IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00018/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination & Reasons Promulgated**
On 21 September 2015	**On 18 December 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

YAS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Seddon, Counsel instructed by Powell Spencer & Partners Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born in Pakistan on 26 December 1983. On 30 October 2013 he was issued with a certificate of naturalisation as a British citizen. He had come to the UK in 2001.

2. On 2 July 2013 he was convicted of two offences of conspiracy to defraud for which he was, ultimately, sentenced to a total of three years' imprisonment.

3. After his conviction, but before sentence, on 10 September 2013 he made an application for naturalisation as a British citizen, that application being successful. However, on 13 May 2014 the respondent made a decision to deprive the appellant of his citizenship under Section 40(3)(a) of the British Nationality Act 1981. That decision was on the basis that he had obtained it fraudulently, having declared on his application that he had not been convicted of any criminal offence in the UK.

4. The appellant's appeal against that decision was heard before First-tier Tribunal Judge Russell on 28 January 2015 whereby the appeal was dismissed.

5. First-tier Tribunal Judge Garratt granted permission to appeal on the basis that the First-tier Judge was arguably wrong to avoid consideration of the consequences of potential removal from the UK in consequence of the deprivation of citizenship, taking into account Article 8 of the ECHR. However, in granting permission he concluded that the First-tier Judge's assessment of whether the appellant obtained his citizenship by fraud contained no arguable error of law.

The decision of the First-tier Tribunal

6. At [20] the decision of the Upper Tribunal in *Deliallisi (British citizen: deprivation appeal: Scope)* [2013] UKUT 00439 (IAC) was referred to. The First-tier Judge concluded that he had to determine whether the basis of the decision to deprive was correct, whether discretion should have been exercised differently because Article 8 of the ECHR was engaged, whether discretion should have been exercised differently because EU rights are engaged, whether discretion should have been exercised differently for any other reason, "including the reasonably foreseeable consequences of the deprivation of citizenship", and lastly whether discretion should have been exercised differently on policy grounds

7. The judge identified that the burden of proof is on the respondent to make out her case in support of the decision to deprive of citizenship, citing the decision in *Re B (children)* [2008] UKHL 35. Having considered the evidence, he concluded that the respondent had established to the required standard that the appellant had fraudulently obtained naturalisation as a British citizen by claiming to have no criminal convictions. The judge rejected the appellant's explanation for the non-disclosure on the application form.

8. In relation to Article 8 of the ECHR the judge accepted the undisputed evidence that the appellant is married to a British citizen and that they have three children, two of whom are the appellant's natural children. He noted that one of the children, S, suffers from a range of disorders associated with epilepsy, and requires a great deal of care. He stated at [37] that:

> "I was left in no doubt as the impact on her Mother of constantly caring for her. The appellant's evidence is that he was very involved in the

> development of care plans for S and his absence from the home has caused direct physical harm to the child."

9. After further consideration of the evidence, at [40] he concluded that the evidence in relation to the other two children was "very thin". He similarly stated that it was unclear to him what impact the absence of the appellant is having in their lives.

10. At [41] he stated that he had not heard or seen any evidence as to the effect of deprivation on the appellant's family or private life, bearing in mind that the appellant lived, studied, worked, married, formed a family and travelled outside the UK without being a British citizen or having the right of abode. He concluded that the skeleton argument submitted on behalf of the appellant and the submissions do not address the issue of the effect of deprivation on the appellant's Article 8 rights, other than pointing to the reasonably foreseeable consequences of deprivation.

11. He made findings at [42] to the following effect, namely that the appellant has formed a family life with his wife and three children in the UK, as well as a private life through his work and outside activities. There was no evidence that the deprivation of the appellant's citizenship "in and of itself, alters the appellant's family or private life". Thus, at [43] he concluded that the fact of deprivation of the appellant's citizenship does not engage the operation of Article 8.

12. Under a section headed "Relevance of reasonably foreseeable consequences of deprivation" it was concluded that it is a reasonably foreseeable consequence of depriving the appellant of citizenship that he becomes liable to deportation owing to his conviction and sentence to three years' imprisonment. At [55] it was concluded that no deportation order had been made "although it is reasonably foreseeable that one will be made as the appellant falls into the automatic deportation provisions of the 2007 Act".

