IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-004181
First-tier Tribunal No: DC/50038/2021
IA/08928/2021

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On the 19 April 2023

Before

THE HON. MR. JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PELLUMB BARDHOSHI
(aka PELUMB SHUTI)
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms. S Cunha, Senior Presenting Officer
For the Respondent: Mr. L Yousefian, Counsel, instructed by Oaks Solicitors

Heard at Coventry Combined Court on 15 February 2023

DECISION AND REASONS

Introduction

1. For the purpose of this decision the parties are referred to as they were before the First-tier Tribunal: Mr. Bardhoshi is the 'appellant' and the Secretary of State for the Home Department is the 'respondent'.

2. The respondent appeals a decision of Judge of the First-tier Tribunal Ripley ('the Judge') allowing the appellant's appeal against a decision to deprive him of British nationality under section 40(3) of the British Nationality Act 1981. The Judge's decision was sent to the parties on 6 June 2022.

Relevant Facts

3. The appellant accepts that he is an Albanian national, born in January 1981 and presently aged forty-two. He entered the United Kingdom clandestinely and subsequently attended the respondent's asylum screening unit in Croydon on 23 October 1998 to lodge an application for asylum. He informed the respondent that he was 'Pelumb Shuti', an unaccompanied minor from the autonomous province of Kosovo, then part of the Federal Republic of Yugoslavia. He stated that he was born in March 1982 and aged sixteen.

4. The appellant now accepts that he provided false details as to his name, nationality and date of birth to the United Kingdom authorities. He is a citizen of Albania hailing from Kukes. He was aged seventeen years and nine months when he claimed asylum.

5. On 4 December 1998, a self-completion questionnaire was served by the appellant's then legal representatives upon the respondent. We observe that on this date the appellant was, in respect of his true date of birth, a minor. He detailed a history of persecution in Kosovo by means of an attendant witness statement. He now accepts that the personal history he provided as to persecution was false.

6. The respondent recognised the appellant as a refugee and on 12 June 1999 granted him indefinite leave to remain in the identity presented. We observe that on this date the appellant was, in respect of his true date of birth, an adult, though the respondent understood him to be a minor. The appellant subsequently secured a travel document in his false identity on 21 December 1999.

7. In his false identity, the appellant sponsored the entry clearance of his Albanian national wife, who was issued with a visa on 3 December 2002. The couple's children were born in 2003, 2006 and 2009. All are British citizens.

8. On 7 March 2004, the appellant applied for British citizenship in his false identity and was naturalised on 11 August 2004.

9. In December 2008, the appellant's mother applied for entry clearance to visit this country. She provided a family certificate confirming the appellant's true identity and nationality. An entry clearance officer made a referral to the respondent's Status Review Unit on 14 May 2009 to consider depriving the appellant of his British citizenship. A decision was made by the respondent not to proceed with deprivation as the appellant was a minor at the time when he made false representations in his asylum application. The appellant was unaware that a referral had been undertaken until the decision challenged in this appeal was issued in 2021.

10. The respondent conducted identity checks with the British Embassy in Tirana in 2020 and was again provided with the appellant's family certificate confirming his identity and nationality. The respondent wrote to the appellant on 29 September 2020 detailing that she was minded to deprive him of his British citizenship. The appellant responded by letter on 4 November 2020, confirming his true identity. The respondent decided to deprive the appellant of his citizenship by a decision dated 4 February 2021.

Grounds of Appeal

11. The respondent advances three grounds of appeal:

    i) The First-tier Tribunal failed to consider additional fraud committed by the appellant after the grant of indefinite leave to remain.

    ii) The First-tier Tribunal failed to consider the discretionary nature of the relevant Chapter 55 policy.

    iii) The First-tier Tribunal's decision in respect of article 8 was perverse.

12. Upper Tribunal Judge Gill granted permission to appeal by a decision sent to the parties on 29 November 2022.

Discussion

Ground 1 – Failure to consider 'additional fraud'

13. At paragraph 38 of her 2021 decision letter the respondent observes her decision of 2009 but states, “However, due to the Secretary of State being in possession of new evidence, the Home Office decided to start a new investigation and you were again referred to the Status Review Unit on 17 September 2020.” No detail is given in the decision as to the substance and nature of the ‘new’ evidence.

