Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: DC/00036/2018**

THE IMMIGRATION ACTS

Heard at Field House
On 2 May 2019

Decision & Reasons Promulgated
On 29 May 2019

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

LUAN KAZIU

(anonymity direction not made)

Respondent

Representation

For the Appellant: Mr. T. Lindsey, Home Office Presenting Officer

For the Respondent: Ms S. Naik QC, of counsel, instructed by Appleby Shaw

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent was born in Albania but, when he arrived in the United Kingdom in July 1997 and applied for asylum, he stated that he had been born in Kosovo in the Federal Republic of Yugoslavia and feared persecution on this basis. He was only 16 years old at that time and in March 1998 he was granted asylum.

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2. He was subsequently granted indefinite leave to remain and was naturalised as a British citizen on 16 February 2005. In November 2007, the Respondent's wife applied for entry clearance and submitted their marriage certificate and his birth certificate in support of her application. This revealed that he had been born in Albania. On 13 May 2009 the Secretary of State wrote to the Respondent indicating that she was considering depriving him of his nationality. His representatives made submissions on his behalf on 15 June 2009. They also sent further representations in 2011 and 2012 asking about whether the Secretary of State had yet made a decision to deprive him of his British citizenship.

3. In 2013 the Respondent visited his wife in Albania and on 13 February 2013, the Secretary of State decided that his British citizenship was a nullity. This decision was issued on 21 March 2013 and in April 2013 the Secretary of State refused the Respondent's wife's application for entry clearance. The Respondent was refused entry and detained on his return to the United Kingdom on 14 May 2013 but released two days later and has remained in the United Kingdom ever since.

4. In June 2013, the Respondent filed a claim for judicial review challenging the decision that his British citizenship was a nullity, but Mr. Justice Ousley refused his application in March 2014 and the Court of Appeal dismissed his subsequent appeal in November 2015. Two of his fellow claimants appealed to the Supreme Court and the Court gave judgment in their favour in *Hysaj & Others* [2017] UKSC 82 on 21 December 2017. In paragraph 2 of that judgment, the Supreme Court noted that the Secretary of State had now accepted the principles adopted in its decision should also apply to the Respondent. Therefore, on 15 January 2018 the Secretary of State withdrew the nullity decision taken in relation to the Respondent.

5. However, the Secretary of State then made a further nullity decision on 11 July 2018 pursuant to section 40(3) of the British Nationality Act 1981. The Respondent appealed against this decision and First-tier Tribunal Judge Wyman allowed his appeal in a decision promulgated on 31 December 2018. The Secretary of State appealed against this decision and Upper Tribunal Judge Warr granted him permission to appeal on 5 March 2019. The Respondent lodged a Rule 24 Response on 10 April 2019 and then filed an amended Rule 24 Response and a skeleton argument on 26 April 2019.

ERROR OF LAW HEARING

6. The Home Office Presenting Officer relied on his skeleton argument and the grounds of appeal. He emphasised that great weight must be given to the public interest in preventing crime in any case involving fraud and submitted that First-tier Tribunal Judge Wyman had failed to do so. He also submitted that at all stages up until the decision by the Supreme Court the Secretary of State had been obliged to apply the judgments given by the High Court and the Court of Appeal in the line of cases addressing the question of when a grant of British citizenship had been a nullity. Counsel for the Respondent made detailed and cogent oral submissions in reply. I have referred to both parties' submissions, where relevant, in my findings below.

ERROR OF LAW DECISION

7. Section 6(1) of the British Nationality Act 1981 states:

> "If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation, he may, if he thinks fit, grant him a certificate of naturalisation as such a citizen".

8. Section 40(3) of the British Nationality Act 1981 states that:

> "The Secretary of State may be 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
>
> (a) fraud;
>
> (b) false representation;
>
> (c) concealment of the facts".

9. Section 40A of the British Nationality Act 1981 states:

> "(1) 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".

