IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000860
First-tier Tribunal Nos:
DC/50172/2022
DC/00056/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 September 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BING GONG
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr A Papasotiriou, Counsel, instructed by Richmond Chambers

Heard at Field House on 24 May 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the appellant, hereinafter "the claimant", against the decision of the Secretary of State to deprive him of his British nationality.

2. The claimant was a national of China but became a British citizen at a ceremony on 2 April 2009. On 8 December 2016 (seven years after he was naturalised) he was convicted by a jury of taking part in a conspiracy to defraud between 23 March 2009 and 10 October 2013. For this offence he was sentenced to seven years' imprisonment and for providing immigration advice or services in contravention of a prohibition between 7 March 2013 and 9 October 2013 he was sentenced to a concurrent term of 12 months imprisonment.

3. As is clear from the imposition of the sentence of seven years' imprisonment, the claimant was convicted of serious crimes. A person who has been naturalised as a British citizen can have that status revoked but the power to revoke naturalisation is limited by statute. A person can be deprived of British citizen

status if the Secretary of State is satisfied that deprivation is conducive to the public good but that power is limited and, broadly, unless it is a national security case, cannot be used where the effect of deprivation would be to render a person stateless. I do not have to determine the point but it would appear from the material before me that this route is not realistically open to the Secretary of State.

4. There is a separate route to deprivation. It applies where a person is found to have obtained their British citizenship by less than frank behaviour. The precise terms are set out in the British Nationality Act 1981, Section 40(3) which provides:

> "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 representations, or
>
> (c) concealment of a material fact."

5. This route is not blocked by reason of the decision making a person stateless and is the route relied upon by the Secretary of State in this case.

6. There is no suggestion that there was an overtly false representation here. The Secretary of State's case depends on the "concealment of a material fact". The material fact was that *after* the Secretary of State informed the claimant that his naturalisation application had been approved in a letter dated 7 January 2009 but *before* the decision was brought into effect at a citizenship ceremony on 2 April 2009 the applicant became involved in a criminal conspiracy. The evidence for the claimant's involvement in criminal behaviour *throughout* that time is less than compelling and I return to it later but it is based on the terms of the indictment that led to the claimant's conviction, which asserts that the claimant was engaged in a conspiracy to defraud between "23 March 2009 and 10 October 2013".

7. It is clearly the case that, generally, a person is not naturalised until he has attended an appropriate ceremony (there may be exceptions in very unusual circumstances which clearly do not apply here). It therefore must be the case that naturalisation is not "obtained" until the ceremony is completed.

8. Here, the claimant was told in the letter dated 27 January 2009 that his application had been approved. I accept (the contrary was not argued) that it was open to the Secretary of State to have changed her mind between the decision to grant naturalisation and the person being naturalised. Apart from this being a "common sense" approach it is supported by guidance. I explain that below.

9. It is improbable that such a letter would have been written but, had the claimant written to the Secretary of State on 23 March 2009 and indicated his intention to take part in the conspiracy to defraud, I am willing to assume that the ceremony would not have gone ahead and he would not have been given British citizenship. However, I am not aware of any evidence before me that confirm that this would have been the case.

10. The Secretary of State wrote to the claimant a letter dated 30 March 2022 saying that:

> "The Secretary of State has reason to believe that you obtained your status as a British citizen as a result of fraud.

> The Secretary of State has received information that indicates that you engaged in criminal activity prior to naturalising as a British Citizen and did not inform the Home Office of these activities. On this basis, it is considered you have obtained British citizenship by deception."

11. It is helpful to look carefully at the Notice of Decision to Deprive of Nationality under Section 40(3) of the British Nationality Act 1981 dated 3 August 2022 (378 in bundle).

12. The letter reminded the claimant that the Secretary of State had:

> "been actively investigating the manner in which you obtained your status as a British citizen on the grounds that this may have been obtained fraudulently (this may encompass a false representation or concealment of a material fact)."

13. The letter continues in paragraph 3 to say that it had been

> "decided that you did in fact obtain your British citizenship fraudulently."

14. Paragraph 5 of the letter sets out the Secretary of State's understanding of the circumstances that must exist before there can be deprivation. It states:

> "'False representation' means the representation which was dishonestly made on the applicant's part, so an innocent mistake would not give rise to a power to order deprivation under this provision (54.4.1). 'Concealment of any material fact' means operative concealment, that is, 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 (55.4.2). 'Fraud, encompasses either of the above (55.4.3). 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 via naturalisation or registration it is appropriate to consider deprivation. (55.7.1)."

