



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001295
First-tier Tribunal No:
DC/50088/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 May 2024

Before

UPPER TRIBUNAL JUDGE PICKUP
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Besnik Deda
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms E Daykin, instructed by Tuckers Solicitors
For the Respondent: MS E Blackburn, Senior Home Office Presenting Officer

Heard at Field House on 23 May 2024

DECISION AND REASONS

1. This is a decision to which both judges have contributed.
2. For convenience and to avoid confusion the parties are referred to herein as they were before the First-tier Tribunal.
3. The Upper Tribunal has received Ms Daykin's skeleton argument, which we have taken into account.
4. At the conclusion of the helpful submissions of both legal representatives, we retired briefly before announcing that we found the error of law argument made out and would remit the appeal to the First-tier Tribunal. We gave an indication of our reasons but reserved the full reasons to be given in writing, which we now do.

Relevant Chronology & Background

5. By the decision of the First-tier Tribunal (Judge Brannan) dated 26.3.24, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal panel (Judges Gibbs and Hughes)

promulgated 24.1.24 allowing the Albanian appellant's appeal against the respondent's decision of 22.6.23 to deprive him of British citizenship under s40(3) of the British Nationality Act 1981, on grounds that naturalisation granted in 2008 was obtained by fraud or false representation.

6. The relevant history is that the appellant entered the UK in 1999 and claimed asylum under a false identity, claiming to be a Kosovan, born 22.2.66. On that same basis he was granted Indefinite Leave to Remain (ILR) in 2002. Still using the same false identity, asserting his good character and signing a declaration of truth, he applied for naturalisation in 2007, which was granted on 19.2.08.
7. The fraud came to light in about 2010, we understand because of an Entry Clearance application made for family members of the appellant. Consequently, the respondent served notice that consideration was being given to deprivation of citizenship. There was then a (largely unexplained) delay until 2021 before the respondent served a second such notice on 28.4.21, to which the appellant responded on 16.6.21 with reasons why he should not be deprived of citizenship, but admitting that he had not been truthful about his nationality or date of birth. As stated above, after considering his submissions, the respondent exercised the discretion to deprive the appellant of his British citizenship on 22.6.23. The appellant exercised his right of appeal under s40A of the 1981 Act, which came before the First-tier Tribunal Panel.
8. Before the appeal was heard on 18.1.24, the respondent was required to review the decision, which it did on 17.10.23 (the Review). We will address this further below.

The First-tier Tribunal Panel's Decision

9. At [28] of the decision, the First-tier Tribunal considered whether the relevant condition precedent was met. Namely, *"whether citizenship was obtained by one or more of the means specified. That requires consideration of whether the respondent has reached conclusions about the precedent facts that are either unsupported by any evidence, or are based upon a view of the evidence that could not reasonably be held by them. That consideration is undertaken on a public law basis, which is limited to the evidence that was before the respondent when they made the decision under appeal..."*
10. At [30] of the First-tier Tribunal decision, the panel noted the appellant's concession that he had lied and that, therefore, the condition precedent under s40(3) exists. There remains no dispute as to that first issue.
11. At [34] the panel stated, *"We have considered if in exercising their discretion the respondent has acted in a way that no reasonable Secretary of State could have acted. In other words, is the decision lawful in public law terms."*
12. At [40] reference was made to the respondent's Deprivation Guidance and at [41] the panel stated, *"we are satisfied that the issue of delay, whilst far from determinative, is identified in the respondent's own guidance as an important, indeed mandatory, factor to be considered."*
13. In purportedly resolving this issue at [43] of the decision, the panel stated *"In our view the delay, in particular, was relevant to the exercise of the respondent's overall discretion in relation to whether or not to exercise his power under section 40(3), but we find that there is nothing in the decision to demonstrate that it has properly been taken into account in the decision-making process. We find that the decision in this regard does little more than pay lip service to the exercise of the discretion. The respondent did not advance any explanation for the failure to follow the guidance."*

14. The panel went on at [44] and [45] to find that, *“By failing to act in accordance with their own policy guidance, and failing to have regard to the issue of delay in the particular circumstances of this appeal, the respondent failed to fully engage in exercising the discretion conferred upon them. Consequently they fell into legal error, and a matter potentially relevant to the exercise of their discretion was considered inadequately, if at all. It follows that we have reached the conclusion that there is an error of law in the decision which the respondent made in this case.”*
15. At [45] of the First-tier Tribunal decision, the panel stated that, *“The respondent has had the opportunity to show that the error was immaterial, and that the same decision would have been taken irrespective of the identified error, but has not done so.”* It was on that basis that the appeal was allowed under s40A(1) of the 1981 Act.

The Grounds

16. In general terms, the grounds argue that the First-tier Tribunal panel erred in law by failing to take into account material matters and resolve conflicts of fact or opinion relevant to the respondent’s exercise of discretion, and provided inadequate reasoning for its conclusions on the issue of delay. More particularly, it is submitted that the First-tier Tribunal panel failed to address the respondent’s reasoning for delay set out in the Review and the respondent’s submissions on materiality. In short, at [18] and [19] of the Review, the respondent had argued that delay was immaterial to the decision to deprive the Appellant of British nationality.
17. In granting permission, Judge Brannan considered it arguable that what the Tribunal panel set out at [44] and [45] of the decision, in particular that the respondent fell into legal error and had had the opportunity to show that the alleged failure to consider delay was immaterial but failed to do so, as set out above, *“fails to engage with the position of the respondent so there are inadequate reasons for the conclusion on materiality.”*
18. The grounds refer to Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC), an authority not considered by the First-tier Tribunal, where the Upper Tribunal held that, *“... the appellant cannot establish that a decision to deprive under section 40(3) should have been taken under a specific policy within a certain period of time. He is therefore unable to substantiate the alleged prejudice. Rather, he has benefited from the delay, being able to continue to enjoy the benefits of his fraudulently obtained British citizenship from 2007 to the present time, including his present ability to work in this country. We are satisfied that no historic injustice arises in this matter and this ground of appeal must fail.”* Other than that benefit is a relevant factor to be taken into consideration, we are not satisfied that this authority advances the respondent’s case to any significant degree. We accept Ms Daykin’s submissions that the context and the issues in Hysaj are rather different to the present case, focusing on alleged historic injustice.