10. On 21 December 2017 in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2017] UKSC 82 the Supreme Court found that a grant of British citizenship was only a nullity if it arose from a situation of impersonation. In particular, it noted in paragraph 16, that it was the Secretary of States' position that:

> "… the law took a wrong turning after [*R v Secretary of State for the Home Department ex p Sultan Mahmood* [1981] QB 58]. The *Mahmood* case involved two real people, X and Y. X impersonates Y for the purpose of applying for citizenship. Y has the characteristics required for citizenship. Y is considered by the Secretary of State and is granted citizenship. But Y has never applied for it, may not want it, or may even be dead. Thus, is cannot be said that citizenship has been granted either to Y or to X. Accordingly there was no grant of citizenship. *Mahmood,* in the Secretary of State's view, remains good law.

11. Paragraph 17 of *Hysai,* states:

> "By contrast, in the later cases, X uses a false identity created by him (or someone on his behalf) and in that identity he acquires the characteristics needed to obtain citizenship. X applies for the citizenship using the false identity Y. But X meets the requirements for citizenship albeit having acquired them by using the false identity Y. X is considered for citizenship by the Secretary of State in identity Y and is granted citizenship in that identity. In such a case, in the Secretary of State's view, the grant of citizenship is valid, albeit that the person may later be deprived of it under section 40. [*R v Secretary of State for the Home Department ex parte Ejaz* [1994] QB 496] was rightly decided but [*R v Secretary of State for the Home Department, ex p Parvez Akhtar* [1981] QB 46 and [*Bibi v Entry Clearance Officer, Dhaka* [2001] EWCA Civ 740 were wrongly decided"

12. In paragraph 2 of the judgment the Supreme Court also stated:

> "Although there are only two appeals before this court, these cases were heard in the Court of Appeal along with a third case, that of Mr. Kaziu, which was decided on the same basis: *R (Kaziu) v Secretary of State for the Home Department* [2015] EWCA Civ 1195, [2016] 1 WLR 673. The Secretary of State therefore accepts that this judgment should also apply to him".

13. The order made by the Supreme Court relating to the Respondent and one other also stated:

> "AND UPON the [Secretary of State] accepting that her decisions, dated 13 February 2013 and 27 June 2013, that the Appellants' British citizenships were 'nullities' (i.e. that the Appellants were not, and had never been, British citizens) were wrong in law".

14. This was based on the fact that, although the Respondent had previous asserted that he was from Kosovo, he had given his correct name and date of birth and had not adopted the identity of another person who was entitled to British citizenship.

15. In the order, which was dated 20 December 2017, the Secretary of State also accepted that the Respondent was and continued to be a British citizen by naturalisation under section 6(1) of the British Nationality Act 1981 and that this citizenship would continue unless or until a formal deprivation order was made pursuant to section 40(3) of the British Nationality Act 1981.

16. The Secretary of State made such an order on 11 July 2018 and it is First-tier Tribunal Judge Wyman's decision to uphold the Respondent's appeal against this decision which is the subject of the current error of law hearing.

17. When considering this appeal, First-tier Tribunal Judge Wyman correctly reminded herself, in paragraph 45 of her decision, that section 40(3) contained a discretionary power and that, therefore, she had to consider whether the decision to make a deprivation order was reasonable and proportionate in all the circumstances. This accords with *Deliallisi (British*

citizen: deprivation appeal: Scope) [2013] UKUT 000439 (IAC) in which the Upper Tribunal found that:

> "An appeal under section 40A of the British Nationality Act 1981 against a decision to deprive a person of British citizenship requires the Tribunal to consider whether the Secretary of State's discretionary decision to deprive should be exercised differently. This will involve (but not be limited to) ECHR Article 8 issues..."

18. In paragraph 37 of her decision, First-tier Tribunal Judge Wyman noted:

> "The [Respondent] married his wife in 2007 and now has two children, both British citizens born in 2010 and 2013. Despite the fact that the fraud was known in 2009, the [Respondent] could still travel and see his family in Albania. However, since he was arrested on return in 2013, he has been unable to enjoy any family life for the past five years. As his youngest child was only born in 2013, this means the [Respondent] has only seen him on one occasion, which has had a huge impact both on the children and the [Respondent]".

