



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002532
First-tier Tribunal No:
DC/50044/2021
LP/00013/2022

THE IMMIGRATION ACTS

Heard at Field House
On 8 November 2022

Decision & Reasons Promulgated
On the 01 February 2023

Before

THE HON. MRS JUSTICE THORNTON
(sitting as a judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE RINTOUL

Between

SHKELZEN TROKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Berry, instructed by Connaught solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Peer promulgated on 5 April 2022, dismissing his appeal under section 40A of the British Nationality Act 1981 (“BNA 1981”) against

a decision of the respondent made on 18 February 2021 to deprive him of his British nationality pursuant to section 40 (3) of that Act.

Background

2. The appellant is a citizen of Albania. He arrived in the United Kingdom on 10 March 1999 and claimed asylum on 1 April 1999, maintaining that he was from Kosovo and that he was at risk from the Serb regime. That application was refused on 1 September 2000, and his appeal against that decision was dismissed in a decision promulgated on 15 May 2001.
3. On 21 March 2001, the appellant was granted six months leave to enter as the spouse of an EU national, leave later extended to 10 February 2003. He was later granted a travel document in his Kosovan identity, and on 10 March 2003 was granted Indefinite Leave to Remain (“ILR”) in that identity on the basis of his marriage.
4. On 12 March 2004, the appellant applied for naturalisation as a British citizen in his Kosovan identity, providing details of his mother and father as Kosovan/Yugoslavian.
5. On 18 November 2009, following concerns arising from an entry clearance application by his parents, a referral was made to the Home Office due to concerns about his identity.
6. On 27 January 2018 the Status Review Unit wrote to the appellant about the allegation; on 8 February 2018 the appellant’s representatives replied, confirming that the appellant is an Albanian national, setting out mitigation.
7. On 18 February 2021, the respondent decided that the appellant should be deprived of his citizenship.

The Law

8. The legal framework was common ground. Section 40(3) Of the BNA 1981 provides that:
 - (3) 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.
9. The Tribunal must first establish whether the relevant condition precedent specified in section 40(3) 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 v SIAC [2021] UKSC 7 - see Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC).

10. In Paragraph 71 of Begum Lord Reed assesses the role of SIAC on an appeal against a decision under section 40(2) of the Act. He describes SIAC as having a number of important functions to perform. Relevantly he stated:

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.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.....”

The Secretary of State’s deprivation decision

11. The decision letter, dated 18 February 2021 states at paragraph [3]:

“Following our investigation and on the basis of the evidence presented the Secretary of State has decided that your British Citizenship was obtained fraudulently. The Secretary of State has decided that you should therefore be deprived of British citizenship for the reasons set out below”

12. The test in section 40 the BNA 1981 is set out along with the explanations of false representation, concealment of material fact and fraud in chapter 55 of the nationality instructions. The letter cites paragraph 55.7.1 of the guidance to the effect that it is appropriate to consider deprivation if the relevant facts had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship.

13. At paragraph [7] it is said that:

“Having considered all the available information including your representations it is considered that the citizenship was obtained by fraud.”

14. Paragraphs [8] – [28] set out a detailed explanation of the Appellant’s immigration history beginning with his arrival in the UK in March 1999 on a passport with the place of birth said to be Kosovo. It sets out details of the

(failed) application for asylum in which the Appellant said he was an ethnic Albanian from Kosovo. It details the 2003 application for indefinite leave to remain on the basis of the spouse of a person present and settled in the UK. The application was granted on the basis of the Appellant's nationality as 'Federal Republic of Yugoslavia'. The letter sets out the application for naturalisation in March 2004 with the country of birth given as Kosovo and nationality said to be Yugoslavian. The letter further explains the section of the form dealing with good character and records the Appellant's responses to relevant questions, including

"4.11 Have you engaged in any other activities which might indicate that you might not be considered a person of good character? No",

and the declaration by the Appellant that

"to the best of my knowledge and belief the information given in this application is correct".

Later paragraphs in the letter set out the guidance accompanying the application, which the Appellant is said to have confirmed he read and understood, which includes the stipulation to provide information about anything which might be relevant to the question of good character

"no matter how long ago'. 'if you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character, you must say so'.

