IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002557

First-tier Tribunal No:
DC/50200/2022
LD/00069/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 September 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KRESHNIK SELA

Respondent

Representation:
For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr D Bazini, Counsel instructed by Karis Solicitors

Heard at Field House on Monday 19 August 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Bird promulgated on 7 May 2024 ("the Decision"), allowing the Appellant's appeal against the Respondent's decision dated 15 September 2022 giving notice of her intention to deprive him of his British citizenship under section 40(3) British Nationality Act 1981 on the basis that the Appellant had exercised deception.

2. The Appellant came to the UK in 2001 as an unaccompanied minor. He gave his identity as Elsaid Jahja, born in Macedonia on 12 October 1987. He said that he had travelled from Macedonia and that his parents had been killed in the civil war between Serbia and Macedonia. He claimed asylum in that identity on 16 November 2001. His application was refused but he was granted exceptional leave on account of his age and that he was an unaccompanied minor. He was subsequently granted indefinite leave to remain in his claimed identity. He naturalised also in his claimed identity on 6 February 2009.

3. As appeared from Mr Bazini's oral submissions, there is some dispute about the way in which the Respondent discovered the Appellant's true identity and what she says is his nationality. I will come to that below. Put neutrally, the Respondent now believes that the Appellant is Kreshnik Sela, an Albanian national with a date of birth of 13 December 1985. The Appellant does not dispute this but says he was unaware of his true identity and nationality when he came to the UK and claimed asylum. His account in broad summary is that he was stolen from his parents in Albania by gypsies who took him to Macedonia. There, the couple who raised him were killed but he says that his grandfather then heard that he had been found and travelled from Albania and returned him to his parents in Albania. The Appellant says however that he was told at that time that his parents were his aunt and uncle and that it was only later (in 2020) that he learnt from his parents that they were his biological parents. That was confirmed by a DNA test. The Appellant then says that he notified the authorities in the UK as well as in Australia (where he now lives with his wife and child).

4. The Respondent relies on two grounds. The first can be categorised as an incorrect self-direction as to the law. The Judge self-directs herself to the guidance in Chimi v Secretary of State for the Home Department (deprivation appeals: scope and evidence) Cameroon [2023] UKUT 00115 ("Chimi"). However, the Respondent argues that the Judge subsequently erred by relying on the Court of Appeal's judgment in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 ("Ullah") as authority for the proposition that the usual legal test in relation to dishonesty applies (in other words that it was for the Judge herself to decide on the balance of probabilities whether the Appellant had in fact exercised deception). The second ground was categorised by Mrs Nolan in her submissions as a mistake of fact leading to an error of law although, as I observed, it might also be said to be the taking into account of an irrelevant consideration or a failure to take into account a relevant one.

5. Permission to appeal was granted by First-tier Tribunal Judge Lester on 31 May 2024 in the following terms:

> "1. The application is in time.

2. The grounds do not state by heading or otherwise the exact grounds which are alleged. However, it appears that they state that the judge erred in that they: (1) misapplied the caselaw and reached an incorrect finding.
3. The grounds disclose an arguable error of law and permission is granted."

6. The matter comes before me to consider whether the Decision contains errors of law. If I conclude that it does, I then have to decide whether to set aside the Decision in consequence of those errors. If I do so, I then have to decide whether to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. I had before me a bundle of documents running to 281 pages (pdf) which includes the core documents for the appeal and the Appellant's and Respondent's bundles before the First-tier Tribunal. I refer to documents in that bundle so far as necessary as [B/xx].

8. Having heard submissions from Mrs Nolan and Mr Bazini and in accordance with a concession made by Mr Bazini, I indicated that I found an error of law in the Decision. I agreed with the parties that the appeal should be remitted to the First-tier Tribunal for re-hearing as there is an issue regarding the credibility of the Appellant's account and, as Mr Bazini pointed out, Judge Bird made only very limited findings of fact.

DISCUSSION

9. I take the second ground first as this was the focus of the parties' submissions and Mr Bazini's acceptance that the Judge had erred in law (albeit his initial position was that this was not a material error).

10. At [23] of the Decision, the Judge rightly directed herself that the issue for her was whether the Respondent was entitled to deprive the Appellant of citizenship on the basis that he had exercised deception. She then set out at [24] to [31] of the Decision the evidence and background relied upon.