19. The Secretary of State accepts that up until 2013 the Respondent was able to travel to Albania to continue his family life with his wife and children. In his skeleton argument the Appellant submitted that the Respondent would have been able to travel to Albania since 2013 if he wished to do so. This ignores the fact that his British passport had been taken from him and that since that time he has been challenging the nullity decision and then pursuing his section 40A appeal rights, which required him to remain in the United Kingdom.

20. It is clear from the chronology of this case that the Respondent's wife was refused entry clearance as a spouse in 2013 and that since that time the Respondent has not had the necessary status to sponsor her entry clearance in any capacity, including that of a visitor. The Respondent also submitted that the Respondent's children could have travelled to the United Kingdom, if the Respondent had applied for British passports for them. Clearly this opportunity would have passed once a nullity decision had been made on 13 February 2013. Prior to that date the Appellant's older child would have been at most two years old and his youngest child would not yet have been born. They were clearly not of an age to travel

without their mother and she was refused entry clearance in April 2013. The inability of the children's mother to obtain entry clearance continued to impact even after the Supreme Court decision even though the Respondent has now applied for British passports on their behalf.

21. Therefore, the decision made by the Secretary of State in 2013, which has now been found to be unlawful by the Supreme Court, prevented the Respondent and his wife and children enjoying a family life together from 2013 and amounted to a breach of Article 8(1) of the European Convention on Human Rights.

22. The Secretary of State submitted that this breach was proportionate. In particular, he submitted that from the date of the decision in 2013 until the date of the Supreme Court decision in *Hysaj*, he was obliged to follow the decisions reached by the Higher Courts in relation to the issue of nullity. However, when a decision is made by the Supreme Court it is declaratory of the law as it has always been. The decision does not just apply to similar cases which come up for consideration after the date of its decision.

23. For example, in *National Westminster Bank plc v Spectrum Plus Limited & others & others* [2005] UKHL 41, Lord Nichols noted at paragraph 12 that:

> "Prospective overruling has not yet been adopted as a practice in this country. The traditional approach was stated crisply by Lord Reid in *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874, 898-899, a case concerning compulsory acquisition:
>
> > 'We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed.'"

24. He also noted at paragraph 13:

> "In *Launchbury v Morgans* [1973] AC 127, 137, Lord Wilberforce noted 'We cannot, without yet further innovation, change the law

> prospectively only'. More recently, in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 379, Lord Goff of Chieveley said the system of prospective overruling 'has no place in our legal system'."

25. There was discussion about whether a prospective approach would be more appropriate but after careful consideration, the House of Lords decided that the declaratory approach should be maintained.as there was sufficient flexibility in the Court's powers to address individual cases where this may not be appropriate.

26. In the case of *Hysaj* the Supreme Court clearly followed the declaratory approach as it made an order that the Appellants' children were British citizens already due to the fact that their father's British citizenship had not been a nullity They also found that the fathers were and would continue to be British citizens pending any section 40(3) decision and any subsequent appeal.

27. This is comparable to the decision in *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19, in which a prisoner's release date, calculated on the basis of the law as it had been at the time, was held to be wrong in law. As such a decision was declaratory of the law as it had always been, the prisoner was able to claim damages for false imprisonment.

28. As a consequence, I find that the Secretary of State cannot rely on the case law as it was whilst he maintained that the Respondent's British Citizenship had been nullified. He had to begin from the basis that the Supreme Court had found as a matter of law that there was no power to nullify the Respondent's citizenship and, therefore, he had continued to have British citizenship.

29. The on-going existence of the Respondent's British citizenship and that of his children was, therefore, a factor to be taken into account when considering the proportionality of now making a decision to deprive the Respondent of his citizenship. Furthermore, such a decision would leave the Respondent in an uncertain situation as, if he was deprived of his citizenship, he would become a foreign national with no right to remain; his previous indefinite leave to remain having been terminated when he became a British citizen. His two children remain British citizens but on the facts of the case, it was reasonably foreseeable that this would not automatically entitle him to leave to remain under the Immigration Rules. Furthermore, any application outside the Immigration Rules would be complicated by his children's ages and

his and his wife's Albanian nationality and the final outcome of any application would be unpredictable.

