Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00002/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 30 April 2019	**On 31 July 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

TIFFANY [P]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Khan, instructed by Parker, Rhodes Hickmotts
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 13 March 2019, I set aside the decision of the First-tier Tribunal and directed a resumed hearing. My reasons for setting aside the First-tier Tribunal's decision were as follows:

> "1. I shall refer to the appellant as the respondent and to the respondent as the appellant as they respectively appeared before the First-tier Tribunal. The appellant was born on 28 March 1983 and is a citizen of the People's Republic of China. She first entered the United Kingdom in 2001 as a student. She was granted indefinite leave to remain on 25 January 2011. On 14 April 2011, the appellant received a certificate of naturalisation as a British citizen. On 26 September 2017,

the Secretary of State notified the appellant of his intention to deprive the appellant of her British nationality. By a decision dated 14 December, the Secretary of State deprived the appellant of her British nationality pursuant to section 40(3) of the British Nationality Act 1981. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 28 June 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. In September 2010, the appellant started work for Law Direct Associates (LDA) in Leeds. She stopped working for the firm in May 2013. She applied to be naturalised as a British citizen on 3 February 2011. On 10 October 2013, police raided the offices of LDA. Several individuals, including the appellant, working for LDR were subsequently charged with conspiracy to defraud between March 2009 and 10 October 2013. The appellant pleaded guilty to the offence of conspiracy to defraud at Bradford Crown Court on 8 December 2016. She was sentenced to 12 months imprisonment, suspended for 12 months. Her plea (which is reproduced at Annex D of the respondent's bundle of documents) reads as follows:

> "I Tiffany [P] of my own free will and without any pressure being exerted upon myself plead guilty to Count 1 an offence of conspiracy to defraud between 23 March 2009 and 10 October 2013. I accept that I falsely produced British naturalisation applications and passport applications during the period I worked for Law Direct Associates which was between 2000 10 May 2013. In doing so I accept that I made false representations by holding out that I was a proper, qualifying person to act as referee and I failed to declare that I was acting as an agent of Law Direct Associates. I handed back all forms to whoever was dealing with applications which was usually Mr Bing Gong who was fully aware of the situation."

3. At [28], Judge Cox wrote:

> "The Respondent asserted that the Appellant had admitted involvement in fraud between 23/3/2009 and 9/10/2013. As such, the Respondent contends that the Appellant had been involved in 'criminal activity' prior to obtaining British Citizenship. However, on the form, the Appellant is asked "whether she had engaged in any other activities which might indicate that she may not be considered a person of good character" and she replied no. Accordingly, the Respondent asserted that the Appellant had falsely represented that she is of good character."

4. At [30], Judge Cox recorded that 'the appellant's counsel acknowledged that the relevant period was not limited to a period prior to her signing the application form [for naturalisation] but included a period up to the naturalisation ceremony in April 2011.'

5. The judge considered that the appeal was 'finely balanced' [40]. He observed that the instructions on the forms which the appellant had signed as a referee when working for LDA were 'clear' he found that the appellant or to have known that she was doing something wrong. However, he also recorded that 'this was the appellant's first office job, she had only signed one application form by the time she obtained the naturalisation certificate and criminal case demonstrates that everyone

working LDA was doing it.' Weighing heavily in the judge's consideration was evidence that OISC (The Office of the Immigration Services Commissioner) had audited LDA on 1 October 2010 but had failed to warn the proprietor of the business that he was committing a criminal offence by himself acting as a referee on behalf applicants in the naturalisation process. The judge found that 'the appellant's understanding cannot be taken to be greater than the OISC and she cannot reasonably be assumed to understand what she was doing something that might indicate that she was not good character.'

6. The judge's reasoning is problematic. First, I do not see the relevance of evidence that others at LDA were committing criminal offences to the failure of the appellant to notify the Secretary of State of her own conduct. Likewise, the judge appears to suggest that the criminal offending of all those charged was in some way mitigated by the failure of OISC to identify the criminality and to notify the police. Moreover, as the Secretary of State submits, by pleading guilty the appellant acknowledged that she possessed the mens rea of conspiracy to defraud at the time of the offence. Section 1 of the Criminal Law Act 1977 provides:

> 'Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.' [my emphasis]

As the grounds of appeal put it, the judge 'fell into error by failing to take into account that the appellant had already admitted to planning a criminal offence during the period prior to 4 April 2011.' The judge considered that the appellant had been unaware that she had committed a criminal offence at the time she made application for naturalisation; only subsequently did she realise that activities and been criminal. That reasoning was faulty because it failed to take into account that, by pleading guilty to the offence, the appellant had unequivocally stated that she had the intention to commit the offence of conspiracy which she and others at LDA had then committed. In other words, she did not become possessed of the mens rea ex post facto. The judge's reasoning seeks wrongly to go behind the appellant's guilty plea and criminal conviction.