15. It is clear that, in the Secretary of State's mind, based on the guidance (the numbers beginning 55 are from chapter 55.3.11 of the Nationality Instructions), that false representation or, in this case, concealment, arose when there were facts that "would have affected the decision to grant citizenship via naturalisation or registration". I find the phrase, "affected the decision" to bear at least two meanings. It could apply to the decision that had yet to be made and "affected" it in the sense that it would determine what that decision would be but it would also apply to a decision that had been made and that would have been affected by the information disclosed. In other words, the guidance applied to decision that had not yet been made and to decision that had been made but (presumably, from context) not carried out.

16. However, I must also look at paragraph 14 of the same letter. This says:

> "On 8 December 2008 you signed and dated a Form AN (Annex K13) in order to become a British Citizen. In this form Question 3.12 asked *'Have you engaged in any other activities which might indicate you that you may not be considered a person of good character?'* you ticked *'no'* (Annex K9). Section 6.1 (Annex K13) states *'I promise to inform the Home Secretary in writing of any change in circumstances which may affect the accuracy of the information given whilst this application is being considered by the Home Office.'* Therefore, if any changes were to happen you should have informed the Secretary of State. Section 6.2 (Annex K13) states *'I confirm that I have read and understood the guide Naturalisation as a British Citizen'*, in the box you marked a tick to confirm this. Based on the

> information supplied in this Form AN you naturalised as a British Citizen (6(1) in the details Bing Gong born 9 March 1973 in Dalian, China (Annex N1)."

17. I draw attention to the words "whilst this application is being considered by the Home Office". It would have been very easy to have said "until your application is rejected" or "until you are granted citizenship" if either of these meanings was intended. This formulation supported the argument that the Secretary of State wanted to be notified until the application was being considered but not afterwards. This would mean that the Secretary of State did not want further information once she had started to consider the application. Such a construction is not absurd. Maybe once the consideration process was underway the Secretary of State did not want to be distracted with further facts.

18. The letter then goes on to note that the claimant was arrested on 9 October 2013 but says:

> "Dates of your naturalisation to become a British Citizen and dates of the criminal activity you undertook present an overlap which shows that deception was present when you naturalised."

19. It was noted that the claimant had written to the Secretary of State and said that he did not understand the time bracket in which the conspiracy was said to have been formed and indeed had asked the CPS to explain the significance of the date but that was not done.

20. It also noted that the claimant said that from 23 March 2009, which is the earliest date given for the conspiracy, until 2 April 2009 he was on holiday, except for one day when he was recovering from the flight and he produced evidence to support that. If the claimant is implying that he could not have been conspiring because he was on holiday I disagree.

21. The Secretary of State considered the date when the conspiracy began. At paragraph 17, the Secretary of State noted that the claimant had provided emails from 23 October 2009 but said there were no emails after this date or before and "therefore this cannot be certain that this was the first email surrounding the business". The Secretary of Sate looked at the judge's sentencing remarks and said the judge found criminal activity took place between March 2009 and 10 October 2013 and the dates are reflected under the conviction in the Police National Computer. The letter noted, correctly, that the offence "took place between 23 March 2009 until 10 October 2013". It continues "therefore this was 10 days before naturalising as a British citizen."

22. I do not wish to be intemperate but the suggestion that this proves that the claimant began his criminal activity on 23 March is plainly wrong. The dates "23 March 2009 until 10 October 2013" are a bracket determining the earliest date that the offence might have started and the last date when it might have finished. It is not evidence that the offending was taking place throughout that period; that is the nature of a range of dates when something happened. It could hardly have been argued in the criminal trial that the defendant was innocent of any conduct because he did not do anything wrong until September 2009. He would have been told that the dates set the range dates when the crime was done. The contention on the part of the Secretary of State that the bracket of offending of itself proves the time when the offence was committed is just unsustainable. What it does do is indicate a period of time during which the offence was committed. It does not show that it was committed throughout that time and it is quite concerningly wrong for the Secretary of State to say otherwise.

23. The letter then, helpfully to the claimant, refers to the guidance and questions. There is a commentary on question 3.12 at paragraph 23 where the Secretary of State says:

> "3.7 You must say if there is any offence for which you may go to court or which is awaiting hearing in court. This includes having been arrested for an offence and waiting to hear if you will be formally charged. If you have been arrested and not told the charges have been dropped, or that you will not have to appear in court, you may wish to confirm the position with the police. For applicants from Scotland any recent civil penalties must also be declared. You must tell us if you are arrested or charged with an offence after you make your application and while the application is under consideration. You risk prosecution under section 46 of the British Nationality Act 1981 if you do not do so."