30. It was also reasonable foreseeable that at best the Respondent would be granted limited leave to remain for 30 months and that, therefore, he would not be able to sponsor his wife to join him and that this would mean that, even though his children are British citizens, the family would continue to be separated. This was not a case, as in *BA (deprivation of citizenship: appeals)* [2018] UKUT 00085 (IAC) in which the strength of the family life being enjoyed in the United Kingdom would prevent his removal in any event.

31. It was also the case that the best interests of the Respondents' children to enjoy a family life with both of their parents, the delay and the historic injustice which had occurred distinguished the case from the generality of similar cases, as found by Firsts-tier Tribunal Judge Wyman in paragraph 54 of her decision.

32. Before First-tier Tribunal Judge Wyman, the Home Office Presenting Officer submitted that the Secretary of State would have to make a decision within eight weeks and therefore there would be no period of limbo. Given the complexities which are likely to arise, in my opinion, it was not unlawful or irrational for First-tier Tribunal Judge Wyman to note that it is known that the Secretary of State does not always keep to stated timescales.

33. First-tier Tribunal Judge Wyman also relied on the long period of delay which had occurred since 2007 when it first came to light that the Respondent was an Albanian and not a Kosovan national. Even if the period from 2007 to 2009 are discounted, there was then a long period of delay from 13 May 2009, when the Secretary of State first informed the Respondent that he intended to deprive him of his British citizenship, and the decision on 11 July 2018 to actually deprive him of his British citizenship.

34. For the reasons given above, it is my view that the Secretary of State cannot rely on previous case law relating to the issue of nullity as a reason for the delay from 2013 to 2018, as this law has been declared to be incorrect.

35. The Secretary of State also submitted that he was entitled to delay his decision from 2009 to 2013 as he was seeking to clarify the law in a number of other cases. However, the effect of

this delay was to deprive the Respondent of having his appeal against deprivation heard during that time.

36. If a deprivation decision had been made during that period, the Respondent may have benefitted from a policy then being operated by the Secretary of State. This policy was to be found at paragraph 55.7.2.5 of Chapter 55 of the *Nationality Instructions* and stated:

> "In general, the Secretary of State will not deprive of British citizenship in the following circumstances:
> …
> If a person has been resident in the United Kingdom for more than 14years we will normally not deprive of citizenship".

37. The Respondent entered the United Kingdom in July 1997 and, therefore, by July 2011 he would have been here for 14 years.

38. In paragraph 22 of the case of *Deliallisi*, which was heard by the Upper Tribunal on 9 July 2013, the Home Office Presenting Officer;

> "confirmed what he had said in his e-mail of 27 June 2013, namely, that given that the two other appellants had been resident in the United Kingdom for fourteen years, the respondent had decided, pursuant to her policy in chapter 55 (Deprivation and Nullity of British Citizenship) of the Nationality Instructions, that it was not appropriate to pursue deprivation..."

39. Counsel for the Respondent submitted that First-tier Tribunal Judge Wyman had been correct to find that this was an historic injustice which was comparable to that addressed in *R (Gurung) v Secretary of State for the Home Department* [2013] [2013] EWCA Civ 8. At the hearing before me the Home Office Presenting Officer was correct to note that the facts of *Gurung* were not the same as those relied upon by the current Respondent. However, the principle is the same.

40. The historic injustice in *Gurung* was described by the Master of the Rolls in paragraph 2 of his judgment as:

> "For many years, Gurkha veterans were treated less favourably than other comparable non-British Commonwealth soldiers serving in the British army. Although Commonwealth citizens were subject to immigration control, the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British armed forces to obtain on their discharge indefinite leave to enter and remain in the UK. Gurkhas were not included in this policy. They were therefore not entitled to settle in the UK".

