IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003086
First-tier Tribunal No:
HU/57664/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 October 2024

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TABAN ALI ISMAEL ISMAEL

Respondent

Representation:
For the Appellant: Mr R. Ahmed, instructed by CJ Legal Ltd
For the Respondent: Mr J. Thompson, Senior Presenting Officer

Heard at Field House on 22 October 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge S. Aziz dated 28 May 2024 allowing Mrs Ismael's appeal against the respondent's decision to refuse her entry clearance to the UK as a partner under Appendix FM.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mrs Ismael as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. Mrs Ismael is a citizen of Iraq, born in 1986. On 5 December 2022, she applied for entry clearance as the spouse of her husband, Mr Niyaz Perot Ahmed. On 5 June 2023, the respondent refused that application. The respondent accepted that the appellant met the suitability, financial and English language requirements of the rules but found that she did not satisfy para. E-ECP.2.1. of Appendix FM because her husband was not eligible to act as a sponsor. Although this was not set out in the refusal letter itself, the reason for this was that on 29 September 2022, the respondent had made a decision to deprive the sponsor of his British citizenship on the grounds that it had been obtained by fraud.

4. The appellant appealed. She argued that although a decision had been made to deprive her husband of his British citizenship and his appeal against that decision had been dismissed by First-tier Tribunal Judge Row on 4 April 2023, an application for permission to appeal to the Upper Tribunal was still pending. He therefore continued to be a British citizen and, as such, eligible to act as a sponsor under Appendix FM.

5. The appellant also relied on the best interests of her three British citizen children, who had been born in Iraq in December 2012, January 2014 and May 2018 and at the date of application were living with her there. She said in her witness statement that it was in their best interests to move to the UK, due to the poor safety, hygiene and medical conditions in Iraq, and that they could not do so without her.

6. Shortly before the hearing in May 2024, the respondent conducted a Respondent's Review. At [8], she accepted, with reference to the appellant's skeleton argument, that the sponsor's application for permission to appeal Judge Row's decision was still pending before the Upper Tribunal. She nonetheless took the position that the rules had not been met either at the date of application or the date of decision because the respondent had made a "request" to "revoke" his citizenship on 29 September 2022. She relied on Judge Row's decision and on two letters she had sent to the sponsor. The first letter was dated 14 September 2023. It noted that the sponsor had exhausted his appeal rights against the deprivation decision on 19 April 2023, informed him that an Order under s. 40(3) of the BNA 1981 was enclosed, and it directed him to return his immigration status document confirming the grant of settlement, his naturalisation certificate and his British passport. The second letter was dated 21 March 2024 and informed him that following the deprivation of his citizenship, the respondent had considered granting him leave to remain on Article 8 grounds, but his "claim" had been refused.

7. The appeal then came before Judge Aziz.

<u>The challenged decision</u>

8. At [8], Judge Aziz set out the agreed issues before him:

   (i) Did the appellant meet the requirements of E-ECP 2.1; and

(ii) In the alternative, were there exceptional circumstances that would render a refusal of entry clearance a breach of the UK's obligations under Article 8 ECHR?

9. At [10], the Judge recorded that it was agreed that the sponsor had applied to the Upper Tribunal for permission to appeal Judge Row's decision, and that this application remained pending. At [14-16], he set out the parties' legal positions as to the effect of this pending appeal. The respondent submitted that the sponsor's British citizenship had been "revoked" by the decision of 29 September 2022, although it could be reinstated if he succeeded in his appeal. The appellant submitted that the sponsor remained a British citizen because his appeal rights were not yet exhausted.

10. At [18], the Judge recorded that neither representative was able to point to any legal authority for their position, but that he had advised them that his understanding was that the sponsor continued to hold British citizenship because his appeal rights were not exhausted, relying on Gjini, R (On the Application Of) v Secretary of State for the Home Department [2021] EWHC 1677 (Admin) [84]. At [19], he recorded the appellant's counsel's submissions that the respondent's letter of 14 September 2023 was consistent with this understanding. The Judge concluded at [20] that

> "the sponsor's exercise of his appeal rights suspends the effect of the deprivation process up until his appeal rights are exhausted. It is only if the sponsor is unsuccessful in that appeal process and upon its conclusion is served with a Deprivation Order, then it is at that date that he loses his British citizenship. That date has not come to pass yet [….]"

For this reason, the Judge concluded that "the appellant does meet" the requirements of Appendix FM.