7. There are further problems with the judge's decision. The judge was referred to BA (deprivation of citizenship: appeals) [2018] UKUT 85 (IAC). The Upper Tribunal held that:

> "In the case of section 40(3), the matter of which the Secretary of State must be satisfied is much more hard-edged. The fact that the subsection speaks of the Secretary of State being "satisfied" that fraud etc was employed does not mean the question for the Tribunal is merely whether the Secretary of State was rationally

> entitled to conclude as she did. In Secretary of State for the Home Department v Al-Jedda [2013] UKSC 62, the Supreme Court was not disposed to say more than that the use of the word "satisfied" in section 40(2) and (3) "may afford some slight significance", although the Court found it difficult to articulate what that significance might be (Lord Wilson at paragraph 30). We consider the Tribunal is in a position to take its own view of whether the requirements of subsection (3) are satisfied. If they are, then the points made in paragraph 43 above will apply in this class of case also. The Tribunal will be required to place significant weight on the fact that the Secretary of State has decided, in the public interest, that a person who has employed deception etc to obtain British citizenship should be deprived of that status. Where statelessness is not in issue, it is likely to be only in a rare case that the ECHR or some very compelling feature will require the Tribunal to allow the appeal."

The Upper Tribunal summarised its guidance as follows:

> (1) The Tribunal must first establish whether the relevant condition precedent exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.
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> (2) In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue.
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> (3) In a section 40(3) case, the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) were used by P in order to obtain British citizenship. As held in Pirzada, the deception must have motivated the acquisition of that citizenship.
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> (4) In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.
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> (5) As can be seen from AB, the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation.
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> (6) The appeal is to be determined by reference to the evidence adduced to the Tribunal, whether or not the same evidence was before the Secretary of State when she made her decision to deprive.

The question of statelessness did not arise in the instant appeal. It is not referred to in the grounds of appeal to the First-tier Tribunal. Likewise, despite the guidance of BA, no reference was made to the

> ECHR. The decision letter of the Secretary of State made it clear that deprivation of citizenship did not mean that removal was inevitable. At [25], the decision letter recorded that the appellant has a child (K) who is a British citizen and who was born in 2007. This child, the appellant's British husband and other matters relevant to Article 8 ECHR did not figure at all in the appeal to the First-tier Tribunal despite the fact that we learn from BA that, 'the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998…' On the face of the limited facts concerning the appellant's private and family life in the United Kingdom, she would appear to have a strong prima facie case for remaining in the United Kingdom under Article 8 ECHR (see, for example, section 117B(6) of the 2002 Act). However, the judge made no finding in respect of Article 8 ECHR nor did he make a specific finding that this is an 'exceptional' case which indicated that the discretion to deprive the appellant of her citizenship should have been exercised differently.
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> I find that the judge's decision should be set aside. His finding that, at the time she made an application for naturalisation, the appellant was unaware that she was committing a criminal offence cannot stand in the face of her guilty plea to the offence of conspiracy to defraud. I refer to the guidance set out above in BA; the judge also failed to follow that guidance to examine, in particular in failing to examine issues surrounding Article 8 ECHR. I shall remake the decision at or following the resumed hearing at Bradford before me on a date to be fixed. Both parties should attend prepared to address in their submissions the exceptionality of the appellant's case (if that is what she seeks to argue), Article 8 ECHR and statelessness (if appropriate). Both parties may adduce new evidence provided that they serve it on each other and file it at the Upper Tribunal at least 10 days prior to the resumed hearing.
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> **Notice of Decision**
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> This decision of the First-tier Tribunal is set aside. None of the findings shall stand. The Upper Tribunal (Upper Tribunal Judge Lane) shall remake the decision at or following a resumed hearing at Bradford on the first available date (No interpreter: 2 hours allowed)"