It further stated that

"A certificate of citizenship may be withdrawn if it is found to have been obtained by fraud, false representation or the concealment of any material fact"

15. Having set out the Appellant's representation, the letter turns to the conclusions, the relevant parts of which for present purposes include the following:

55. When asked the question 'have you engaged in any other activities which might indicate that you may not be considered a person of good character on your naturalisation form, you ticked No... By answering No...you committed further deception since you were aware you should have declared your false statements regarding your identity and personal history. You deliberately deceived the Home Office in order to increase your chances of a successful application since you could have been in no doubt that your prolonged deception regarding your identity was exactly the kind of behaviour you were being asked to declare. ...

16. Having set out relevant extracts from the Nationality guidance on good character, the letter continues

59 In accordance with the requirements of being granted British Citizenship you have demonstrated that you are not of good character in that you have perpetrated a prolonged identify fraud beginning with your asylum claim

and throughout all your dealings with the Home Office culminating in your naturalisation. You have raised Sleimann and stated that this deception was not material due to how you were granted ILR. It is accepted that ILR would most likely have been granted to you in your genuine identity. However, you then choose to naturalise and practised deception when doing so presumably to avoid a refusal on good character grounds. Had the truth been known, your application would have been refused since, in omitting the facts of your prior deception you compounded this and prevented the caseworker from giving proper consideration to your application. The prolonged nature of your deception and your compounding of it in your naturalisation application would have prevented you from meeting the good character requirement and as such was material to the grant of citizenship

....

60...Had the caseworker been aware of these details it is highly likely your naturalisation application would have been refused because you could not meet the good character requirement.

61 ... on the balance of probabilities it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application would have been unsuccessful had you told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship

The decision of the First Tier Tribunal Judge

17. Having set out the legal framework and directed himself to apply Ciceri, the judge observed that there was no dispute that the Appellant had continued to represent himself falsely as Kosovan when he is in fact Albanian [43]. In a section of his judgment titled "Obtained by means of fraud, false representation or concealment of a material fact", the judge reminded himself [44] of the appropriate test ("where the Secretary of State had made findings of fact which are unsupported by evidence or based on a view of the evidence which could not reasonably be held"). The FTTJ refers to Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 [45, 46]. He notes the Secretary of State's guidance on citizenship and good character and comments that 'an aspect of rationality is adherence to policy to ensure consistency of and therefore non-discriminatory or arbitrary decision making' [47]. At [49] he notes that the policy on deprivation states that it would not be appropriate to deprive a person of citizenship where the deception did not have a 'direct bearing' on the grant but notes that the examples provided do not apply to the Appellant [49]. At [50] he observes that

"A grant of British citizenship confers the privileges of British Citizenship including the right to hold a passport and identify as British. This is an entirely different status from holding ILR. The assessment as to whether or not to grant citizenship also includes a good character assessment and that assessment is made in the context of the status of citizenship being granted or refused"

He then concludes:

51. The respondent's bundle contains a copy of guidance for applicants for naturalisation as British Citizens (Guide AN). The guidance is clear that 'good character' will be taken into consideration and under a section on 'How to fill in the application form' after setting out that applicants must ensure that name, date and place of birth details are correct gives the warning to 'Make sure that all the information is correct before you submit your application. It is a criminal offence to give false information knowingly or recklessly.' In this context, it is reasonable to consider that provision of false information as to place of birth is not a minor matter. The relevance of the provision of a true identity is to enable checks to be carried out to ensure there is no concealment of criminality or as to other information in order to assess good character. Good character is a key factor in the consideration as to whether a person should obtain the benefit and privilege of British citizenship.

52. The respondent's policy on good character in the respondent's bundle sets out at 2.1 that applicants would not be considered to be of good character if there was information on file to suggest they had practised deceit in their dealings with the authorities including the Home Office. The section on deception which the appellant refers to indicates that lies or concealment of the truth 'count heavily' against a person although can be overlooked if considered to be minor matters. The appellant provided false information in his application for naturalisation and used that false information in connection with his asylum claim which he maintained even though he had leave to enter on the basis of his marriage including before the tribunal.