24. The guidance contemplates behaviour known to the claimant when the application was made. It does not clearly apply to behaviour after the application was made but before it was decided.

25. At paragraph 28 the letter then refers to guidance that begins "While the application is under consideration ...". As far as I can see this phrase is not defined anywhere.

26. The letter then refers to an undertaking that the applicant had to sign. It was in the following terms:

> "I promise to inform the Home Secretary in writing of any change in circumstances which may affect the accuracy of the information given whilst this application is being considered by the Home Office."

27. The letter continues:

> "Clearly, you could have been in no doubt you knew you were expected to do this and had declared to inform any change in circumstances, but you failed to do this."

28. I make the obvious comment that the claimant was told to inform the Secretary of State about misconducted whilst the application was being considered and the claimant had been told that the application had been decided *before* there was any question of his being involved in criminal behaviour. The use of the word "clearly" is, at least, optimistic.

29. The First-tier Tribunal's Decision and Reasons is short and, if I may respectfully say so, written exceptionally clearly. At paragraph 20 of the Decision and Reasons the judge noted that it was beyond argument that when the claimant made the necessary declaration there is no evidence that he was engaging in any kind of criminal activity. The judge also noted, as I have done, that the claimant signed an undertaking to inform the Secretary of State of a change in circumstance "whilst this application is being considered." The judge quoted from the decision letter of 27 January 2009 where the Secretary of State said:

> "I am pleased to tell you that this application for British citizenship has been approved. To complete the process of being a British citizen, you will need to attend a citizenship ceremony ...".

30. The judge accepted that the Secretary of State had fulfilled the statutory obligation under 6(2) of the British Nationality (General) Regulations 2003 which provides that notice should be given of the intention to grant a certificate. That had been done.

31. The judge noted it was the claimant's case that he had no duty to disclose behaviour after the decision had been made. The judge acknowledged that the submission at first sight seemed "unpalatable" but, importantly, said at paragraph 40:

> "On the other hand, the wording of the declaration and the guidance note for that section of the form state that the Appellant promises to update the Secretary of State 'whilst the application is being considered'. Whilst the letter of 27 January 2009, in stating that the application has been approved, suggests that the application has been 'considered'".

32. The judge found that before there was any suggestion of criminality the application had been approved and therefore, in accordance with the guidance, there was no ongoing duty to update the Secretary of State of any change in circumstance between deciding to approve the application and the ceremony giving effect to it.

33. This was challenged in grounds of appeal drawn by the Specialist Appeals Team. The grounds refer to Schedule 1 requirements for naturalisation under the British Nationality Act which are set out. It says that the requirements for naturalisation as a British citizen include being of good character. It was contended unequivocally in the grounds that there is an ongoing obligation to disclose character. It is noted in the grounds that the judge relied on the strict wording of the application form drafted of course by the Secretary of State) and it was said that the wording on the form was only part of the picture.

34. The Secretary of State particularly relied on the case of **Pirzada [2017] UKUT 00196**. **Pirzada** is not on point. In **Pirzada** the appellant had been engaged in unlawful activity before he applied for citizenship and represented that he had not been engaged in such activity. That is not what has happened here. The instant case is not about a false representation but a case about concealing a material fact. The alleged material fact did not exist when the representations were made and what impressed the judge was the Secretary of State's insistence that what mattered was reporting before the decision was made.

35. The second ground of appeal refers to Nationality Caseworker Instructions which make it plain that once a decision to grant leave has been taken but there still has to be a citizenship ceremony "we would not normally change the decision to grant except in very restrictive circumstances". Illustrations are given including a simple mistake in the invitation to the ceremony or "material and significant information comes to light". The material and significant information is described and would be such as to warrant deprivation or to justify treating the proposed grant as a nullity or with new information that shows the applicant does not have the required good character._In that event the papers would be considered with a view to refusal. The ground draws attention to Casework Guidance that supports the wholly unsurprising conclusion that the Secretary of State asserts that she has power not to go ahead with a citizenship ceremony if something comes to light, including evidence about character, that shows it should not have been granted.

36. As far as I can this was never argued in the First-tier Tribunal.

37. Mr Papasotiriou was careful not to object to the terms of ground 2 although the point was not raised below. He said that the guidance was misunderstood. It indicated how the Secretary of State could react if it came to her attention that the person was not of good character. That is not at all the same as saying that it any way created an obligation on the claimant after the decision had been made to grant citizenship even though the decision had not been put into effect.