14. Before us the respondent relies upon an internal file note, from 2009, that establishes an internal recommendation was made not to deprive the appellant of citizenship because he was a child when he made false representations when applying for asylum. The respondent’s position before us is that the file note was singularly specific to the fraud used in the appellant’s asylum application, whilst the 2021 decision letter considered additional exercise of fraud by the appellant after the grant of indefinite leave to remain, when he was an adult.

15. The Judge addressed the substance and nature of the decision taken by the respondent not to deprive the appellant of citizenship in 2009 at [27] of her decision:

> ‘27. The respondent has failed to give any explanation for why she took the decision in 2009 not to deprive the appellant of his citizenship and then eleven years later reversed that decision. In the RFRL reference has been made to information having come to light. However, no detail has been given of that information. The respondent was already aware in 2009 that the appellant was Albanian and not Kosovan and nonetheless took the decision not to take any action because he was a minor when he first practised the deception and applied for asylum. That history is unaltered. The respondent has referred to the appellant’s birth certificate and his family registration certificate. The respondent had the family registration certificate in 2009 and has not explained why the appellant’s birth certificate should make any material difference. The respondent has failed to explain why she has come to a different decision in 2021 from that she reached in 2009. She has not argued that the policy in respect of applications made by minors has changed. It would already have been apparent to the respondent in 2009 that, pursuant to his genuine date of birth, the appellant was over 18 when he was granted refugee status and indefinite leave.’

16. The respondent was provided with significant information by means of the appellant’s mother’s entry clearance application, including a copy of a family certificate establishing the appellant’s true identity and Albanian nationality, and this evidence clearly made her aware that the appellant secured both settled status and British nationality by use of a

false identity at the time of her review in 2009. All relevant events now relied upon by the respondent, namely the appellant applying for a travel document, sponsoring his wife's entry clearance application and applying to naturalise in a false identity were known to the respondent in 2009. We are satisfied that the Judge gave cogent reasons that contrary to the respondent's present assertion, no new evidence as to fraud has come to light after the 2009 decision. The conclusion that the respondent was not rationally able to justify her exercise of discretion to deprive the appellant of citizenship on the same facts as known to her when she undertook a contrary exercise of discretion in 2009 was one the Judge could lawfully make on the evidence before her. This ground is dismissed.

Ground 2 – Failure to consider discretionary nature of Chapter 55

17. Central to this ground is the respondent's 'Chapter 55' guidance, which at the time of her decision in 2009 constituted 'instructions' in respect of nationality matters and is presently policy guidance. It has existed in several versions over the years.

18. The Judge's decision, at [28]:

> '28. Having considered Chapter 55 of the respondent's policy as set out at paragraph 55.7.8 this would support the approach the respondent took in 2009 not to deprive the appellant of his citizenship. It is stated there that if an individual was a minor when the original deception took place and was granted ILR without any further application then they should not be regarded as complicit in the fraud. This appellant was under 18, using his genuine date of birth, when he applied for asylum in 1998. He turned 18 on 22 January 1999. He did not make any further applications or any further representations after that date and before he was granted indefinite leave on 12 July 1999. In making the present decision the respondent has therefore failed to take into account her own guidance.'

19. The respondent's ground can properly be identified as addressing two different issues:

    i. The Judge failed to have due regard to the wording of paragraph 55.7.8.3 of the Chapter 55 policy when concluding that it operated as an effective amnesty for those who commit fraud as a minor. This paragraph must be read with paragraph 55.7.5 which confirms that there is no mandatory amnesty where fraud

is committed as a child, there is instead a normative discretion to caseworkers which necessarily imparts a discretion.

ii. It was not irrational for the respondent to take the fraud perpetuated as a minor into account, given the appellant's continued use of fraud as an adult.

20. The second challenge is simply a repeat of ground 1 in a different form and adds little to the substance of ground 1.

21. Turning to the first challenge we observe the initial sentence of [28] and in particular, "… this would support the approach the respondent took in 2009 …" The respondent filed with the First-tier Tribunal a copy of the Chapter 55 policy guidance, which was considered by the Judge and commented upon by the representatives before us. Upon inspection, the document does not identify its version number, nor the date it came into force. That it references the judgment in *R (Kadria and Krasniqi) v. Secretary of State for the Home Department* [2010] EWHC 3405, at page 20 of the document, establishes that it post-dates the respondent's 2009 decision. We understand this document to be the latest version of the policy guidance.