53. The appellant has produced several decisions not to take deprivation action on what are said to be similar fact patterns. I am mindful that an aspect of rationality is consistency in decision-making but I am also mindful that such assessments are fact sensitive and what is shown by the documents available to me does not suggest that the facts are identical although there is the common feature of grants of leave on the basis of marriage. Adherence to the policy requires a decision-maker to count deception heavily against an applicant and in those circumstances refusal to grant does not present as so unreasonable that no reasonable Secretary of State would so refuse. Where an applicant is not honest and where deception is not admitted, the Secretary of State is prevented from full assessment and the applicant ensures a factor that would weigh heavily against them is not counted at all. The counter-factual is therefore that the deception does have a direct bearing on and causative relevance to the grant of citizenship as it would materially have influenced the assessment as to whether the appellant had good character.

54. The respondent submits that had the deception been known, the application for naturalisation would not have been granted because good character would not have been established. I have given this careful consideration given the range of matters taken into account with good character and in circumstances where the respondent concedes the grant of ILR would not have been affected and the appellant has produced cases where deprivation action has not been taken which have some similarities

with the appellant's case. I cannot however find that this position is one which no reasonable Secretary of State could hold.

55. Accordingly, I find that the respondent has demonstrated that she has made findings of fact supported by the evidence and based on a view of that evidence that can reasonably be held to the effect that the appellant obtained by means of fraud, false representation and/or concealment of a material fact British citizenship.

56. I therefore find that section 40(3) is engaged and the respondent was entitled to exercise discretion as to whether or not to deprive the appellant of British Citizenship.

Discussion

18. As is apparent from the legal framework and is common ground, Parliament has conferred on the Secretary of State the assessment of whether British citizenship has been obtained by means of fraud or deception ('if the Secretary of State is satisfied...'). The function of the FTT (and this Tribunal) is to review the Secretary of State's assessment to consider whether the Secretary of State has erred in law in her assessment.
19. Applying this test, it cannot be said that the Secretary of State (or the FTT in a careful and cogent judgment) has fallen into error. We acknowledge the skilful and cogent submissions advanced by Mr Berry. However, they must fail for the reasons set out below.
20. Mr Berry's submissions relied heavily on the Appellant having been granted indefinite leave to remain, as the spouse of an Irish citizen. This, he submitted was the springboard for the naturalisation application and interposed a break in the chain of causation between the deception and the grant of naturalisation. There is therefore, he submitted, no causal connection between the deception and the grant of naturalisation.
21. It is common ground and acknowledged by the Secretary of State that the Appellant would have obtained indefinite leave to remain, even on the basis of his true identity, by virtue of his marriage. In this respect, the Appellant's ILR may be characterised as having been obtained, whilst engaging in fraud, but not by means of fraud.
22. However, Mr Berry's submissions fail to recognise the application for naturalisation as a separate application for a distinct status. As the FTTJ said ' A grant of British citizenship confers the privileges of British Citizenship including the right to hold a passport and identify as British. This is an entirely different status from holding ILR'. The Secretary of State put the point as follows in the deprivation letter "That was a choice you made. There was no requirement upon you to naturalise and you already had settled status through your grant of ILR" (para [37]).