13. At [56] the judge stated as follows:

> "In the absence of any assessment of the relevance of art.8 ECHR to the appellant's case by the Home Secretary, and the corresponding absence of countervailing evidence of the effect of family separation or relocation to Pakistan on the appellant and his family, I find that it would be wrong, even dangerous, to proceed to make an assessment as to whether the appellant should be excepted from deportation, nor do I believe I have the authority to do so in the absence of an 'immigration decision'."

Submissions

14. In advance of the hearing, notification was given to the Upper Tribunal that there would be an application for evidence to be admitted but not to be disclosed to the appellant, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Walker indicated that there was material that he wished to put before me pending a consideration 'in

chambers' of the material. Mr Seddon indicated that he would object to the admission of such evidence.

15. In the event, the application under rule 14 was not actually substantively advanced or considered in the light of the development of the other arguments set out below.

16. In relation to Article 8, in summary it was submitted on behalf of the appellant that in accordance with the decision in *Deliallisi* the First-tier Tribunal was obliged to consider the Article 8 consequences of the decision to deprive the appellant of his citizenship, on the premise of the appellant being removed from the UK. Mr Walker on the other hand relied upon the decision in *Arusha & Demushi (deprivation of citizenship – the delay)* [2012] UKUT 80 (IAC). It was submitted on behalf of the respondent that the issue of deprivation of citizenship was separate from that of removal and there is as yet no decision on the appellant's removal. The only Article 8 consideration would be in relation to the consequences of deprivation of citizenship itself, rather than with reference to any prospective removal.

Conclusions

17. At [22] the First-tier Judge referred to what he described as Chapter 55 of the Nationality Instructions, said to have been last updated on 21 August 2014. It was noted that the guidance sets out factors to be considered when deciding whether or not to deprive a person of citizenship, and including whether deprivation is a proportionate interference with a person's Convention or EU rights. Neither party was able to put before me a copy of that guidance although it was not disputed that the judge's summary of its content was accurate. It was not disputed on behalf of the respondent that Article 8 considerations are relevant to the question of deprivation of citizenship, although it was not accepted that potential removal was a matter that needed to be included in such consideration.

18. The guidance is in fact referred to in the respondent's bundle at G1 in a document entitled "Referral of case for approval of decision for deprivation of British citizenship under s.40(3) British Nationality Act 1981". In the version of the guidance that is presently available on the Home Office website, and therefore in the public domain, it is not apparent that the passages quoted in the document at G1 are any different from the guidance that is on the website although it is described as having been updated on 10 September 2015.

19. It is to be noted what is said at 55.7.11.6 as follows:

> "The caseworker should consider the impact of deprivation on the individual's rights under the European Convention on Human Rights (ECHR). In particular you should consider whether deprivation would interfere with the person's private and family life and, if so, whether such action would nevertheless be proportionate. In some cases it might be appropriate to remove citizenship <u>but allow the person to</u>

remain in the UK. In such cases you should consider granting leave in accordance with guidance on family and private life." (My emphasis).

20. In a letter to the appellant dated 14 April 2014 at C1 of the respondent's bundle, after reciting the background to the appellant's obtaining of citizenship, it states that if the appellant is deprived of his British citizen status he would lose any Right of Abode in the UK "and so may be liable to be removed from the United Kingdom". The letter requires the appellant to provide information in mitigation of the allegation, on personal or family life, compassionate circumstances and human rights, asking the appellant to provide details of any human rights issues that he may wish to be taken into account. The appellant replied on 24 April 2014 setting out his history, mitigating factors, personal and family life, compassionate circumstances and lastly referring to his human rights under Article 8 of the ECHR. The letter refers to the issue of his and/or his family being required to leave the UK.

21. It was accepted on behalf of the respondent before me that the decision to deprive of citizenship dated 13 May 2014 makes no reference to any human rights considerations being taken into account. Mr Walker indicated that he could only assume that such consideration was not apparently given because there was no removal decision.

22. At [34] of the determination the First-tier Judge noted that the respondent had not herself considered the relevance of Article 8 of the ECHR, EU law, policy or the consequence of deprivation "notwithstanding a requirement to do so and that her own policy states that such factors will be considered" referring to the guidance he had earlier quoted.