2. The representatives of both parties made submissions at the resumed hearing following which I reserved my decision.

3. I refer in my error of law decision to the recent decision of the Upper Tribunal in *BA* (see error of law decision at [7]). Subsequent to that decision, the Court of Appeal has given its judgement in *KV* [2018] EWCA Civ 2483. At [6] the Court of Appeal to endorsed principles of law articulated in the earlier Upper Tribunal decisions of *BA* and also *Deliallisi* [2013] UKUT 85 (IAC):

> "(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

> (2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.
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> (3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.
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> (4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.
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> (5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.
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> (6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799)."

4. Moreover, in *KV* the Court of Appeal considered whether, in deciding whether a person should be deprived of citizenship, it is necessary to consider the proportionality of that decision. At [16] the court concluded

> "In making a decision whether to order deprivation of citizenship in the exercise of a discretionary power under section 40, the decision-maker (whether that be the Secretary of State or the tribunal on an appeal) has to form a view, not just as to whether it would be rational to make such an order, but whether it is right to do so. This necessarily involves an evaluation of the relative weight to be accorded to the public interest in depriving the person concerned of citizenship and any competing interests and considerations, including the impact of deprivation on the legal status of the individual concerned."

5. By the provisions of section 40 (3) of the British Nationality Act 1981, 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 fraud, false representation or concealment of a material fact. Both parties agree in the present appeal that the appellant's citizenship status was derived by fraud and/or false representation.

6. The appellant appeals under the provisions of Section 40A of the 1981 Act:

> "A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal."

7. As I understand the grounds of appeal and also given the reliance placed by Miss Khan, who appeared for the appellant at the resumed hearing, on *KV*, the appellant advances her appeal on the ground, first, that the decision of the Secretary of State to exercise his discretion by depriving the appellant of her citizenship was not proportionate and, secondly, on Article 8 grounds.

8. Dealing first with the proportionality of the decision, the appellant relies on the expert report of Guofu Liu just dated 22 April 2019. I am able to consider this report in remaking the decision notwithstanding the fact that it was not before the Secretary of State at the time of the decision to deprive (see *BA,* headnote (6)). Mr Liu concluded that the appellant lost her Chinese nationality automatically when she became a British citizen; China does not recognise the dual citizenship for any Chinese national [7]. There is a procedure by which the appellant could reapply for Chinese nationality having lost her British citizenship but this gives rise to two potential problems for the appellant. First, the appellant would have to disclose any criminal convictions which had been imposed upon her by courts outside China. The existence of a conviction (such as the appellant has) would be inevitably prove a negative factor in the determination of her application for citizenship. Secondly, the relevant Chinese statute law provides that 'the applicant must settle in China when the application for restoration of the Chinese nationality is lodged [28]'. Miss Khan submitted but this would involve the appellant and her British child having to travel to China, a country of which neither are citizens, in order to live there whilst they await the outcome of the application for nationality. As non-citizens, they would not be able to access public services and would be at risk of destitution and other harm.

9. The Court of Appeal in *KV* addressed the question of possible reacquisition of former citizenship at [19-20]:

> "19. Where, as in the present case, it is established not only that deception was used but that, without it, an application for naturalisation as a citizen would not have been granted, it seems to me that it will be an unusual case in which the applicant can legitimately complain of the withdrawal of the rights that he acquired as a result of naturalisation. That is because the withdrawal of those rights does no more than place the person concerned in the same position as if he had not been fraudulent and had acted honestly in making the application. The position may be different, however, in a case where, as a result of naturalisation, the individual has lost other rights previously enjoyed which will not or may not be restored if he is now deprived of his citizenship. In such a case depriving the person of citizenship will not simply return him to the status quo ante but will

> place him in a worse position than if he had not been granted citizenship in the first place.
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> 20. That may occur where a person who was a national of another state has lost that nationality as a result of becoming a British citizen and would not be entitled to resume his former nationality if deprived of his British citizenship. In such a case the decision-maker (whether it be the Secretary of State or the tribunal on an appeal) will need to consider whether deprivation of citizenship is justified having regard to that consequence. Relevant factors in making that determination are likely to include both the nature and circumstances of the deception by means of which naturalisation was obtained but also, on the other side of the scales, the likelihood (if any) that the individual would be able to re-acquire his former citizenship and the extent to which the inability to do so will have practical detrimental consequences for the individual or others. Although it does not seem to me necessary that the assessment should have to be conducted using the formal four stage test of proportionality adopted in cases such as Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700, para 74, it will necessarily involve a balancing exercise and a judgment as to whether in all the circumstances deprivation of citizenship is proportionate."