23. The grant of British Citizenship is dependent upon a good character assessment. Home Office guidance on good character explains that an applicant will not be considered to have good character if he/she has practiced deceit in his/her dealings with the Home Office. Mr Berry submitted that the guidance on acquisition of nationality and its deprivation should be distinguished and kept separate, not least because the relevant statutory tests are different. That submission may be technically correct but it fails to acknowledge that, in the present context, the guidance on acquisition of citizenship is being used to assist in an assessment of the bearing, if any, of the deception on the naturalisation decision, at the time it was made. We note, in passing, as conceded by Mr Berry, that the case of Sleiman which he placed reliance on, cited the same guidance in its discussion.
24. Mr Berry accepted that the relevant policy guidance is consistent with the statutory test in section 40(3) BNA. In this regard he emphasised 55.7.3 (if the fraud... did not have a direct bearing on the grant of citizenship it will not be appropriate to pursue deprivation action) He submitted, however, that the Secretary of State had failed to apply her policy. We do not agree. The deprivation letter sets out the policy stipulation at 55.7.1 that if the relevant facts, if known at the time the application for citizenship was considered, would have affected the decision to grant citizenship. The decision maker treats that as the starting point (as Mr Berry said should be done) for the detailed assessment of the evidence that follows, which, in our judgment, amounts to an examination of the bearing the deception had on the assessment of the application for naturalisation.
25. On the basis of her assessment, the Secretary of State reaches the view that it is 'highly likely' that the Appellant would have failed the good character test, had the true facts been known, given the prolonged nature of the deception as to identity, compounded by a repeat of the deception on the face of the application form. This view, as to a causal link between the deception and the outcome of the application, is reached on the basis of facts, which are not disputed and in line with the relevant policy guidance.
26. Mr Berry submitted that the exercise conducted by the Secretary of State in this regard amounted to an inappropriate exercise in speculation. Good character is not, he submitted, a binary question but an evaluative exercise in the round which would have included consideration of the Appellant's marriage to an Irish citizen. He further submitted that it is apparent from the Secretary of State's policy that not all actions of deception will lead to deprivation, yet the effect of the Secretary of State's backward looking exercise is to impose a rigid policy of deprivation in all cases of fraud. On the facts of this case, we do not accept the argument. The deprivation letter takes as its starting point that deprivation may be appropriate (given the admitted deception) but goes on to consider the evidence in detail before forming a view. The fact that ILR would most likely have been granted on the Appellant's true identity is acknowledged during the course of the assessment.

27. Mr Berry sought to rely on Sleiman. In that case the Appellant gave a false date of birth on arrival in the UK which led to the grant of discretionary leave to remain on the basis he was an unaccompanied minor. He applied for indefinite leave to remain (before expiry of his discretionary leave to remain). His application was outstanding for 5 years as a result of which he was granted ILR under a legacy scheme. He subsequently applied for citizenship. The Upper Tribunal accepted that the concealment of age by the appellant in that case had not had a direct bearing on the grant of naturalisation. UTJ Kopieczek held [69]:

“However, having concluded that the behaviour (fraud etc) must be directly material to the grant of citizenship I do not consider that the evidence in this case justified the FtJs conclusion that the appellant’s deception as to his date of birth was directly material to the decision to grant citizenship; in the language of section 40(3) that the appellant’s citizenship was obtained ‘by means’ of fraud..”

28. Mr Berry relied on paragraph 60 of the judgment in which the Tribunal stated:

“The phrase "direct bearing" suggests that in cases where the fraud etc. only has an indirect bearing on the grant of citizenship, deprivation action would not be appropriate. This, it seems to me, is consistent with the phrase "by means of" in s.40 (3). Furthermore, under the "Definitions" in the NI's, "Concealment of any material fact" (although s.40 (3) itself reads "concealment of a material fact"), is described as meaning " **operative** concealment i.e. the concealment practised by the applicant must have had a direct bearing on the decision to register or, as the case may be, to issue a certificate of naturalisation" (emphasis as in original).”

29. Mr Berry submitted that his client is in a stronger position than the Appellant in Sleiman where ILR was granted under the legacy scheme without any factual inquiry into the basis of the application, whereas here, the appellant’s application for ILR had been considered on its merits and granted (on the basis of the spousal relationship).

30. We accept that in both Sleiman and the present case it may be said that ILR was obtained, whilst the appellant in each case was engaged in fraud, but not by means of fraud. However, in our view, what distinguishes the present case from Sleiman, is that good character was not in issue in Sleiman, as can be seen from the decision at [65]:

“Furthermore, it is not suggested by the respondent that had the false date of birth being known by her at the time of the citizenship application, the application would have been rejected on the ground that the appellant had not shown he was of good character”.

31. In the present case, the Secretary of State has come to the view that it is highly likely that the Appellant’s application for naturalisation would have been refused had the true facts been known. Her views in this regard are based on the nature and length of the deception, compounded by the deceit on the face of the application form. In our judgment, on the

evidence available to her this was a finding she was entitled to come to on the evidence and cannot be said to be unduly speculative given the policy weight attached by the Secretary of State to dishonesty in dealings with the Home Office and the requirement of good character in any successful application for British Citizenship.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it
2. No anonymity order is made.

Signed: MRS JUSTICE THORNTON DBE

Date: 25 November 2022

The Hon. Mrs Justice Thornton DBE sitting as a judge of the Upper Tribunal