difficult because the Court made clear it is not our role to consider whether deprivation is conducive to the public good. Our role is to consider whether the Secretary of State's decision to deprive the Appellant of his citizenship was a reasonable decision to take at the material time.

19. The difficulty this Appellant faces is the respondent has made clear in her decision letter that she was satisfied the Appellant's deprivation was conducive to the public good and gave her reason as the Appellant had falsely told the respondent he came from Kirkuk whereas the evidence showed he came from Ranya. The Tribunal has rejected his claim to come from Ranya and is satisfied he deliberately made a false representation.

20. Section 40(2) of the 1981 Act gives discretion to the Secretary of State. This is not a discretion with which this Tribunal should refrain from interfering as long as the Secretary of State's decision falls within the range of reasonable responses available to her and was not unreasonable by reference to the principles of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223. We find as a fact that the Appellant lied to the respondent about his home area of Iraq and that this deception led directly to the caseworker's decision. In other words, the appellant's untruthful statement was the determinative factor in the respondent's decision.

21. We are satisfied that, if the Appellant had admitted he came from Ranya, then the caseworker's decision may have been different given the policy at the time was to consider each case on its merits. We find it likely that the appellant was fully aware that by lying about his home area he would be assured a grant of leave to remain.

22. Following the approach set out in paragraph 71 of *Begum,* we do not find the respondent has acted in a way in which no reasonable Secretary of State could have acted. She has not taken into account irrelevant matters or disregarded matters to which she should have given weight. He decision is free of any procedural impropriety. There is no evidence that the respondent has made findings of fact which are unsupported by evidence or are based upon a view of the evidence which could not reasonably be held.

23. It was previously conceded by Mr Sadiq that the Appellant was not stateless and it follows that an order under section 40(2) of the 1981 would not be contrary to section 40(4) of the 1981 Act.

24. Mr Sadiq confirmed that, as the Secretary of State does not at present seek to remove the appellant, no human rights issues are being raised at

this time. We find that the respondent has not acted in breach of any other legal principles applicable to his decision, such as any obligation arising under section 6 of the Human Rights Act.

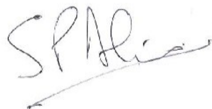
25. In our view, and on the basis of the evidence before us, we find that the appeal against the decision of the Secretary of State should be dismissed.

NOTICE OF DECISION

26. The decision of the First-tier Tribunal having been set aside, we have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 5 December 2019 is dismissed.

27. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Dated



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

FEE AWARD

No fee award made as the appeal has been dismissed.

Signed Dated

Deputy Upper Tribunal Judge Alis