10. First, I have no evidence before me to show that it would either be necessary for the appellant to be joined by her British child during the time he spends in China re-acquiring her nationality and, secondly, to show that either the appellant (or, if he did accompany her, the child also) would experience significant hardship pending the outcome of the application. If they did travel to China, the appellant and child would, in effect, be in the position of visitors; there was no evidence to suggest that their financial circumstances are such that they could not afford to remain living abroad for a period of time without becoming destitute. It also seems likely that they may have family members or friends in China who may be able to accommodate or otherwise assist them. Thirdly, although Mr Liu does not characterise the chances of the appellant re-acquiring a nationality as 'big', he does state at [29] that the Chinese authorities have a 'big discretion' in respect of such applications. The prospect of the appellant reacquiring her Chinese citizenship therefore cannot be described as hopeless.

11. These findings are relevant in the light of the guidance in *KV*. Is important to note that the Court of Appeal did not discuss statelessness and problems in reacquiring citizenship as if these were abstract or academic matters of no practical consequence. Rather, the court stressed the need to have regard to any 'practical detrimental consequences for the individual or others.' I have found that the appellant has not provided evidence to show that such 'practical detrimental consequences' would, on a balance of probabilities, arise for her or others.

12. I accept that 'the nature and circumstances of the deception by means of which naturalisation was obtained' were not, perhaps, in the appellant's case of the most egregious kind. I consider it likely that the appellant was not the instigator of the nationality application fraud perpetrated at the

office where she worked. However, the fact remains that she pleaded guilty in a criminal court to the offence as charged. As a factor in the assessment of proportionality, the circumstances of the offence which led to the fraudulent misrepresentation do not weigh heavily in the appellant's favour, if at all. The fact that she has been unable to prove the likelihood of 'practical detrimental consequences' arising from any future application to regain her Chinese citizenship leads me, having had regard to all the circumstances, to conclude that the Secretary of State's decision to deprive the appellant of her British nationality was proportionate.

13. The principles of law extracted by the Court of Appeal in *KV* from *BA* and other Upper Tribunal decisions do not include the guidance given by in *BA* at headnotes (4) and (5) although there is nothing in the Court of Appeal's judgement which would indicate that it disapproved of that guidance. I have quoted the guidance above in my error of law decision but repeat it here for ease of reference:

> "(4) In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.
>
> (5) As can be seen from AB, the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation."

14. The appellant is married to a British citizen and her child is British. The Secretary of State has not suggested that he intends to remove the appellant from the United Kingdom having deprived her of British nationality. Following the judgement in *KV*, the second part of the guidance in (4) above ('some exceptional feature') may have been supplanted by the need for decision makers to consider the proportionality of the decision to deprive. As regards her appeal on Article 8 ECHR grounds, as *BA* shows, the stronger an appellant's case to remain under Article 8 may be, the less likely that her removal from the United Kingdom will be a consequence of the removal of her citizenship. To that extent, any problems which the appellant might face in China seeking to regain her citizenship there remain hypothetical.

15. As Court of Appeal noted in *KV* [16], there is no right not to be made stateless for persons whose nationality has been obtained by fraud. At [19], Court of Appeal observed that it would 'be an unusual case in which the applicant can legitimately complain of the withdrawal of the rights which he acquired as a result of naturalisation [obtained by fraud].' I have concluded that the decision to deprive the appellant of a nationality was proportionate and that, in the light of the obvious strength of her Article 8 family rights in this jurisdiction, she would not face any 'practical

detrimental consequences' of the loss of her Chinese nationality and/or any difficulties she may encounter seeking to reacquire it. In the circumstances, her appeal against the Secretary of State's decision is dismissed.

Notice of Decision

I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 14 December 2017 is dismissed.

Signed Date 2 July 2019

Upper Tribunal Judge Lane