11. At [21], the Judge found that the because the appellant met the rules, this was "determinative of the proportionality exercise under Article 8 as the respondent has raised no other issue as to why entry clearance should not be allowed and there is no public interest in refusing entry clearance."

The Secretary of State's appeal

12. The Secretary of State was granted permission to appeal on the ground that the Judge had made a "material misdirection of law on the facts of the case". She continues to maintain that the sponsor ceased to be a British citizen on the date of the deprivation decision, namely, on 29 September 2022, although without pointing to any legal authority for this. She also now says that, contrary to what was agreed before Judge Aziz, there was no application for permission to appeal pending at the date of hearing. The sponsor's appeal rights had in fact been exhausted on 23 June 2023 and a "Deprivation Order sent to the sponsor dated 14 September 2023 confirmed he no longer has British citizenship".

13. There was no rule 24 response.

14. The appeal then came before me at Field House. Both representatives appeared by CVP. Mr Ahmed struggled throughout the hearing with his internet connection, but I am satisfied that there was no prejudice to the appellant because the Tribunal repeatedly paused the proceedings and both Mr Thompson and I repeatedly reiterated any questions or submissions that might have been interrupted.

Discussion

15. I consider it unarguable that the respondent may only deprive a person of their British citizenship by making a deprivation order under the relevant section of the BNA 1981, in this case, s. 40(3). This is clear from the language of the Act: "the Secretary of State may by order deprive a person of citizenship status" [my emphasis]. An appeal against the decision to make such an order is not necessarily suspensive; the Secretary of State can make the decision and the order at the same time, if she so chooses. (See D4, R (On the Application Of) v Secretary of State for the Home Department [2021] EWHC 2179 (Admin) [17]). Nonetheless, a decision to make a deprivation order is not the same thing as an order, and British citizenship continues until an order is made (see Gjini [32, 84]). Although Mr Thomspon's instructions were to argue otherwise, he was unable to identify any authority that supported his position.

16. For this reason, the date on which the sponsor ceased to be a British citizen is unclear. It is not necessarily either the date on which the decision to make such an order was made (29 September 2022) or the date on which his appeal rights were exhausted. However, it is now accepted by the appellant that a deprivation order had been made by 14 September 2023 at the latest, which was the date that an order was served on the sponsor.

17. Judge Aziz's decision was therefore based on a significant mistake of fact. The sponsor was not a British citizen on the date of the hearing in May 2024 and the appellant did not meet the relationship requirements of Appendix FM.

18. It is also now accepted that the sponsor did not apply to the Upper Tribunal for permission to appeal Judge Row's decision. Mr Ahmed apologised for his misstatement to the contrary in the appellant's skeleton argument before the First-tier Tribunal, which he said was based on his instructions at the time. His appeal rights were therefore exhausted on 23 June 2023, which is after the appellant's entry clearance application was refused but long before the hearing before Judge Aziz.

19. Mr Ahmed urged me to consider that Judge Aziz's mistake about the sponsor's continuing citizenship was not a material one; the appeal would still have fallen to be allowed because the sponsor had been a citizen both at the date of application and at the date of decision. I disagree. In the first place, we do not know when the deprivation order was made. It could be inferred from the letter of 14 September 2023 that it was only after the

respondent thought that the sponsor's appeal rights had been exhausted, but I decline to make a specific finding in this regard on the limited evidence before me. In any event, that letter (erroneously) gives the date on which the sponsor's appeal rights were exhausted as 19 April 2023, which was before the refusal of entry clearance.

20. Moreover, at [20] Judge Aziz clearly made his decision on the basis that the sponsor was a British citizen and the rules were met at the date of the hearing. If Judge Aziz had properly understood that the sponsor was no longer a British citizen at the date of the hearing, he might have taken that fact into account in his Article 8 assessment. It is not the case that meeting a particular rule at the date of application or decision resolves the Article 8 calculus entirely. There may be cases in which other factors effectively override the public interest expressed by the rule. OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC) [27-28]

Notice of Decision and Directions

21. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside. The only findings that are preserved are those agreed at the hearing before me:

(i) The respondent's decision to make an order depriving the sponsor of his British citizenship status did not in itself deprive him of that status. The sponsor remained a British citizen until a deprivation order was made in accordance with s. 40 of the BNA 1981.

(ii) The date on which the order was made has not been established, but it was no later than 14 September 2023, which is the date that it was served on the sponsor.

(iii) The sponsor's appeal against the decision to deprive him of his British citizenship status was finally determined on 23 June 2023.

22. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Aziz.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 October 2024