11. At [32] and [33] of the Decision, the Judge reached her findings as to the deception. She did so by applying the usual legal test as to the dishonesty (relying on the Court of Appeal's judgment in Ullah). She said the following:

> "32. The respondent had raised prima facie evidence of deception (the first stage -Ullah above). The appellant by providing the above evidence has shown that there was a plausible explanation (the second stage). It is then for the respondent to show why this explanation must be rejected. The reasons for the refusal letter makes no reference to the attachments in the letter from the appellant's representatives which are contained in the respondent's bundle and should have been taken into account by the respondent when considering whether or not the appellant had fraudulently concealed his identity.

> 33. The evidence before me shows that the respondent was not entitled to conclude on public law grounds that on all the evidence available to him at the time of making the decision to deprive that the condition precedent existed. Furthermore the respondent's exercise of discretion to deprive the appellant of his BC on the evidence available to him and contained in his bundle, was not lawful on public law grounds."

12. As Mrs Nolan pointed out and Mr Bazini accepted, the Respondent did in fact consider the evidence on which the Appellant relied. His account is set out at [18] to [24] of the decision letter ([B/41]). The Respondent considered this explanation at [25] of the decision letter ([B/43]) and said this:

> "It is clear that you set out to deceive the Secretary of State so that you could remain in the UK. You persisted with the deception in all your applications to the Home Office. Your grant of ILR was based on your false representations that you disclosed when you claimed asylum, if the Home Office would have known at the time that your true nationality was Albanian it is likely that you would not have been granted ILR. You have claimed that you were unaware of your Albanian nationality due to you being abducted as a child. This is explanation is not satisfactory [sic], you have stated in your mitigation that you returned to Albania to live with family before you travelled to the UK illegally and claimed asylum. You failed to declare this fact throughout your immigration history in the UK. You were an adult at the time you applied for ILR and subsequently British citizenship, therefore it was your responsibility to inform the Home Office that you had resided in Albania with family members prior to travelling to the UK to claim asylum. It is noted that you have signed false declarations in all your applications to the Home Office throughout your immigration history in the UK."

13. Reference is also made in the grounds to [31] of the decision letter ([B/44]) where the Respondent says in terms that, in considering the exercise of discretion, she has taken into account the representations made on the Appellant's behalf in the lawyer's letters dated 22 November 2021 and 9 December 2021.

14. As Mr Bazini accepted, the Judge was wrong to say that the Respondent had not taken into account the Appellant's explanation. He argued however that the error was not material. He submitted that this was an unusual case. That may be so, although I observe that this is not the first case which I have seen of an Albanian national claiming to be unaware of his true nationality due to being or being involved with Roma persons.

15. Be that as it may, the Judge clearly did not take into account that the Respondent had dealt with the explanation but rejected it for the reasons given. Also, for that reason the Judge does not appear to have recognised that the deception relied upon by the Respondent did not turn on the Appellant's failure to disclose his nationality but on his failure to tell the Respondent that he had been living with family members in Albania before coming to the UK (be they his aunt and uncle as he then thought or his biological parents). As the Respondent

pointed out, the Appellant's asylum claim was predicated on him being an unaccompanied minor who had travelled from Macedonia and whose parents had been killed in the civil war there. He made no mention of being in Albania before coming to the UK nor that he had family members there.

16. Mr Bazini said that the deception relied upon would have made no difference if the Appellant were not Albanian. Leaving aside that the Respondent, if she had known, might have made investigations which might have established what the evidence now shows about the Appellant's nationality (although might not as he provided a different name), this appeal is currently at error of law stage. The Judge did not consider whether the Appellant's failure to disclose his true circumstances at that time amounted to a deception.

17. Mr Bazini also said that the Respondent had been guilty of a misrepresentation in the decision letter. At [16] of the decision letter ([B/40]), the Respondent says that the Appellant's case was referred to the Status Review Unit following investigations which confirmed that the Appellant had used a false identity. Mr Bazini pointed out, however, that, as recorded at [17] of the decision letter ([B/41]), the Appellant had himself drawn attention to his true identity prior to the investigation letter in November 2021.