Error of Law Reasoning

19. Much of Ms Daykin’s argument tended to draw the Upper Tribunal panel into discussion as to whether the delay was explained or justified by the impugned respondent’s decision. However, that was to engage in the very consideration that was the task of the First-tier Tribunal. What we had to bear in mind and determine was whether the decision of the First-tier Tribunal amounted to an error of law by failure to take into account the matters set out in the respondent’s review.

20. In her submissions, Ms Blackburn essentially relied on the grounds, which argued that the respondent's case as set out in the Review was that any delay did not outweigh "*the significant public interest in depriving citizenship from those who have obtained it through repeated deception.*" It was submitted that if there was any error or failure by adequately taking the delay into account when the respondent exercised the discretion to deprive of citizenship, the error was immaterial as that delay in the decision-making process "*would not result in the Respondent's decision to deprive the Appellant of his British Citizenship being either irrational or unlawful.*" It was further submitted that the respondent would have made the same decision to deprive even if there had been more detailed discussion within the decision of the delay factor.
21. Ms Daykin relied on her skeleton argument, asserting that the respondent made no challenge to the First-tier Tribunal's conclusions that the respondent's decision contained errors of public law. She referred us to the list of six factors identified by the First-tier Tribunal at [42] of its decision as relevant to the issue of delay. She submitted that the grounds focused on the alleged failure to take the Review into consideration when what was at issue was the deprivation decision and not the post-decision Review. The essence of Ms Daykin's submissions was that the inadequately explained or justified delay was so grave as to render immaterial any error of the First-tier Tribunal to take into account the Review, as the outcome of the appeal would have been the same. With respect, and for the reasons outlined below, we disagree.
22. Ms Daykin accepted that delay is referred to repeatedly in the respondent's decision. For example, at [17] of the decision the respondent stated, "*There was a delay in the Home Office considering your case, as a number of enquires needed to be made and the nature and extent of those enquiries, and the length of time taken to complete them, varies according to the particular circumstance of each case.*"
23. Furthermore the appellant's submissions as to the effect of delay were taken into account at [26] of the respondent's decision, where it is stated, "*It is noted that your legal representatives have submitted that it is unlawful and unfair for you to be deprived of your British citizenship now, given the Secretary of State's excessive delay in pursuing deprivation action. However, you knowingly provided false information in your applications to the Home Office, despite signing multiple declarations stating otherwise in each case. You only admitted the truth after you had acquired British citizenship and a British passport using false details. It is therefore considered that the fraud perpetrated by yourself was deliberate and material to the acquisition of British citizenship. Although it is acknowledged that there has been a delay in deciding your case, the Deprivation of British citizenship guidance states: 'there is no specific time limit within which a deprivation decision may be made. A person to whom section 40 of the BNA 1981 applies remains indefinitely liable to deprivation' (Annex Q - Page 17 refers).*"
24. In summary, it cannot be said that the respondent's decision ignored the delay. However, we accept the submission that much of the reason for the significant delay remains unexplained, and that this was a relevant factor in the First-tier Tribunal's consideration of the respondent's exercise of discretion.
25. However, we find that the assertion at [45] of the First-tier Tribunal decision that, "*The respondent has had the opportunity to show that the error was immaterial, and that the same decision would have been taken irrespective of the identified error, but has not done so,*" is unsustainable. The respondent's Review clearly raised and addressed the issue of materiality of any error by failure to properly consider delay.

26. The Review also stated at [18] that *“if the Tribunal finds there has been any form of delay, the Appellant benefitted from that delay as it allowed him more time to benefit from his fraudulently obtained citizenship.”* Unarguably, there was no consideration of this submission in the decision of the First-tier Tribunal panel. It did not feature in the First-tier Tribunal’s list of relevant factors set out at [42]. The Review was before the First-tier Tribunal but its submissions evidently disregarded. When challenged on this by the Upper Tribunal Panel, Ms Daykin conceded that benefit to the appellant was a relevant consideration in relation to the delay and should have been but was not been taken into account. We find that the failures to address the respondent’s submissions in relation to materiality and as to benefit to the appellant amount to errors of law.
27. It may be that another Tribunal would reach the same conclusion as the First-tier Tribunal Panel. However, after careful consideration, we are unable to conclude that the First-tier Tribunal’s assessment of the respondent’s exercise of discretion would have inevitably reached the same conclusion had the submissions in the Review been properly taken into account. It follows that the errors of law were material to the making of the decision of the First-tier Tribunal, so that the decision is flawed and cannot stand.
28. Whilst Ms Blackburn suggested that the decision could be remade in the Upper Tribunal, Ms Daykin pointed out that the First-tier Tribunal did not go on to consider article 8 ECHR and submitted that it remains a distinct possibility that another Tribunal remaking the decision in the appeal may need to do, which in turn would require evidence of the appellant’s then current circumstances. For that reason, we conclude that this is a case which falls within 7.2 of the Practice Statement and should be remitted to the First-tier Tribunal for the decision to be remade de novo, with no findings preserved.

Notice of Decision

The respondent’s appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in its entirety.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be remade de novo.

We make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 May 2024