38. The claimant's main point was that the judge had decided that there was no duty to disclose any criminal behaviour after the decision had been made. The judge reached such conclusion largely because of what the Secretary of State had said which I have highlighted above. This is a case where the Secretary of State needed to be told of change of circumstances before a decision was made. Possible equivocal understandings of the meaning of the guidance either on its own terms or by reference to other parts of the guidance do not appear to have been argued before the First-tier Tribunal. Certainly, I find nothing perverse or otherwise wrong in law for the judge not to have accepted them.

39. This is a case I find that turns very much on its own facts. It is certainly not a decision by the Upper Tribunal that there is no duty to disclose a change of circumstance up to the grant of citizenship.

40. However, I am persuaded, just, that the judge was entitled to conclude on the facts and arguments before him that the claimant had not been dishonest because he had done what the Secretary of State had asked him to do. At the very least what he did was consistent with a reasonable interpretation of what the Secretary of State had said. It is the Secretary of State that drew distinction between the decision and the grant. Of course, the decision is plainly there but it was the Secretary of State who chose not to say there was an obligation to disclose until the grant of citizenship but until the decision had been made. The claimant was entitled to rely on it and the judge was entitled to rule as he did.

41. I have of course considered what Ms Everett had to say which was not much more than the grounds of appeal. I certainly agree with her contention that the claimant does not save his position by asserting that he did not know there was a duty but the case is more subtle than that. The respondent is asserting dishonesty and the question of whether a person was dishonest that has to be assessed by the standards of an ordinary person and the judge was entitled to find that an ordinary person, having been told expressly by the Secretary of State that there was a duty to disclose convictions or bad character until the decision was made, was perfectly entitled to conclude it was not dishonest to withhold information about things that had happened after the decision was made.

42. There is another element not featured very much in the arguments before me but I think it to be very important and I have indicated it above.

43. There is hardly anything in the Secretary of State's to show that the claimant had been involved in criminal activity before 2 April 2009.

44. It is quite plain that the claimant denies that there was but that is perhaps not that important except that it puts the point in issue. I have already indicated that the bracket time for the conspiracy is no more than an indication about the range of time when the claimant was involved in criminal behaviour throughout that time. It determines the earliest date on which it could have started for the purposes of putting the case to the jury. When the claimant asserted firmly that he had not been taking part in such activity more thought was needed. Of course, the explanation he offers is not particularly persuasive. He was in the United Kingdom on one of the days in the range day and I do not see how absence from the UK means would necessarily mean that he was not conspiring. However, when I ask myself what evidence there is that the claimant was involved in a conspiracy before 2 April 2009 I am confounded. The trial judge's summing up is set out in the Secretary of State's bundle. It is a very long document because it is summing up after a long trial with (I think) three defendants. Much of it was of little pertinence to this appeal although I rather enjoyed some homely reflections on appearing in the old Crown Court at Derby

before H H Judge Brian Woods because I have done that too. In his sentencing remarks the judge just referred to misconduct "between March 2009 and 10 October 2013". The 10 October date was identifiable precisely because that is when police raided offices that were central to the case. It is clear that the exact day in March was of no interest to the judge. The judge found that the jury must have accepted that the claimant had set up a legitimate business that did not remain legitimate. The judge referred to significant changes "maybe in 2010 but possibly earlier" (page 3 of summing up, paragraph 22, page 304 of bundle). Later on (page 284 or 309, line 5) the judge refers to the conspiracy being "in operation in 2009" and being "alive and well" in summer 2013. I remind myself that in the judge's summing up (page 146/171, line 4) the judge said that the prosecution said that the defendants "between those dates, March 09, a start date not particularly relevant but that is as good a start date as any, and 10 October 13, conspired together and with other persons ...". Again, there is no obvious triggering event that picks the date in March and indeed the trial judge in summing up did not find it important to actually mention the date at all except that it was in March. Clearly if the claimant had been involved in criminal behaviour in March there might be something in the Secretary of State's case, depending on what had to be disclosed but I find no evidence at all that the claimant did anything in March 2009 or did anything improper before he became a British citizen. That is rather important. It is for the Home Office to prove the precedent facts. I do not see how they can do it on the evidence they provided. Had I not made the decision I had on the first point I would have further found that the error was immaterial because the evidence cannot support the conclusion that the Secretary of State seeks.

45. Putting all this together I am not persuaded that there is a material error of law and I dismiss the Secretary of State's appeal.

Notice of Decision

46. The First-tier Tribunal did not err in law. The Secretary of State's appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 August 2024