22. Three versions of the Chapter 55 instruction were operative in 2009. The first came into force on 17 December 2007, and the latter two on 27 February 2009 and 18 November 2009 respectively. As the respondent has not identified with precision the date of her 2009 decision, relying upon a note identifying when the recommendation was made, we are unable to identify which instruction was in force at the relevant time.

23. In any event, as the relevant Chapter 55 instruction was not placed before the Judge, we are satisfied that through no fault of her own she erred in drawing upon the latest Chapter 55 policy guidance when seeking to identify the policy basis of the respondent's reasoning in 2009.

24. We are satisfied the error was not material. As confirmed above, the Judge lawfully concluded that the respondent could not rationally justify her exercise of discretion to deprive the appellant of citizenship on the same facts as known to her when she exercised discretion favourably to him in 2009. Consistency is a public law principle. Furthermore, in the context of this appeal it is for the respondent to demonstrate that any error of law would have led to the decision being materially different, and the respondent has failed to provide the

evidence which establishes that this is the case. This ground is dismissed.

Ground 3 - Perversity

25. In respect of article 8, the Judge concluded, *inter alia*:

> '33. … I am satisfied that the weight in the public interest in this appeal is reduced by the respondent's initial decision not to proceed with deprivation action in 2009 and then her subsequent unexplained decision to revisit the matter in 2020 and go on to make the present decision in 2021. That has created a delay of over ten years. I do not find the decision not to proceed with deprivation in 2009 equivalent to a decision to make a nullity decision which was later on found to be erroneous. A nullity decision is clearly indicative of the respondent's intention to proceed with deprivation. That was not the case here. To the contrary, I find that the decision in 2009 not to take any action followed by the decision on the same facts eleven years later to take action, is more indicative of the delay addressed in *EB Kosovo v. SSHD* [2008] UKHL. That delay may "reduce the weight otherwise to be accorded to firm and fair immigration control if the delay is shown to be the result of a dysfunctional system which was unpredictable, inconsistent and unfair outcomes." Lord Bingham has clearly used strong words. Lady Hale instead stated that the public interest would be reduced where the delay was prolonged and inexcusable. The respondent had not provided a reason or an excuse for taking one decision in 2009 and another one in 2021. I find these inconsistent decisions and the lengthy gap between them to reduce the public interest in the respondent's decision to deprive citizenship.'

26. By means of her grounds of appeal, the respondent focused solely upon [33] of the decision, asserting in general terms that the conclusion reached was unlawful and contended that the Judge failed to have any regard to paragraph 55.5.1 of Chapter 55 which confirms, "There is no specific time limit within which deprivation procedures must be initiated. A person to whom section 40 of the 1981 Act applies remains indefinitely liable to deprivation."

27. Ms. Cunha expanded the challenge before us, asserting that the Judge had undertaken a proleptic assessment of the appellant's article 8 position by attaching impermissible weight to the potential lack of employment during the identified eight-month period, the fact that a child is sitting GCSEs and the stress flowing from deprivation which would have significant, adverse consequences on the child's best

interests. These observations of the Judge are to be found at [32] of the decision.

28. It may be that Ms. Cunha advanced the respondent's case beyond the grounds upon which permission to appeal was granted. However, we are not required to make a determinative consideration as to whether this is the case, as we are satisfied that the Judge was lawfully permitted to conclude, having found that the respondent irrationally exercised her discretion, that the public interest in the respondent's decision to deprive the appellant of citizenship was reduced because of the 'inconsistent decisions' and 'lengthy gap between them'. Such conclusion was reasonably open to the Judge on consideration of the facts arising. As the Court of Appeal recognised in *Laci v. Secretary of State for the Home Department* [2021] EWCA Civ 769, [2021] Imm AR 1410, individual facts arising in a matter are to be considered and the First-tier Tribunal in this matter could properly regard deprivation as a disproportionate interference with an individual's article 8 rights given unexplained inaction for an extraordinary length of time, taken together with all the other circumstances in the case. The respondent's reliance in her ground of appeal upon paragraph 55.5.1. of Chapter 55 is misconceived in a matter where she made her initial decision not to deprive in 2009 and returned to the matter in 2021.

29. In any event, in respect of Ms. Cunha's submission we note the observations at [32] where the Judge is clear in her final sentence that the impact of deprivation during the limbo period would not normally tip the balance in favour of the appellant. In the circumstances, the respondent's challenge is properly to be dismissed.

Decision

30. The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision sent to the parties on 6 June 2022 is upheld, and the appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 April 2023