18. It is not entirely clear to me from what is said at [17] of the decision letter that the Respondent accepts this. She says that the Appellant "claim[s] that [he] wrote to the Home Office by post on 25 June 2021". That suggests to me that it was not accepted that he had done so. I can see no evidence of such a letter in the bundle. Nor can I find any mention of it in the Appellant's witness statement ([B/50-52]) or the skeleton argument produced on the Appellant's behalf ([B/61-67]). It is mentioned in the letter from the Appellant's Australian lawyers at [B/201]. They say it was a letter from them but, if that were so, it is surprising that it has not been produced.

19. Mr Bazini said that if the Respondent did not accept that the Appellant had owned up to the truth without being asked, that should be said but otherwise this was a strong indication that he had not intended to deceive. Again, however, this is an error of law hearing, and the Judge did not consider this point. The point can be clarified if needs be by way of the Respondent's records at a later hearing.

20. For the foregoing reasons, I am satisfied (as was conceded) that the Judge erred in saying that the Respondent had not engaged with the Appellant's evidence. She had done so. The Judge therefore took into account an irrelevant consideration (namely the Respondent's failure to consider something which was in fact considered) or failed to take into account a relevant consideration (what was said by the Respondent in response to the evidence about the nature of the deception). Put another way, as pleaded by the Respondent, the Judge made a mistake

of fact. The Respondent's second ground is therefore made out. The mistake is material.

21. I do not need to dwell on the first ground at length because it was not the focus of submissions, and the parties were agreed that the error on the second ground was sufficient to justify the setting aside of the Decision as a whole. However, I deal briefly with the first ground.

22. The Tribunal's guidance in Chimi that the role of the Tribunal in a deprivation case is to review the Respondent's decision as to the existence of the condition precedent and exercise of discretion is based on the principles in R (oao Begum) v Special Immigration Appeals Commission and another [2021] UKSC 7 ("Begum") and the guidance in Chimi. That was not the approach which the Judge took in this case because she considered herself bound by the Court of Appeal's judgment in Ullah. I accept of course that a judgment of the Court of Appeal is binding on the First-tier Tribunal as it is on this Tribunal.

23. However, in relying on Ullah, the Judge has failed to explain how she is able to reconcile her approach with the guidance in Chimi which she was also bound to follow unless she were able to explain why it should be departed from. The Judge correctly set out the guidance in Chimi but appeared not to recognise that she was departing from it by her approach and therefore failed to explain her reasoning for applying the approach in Ullah as she understood it rather than the guidance in Chimi.

24. The Respondent sets out in her grounds what she says is the distinction between Ullah and Chimi and purports to reconcile the two. However, it would be wrong of me to express a view on this as I did not hear argument about it. I do however make one or two observations of my own.

25. I accept that Begum was itself not concerned with non-national security deprivation cases. However, in reaching its judgment about the nature of the Tribunal's (or there the Commission's) function, the Supreme Court carried out an analysis which is largely based on cases arising in the non-national security deprivation context.

26. As Begum was not concerned with non-national security deprivation cases it may be difficult to suggest that the judgment in Ullah is per incuriam. However, neither is Ullah authority for the proposition that Chimi is wrongly decided. The Court of Appeal was not referred to that guidance and did not disapprove of it.

27. The exercise which the Judge conducted in this case was not consistent with the guidance in Chimi. I do not resolve the error of law on that point. However, I have grave doubts whether the approach adopted by the Judge was correct in law.

28. In any event, however, having found an error on ground two, I set aside the Decision. As indicated at the outset, the parties agreed that the appeal should be remitted for re-determination given the lack of factual findings made and that the appeal turns to some extent on the Appellant's credibility. I am satisfied that this is the appropriate course.

CONCLUSION

29. An error of law is disclosed by the Respondent's second ground. The Judge may also have erred in the way suggested by the first ground. I set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Bird.

30. The First-tier Tribunal will wish to note that the Appellant remains in Australia, but I am told that the Australian authorities have given permission for evidence to be received from the Appellant remotely from Australia. Account will need to be taken of the time difference between the UK and Australia when listing this matter for re-hearing.

NOTICE OF DECISION

The decision of Judge Bird promulgated on 7 May 2024 contains errors of law which are material. I set aside the decision. I remit the appeal to the First-tier Tribunal (Taylor House hearing centre) for re-hearing before a Judge other than First-tier Tribunal Judge Bird. It does not appear that an interpreter will be required for the hearing, but the Tribunal will wish to note what is said above regarding the need for evidence to be given remotely.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 August 2024