23. At [58] it is again stated that the respondent's policy is that before depriving someone of their nationality she will consider whether deprivation engages obligations under the Human Rights Convention or EU law and that there is no reference to these considerations in the respondent's decision. It is also stated in the same paragraph that the respondent is required to consider the consequences of deprivation "which in this case include the deportation of the appellant". He concluded that there is no evidence that she had turned her mind to those consequences or taken into account her 'section 55' responsibilities.

24. I am satisfied that the First-tier Judge erred in law in failing either to decide that the respondent's decision was not in accordance with the law for having failed to take into account Article 8 considerations in the deprivation of citizenship, or failing to go on himself to consider those consequences. As I have indicated, at [20] the judge concluded that in the light of the decision in *Deliallisi* he had to consider whether the discretion of the respondent should have been exercised differently, including in terms of the reasonably foreseeable consequences of the deprivation of citizenship.

25. The judge himself did not go on to deal with that question. At [55] he concluded that it was "clearly important" that the respondent conducts the assessment of whether the appellant's deportation would breach Article 8 of the ECHR. At [56] he decided that it would be inappropriate for him to make any assessment of Article 8 in terms of family separation or relocation to Pakistan by the appellant. In my judgement the First-tier Judge erred in law in not concluding that the decision of the respondent was not in accordance with the law for having failed to take into account Article 8 considerations on the deprivation of citizenship, and in failing to undertake the assessment himself.

26. On a minimum basis, the respondent was at least required to consider Article 8 of the ECHR in terms of the deprivation of citizenship and its implications for Article 8 on its own terms, regardless of any further consideration of the consequences of deprivation by reason of potential removal.

27. In the circumstances, those are reasons alone for me to conclude that the decision of the First-tier Tribunal is to be set aside, for the decision to be re-made. As I indicated to the parties, I was minded to find in the re-making of the decision that the decision of the respondent was not in accordance with the law for failing to take into account guidance in relation to Article 8 but also in terms of a consideration of the consequences of removal in accordance with the decision in *Deliallisi*.

28. I do not accept, as advanced on behalf of the respondent, that the decision of the Upper Tribunal in *Arusha & Demushi* is authority for the proposition that there is no need for the respondent to consider the hypothetical prospect of removal. As submitted by Mr Seddon, there was no argument on that point before the Upper Tribunal in *Arusha & Demushi*, which simply quoted the findings of the First-tier Tribunal. The First-tier Tribunal's findings do not amount to a decision by the Upper Tribunal after any argument. Furthermore, the First-tier Tribunal's decision on that point was *obiter* because its decision was in fact that there was no fraud perpetrated by the appellant in that case.

29. In addition, it is now clear from the decision in *Deliallisi* that the Tribunal is required to determine the reasonably foreseeable consequences of deprivation, which may, depending on the facts, include removal (see [54]-[56]). Indeed, that consideration of the consequences of removal is of potential relevance is indicated in the respondent's own guidance at 55.7.11.6 which, aside from stating that the caseworker should consider the impact of deprivation on the individual's human rights, including private and family life, it states that it might in some cases be appropriate to remove citizenship but allow the person to remain in the UK. That clearly in my judgement indicates that the potential for removal is a factor to be considered. Furthermore, on the facts of this appellant's case, in the light of his convictions the potential for removal is undoubtedly a very live issue.

30. Accordingly, I am satisfied that the First-tier Tribunal erred in law and that the error of law is such as to require the decision to be set aside. In the circumstances, it is not necessary for me to consider the remainder of the appellant's grounds. It is to be noted however, that permission having been refused in relation to the First-tier Judge's assessment of whether the appellant obtained his citizenship by fraud, that aspect of the First-tier judge's decision stands.

31. I set aside the decision of the First-tier Tribunal and re-make the decision, allowing the appeal on the basis that the respondent's decision is not in accordance with the law and a lawful decision is therefore awaited. That decision must take into account Article 8 of the ECHR with reference to the appellant and his family, but also the reasonably foreseeable consequences of deprivation, including removal, in accordance with the decision in *Deliallisi*.

Decision

32. The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision is set aside and the decision re-made, allowing the appeal to the limited extent that the respondent's decision is not in accordance with the law such that a lawful decision is awaited.

Costs

33. The application made on behalf of the appellant in respect of costs is to be the subject of a separate written decision.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

In order to preserve the anonymity of the children referred to in these proceedings, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 12/11/15