41. In my view, a similar historic injustice occurred in this case. The Secretary of State did not apply the policy contained in paragraph 5.7.1.5. to the Respondent, even though he was applying his policy to others in the same situation as him, as can be seen from the facts of Mr Deilalisi's case. He also made a nullity decision in the Respondent's case on 13 February 2013 whilst his representative was still relying on a policy relating to deprivation in court in the case of *Deilalissi* on 9 July 2013.

42. In paragraph 43 of *Gurung* the Master of the Rolls also noted that "the requirement to take the injustice into account in striking a fair balance between the article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in article 8(2) itself, and it is ultimately for the court to strike that balance"..

43. Therefore, in my view, First-tier Tribunal Judge Wyman was entitled to take the "historic injustice" suffered by the Respondent into account when reaching her decision.

44. First-tier Tribunal Judge Wyman had also relied on the decision in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 where Lord Bingham held in paragraph 14 that:

> "It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways..."

45. As accepted by the Secretary of State, the first two ways were not relevant but in paragraph 48 of her decision, First-tier Tribunal Judge Wyman relied on paragraph 16 of *EB (Kosovo)* where Lord Bingham held:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes…"

46. First-tier Tribunal Judge Wyman had noted in paragraph 47 of her decision that it had been eleven years since the Secretary of State had discovered that the Respondent had fraudulently claimed to be a national of Albania and twenty-one years since he gave this information.

47. The facts of the case, as found by First-tier Tribunal Judge Wyman, also included the fact that the actions by the Secretary of State had deprived the Respondent of the opportunity to rely on having been in the United Kingdom for more than fourteen years when other individuals who had also practiced a similar deception were not deprived of their British citizenship. She also noted that the Secretary of State had initially intended to deprive the Respondent of his British citizenship but then decided that his citizenship was a nullity and finally decided that his citizenship was not a nullity and once again decided to deprive him of his citizenship. On this factual basis it was clearly possible to characterise the process adopted by the Secretary of State in the Respondent's case as "unpredictable, inconsistent and unfair".

48. The Home Office Presenting Officer relied on paragraph 10 of *EB (Kosovo)* in which Lord Bingham noted that:

> "In a complex and overloaded system perfect equality of treatment between applicants similarly placed will be impossible to achieve, but startling differences of treatment between such applicants, or anything suggestive of randomness or caprice in decision-making, must necessarily give grounds for concern".

49. As noted above, in the Respondent's case there was a startling difference between the manner in which his case was dealt with and others with the same facts which were accorded the

benefit of paragraph 55.7.2.5 of Chapter 5 of the *Nationality Instructions*. It is the case that the Secretary of State is entitled to change his policy over time but there is a clear and legitimate expectation that whilst a specific policy is in force like cases will be treated under the policy in a similar manner.

50. Finally, the Home Office Presenting Officer sought to distinguish *EB (Kosovo)* on the basis that no public interest issues arose. However, in the current case the delay in reaching a decision on the Respondent's case was one of a number of factors to weighed in the balance and *EB (Kosovo)* was relied upon for what it said about the effect of delay not about the weight to be apportioned between the public interest and factors weighing in the Respondent's favour.

51. The Home Office Presenting Officer also submitted that First-tier Tribunal Judge Wyman had failed to give sufficient weight to the fact that the Respondent had used fraud in order to obtain British citizenship. He relied on the fact that First-tier Tribunal Judge Wyman found in paragraph 54 of her decision that:

> "Taking all these points into consideration, notwithstanding the appellant's historic fraud and any claimed public interest in deprivation as a result of the fraud, I find that the delay by the [Secretary of State] and the significant impact of the decision by the [Secretary of State] on the [Respondent] distinguishes the [Respondent's] case from many others and I therefore find that deprivation of citizenship is not appropriate, despite the previous false representations by the [Respondent]"

52. Read in its entirety, this balancing exercise clearly took into account the fact that the Respondent had made false representations. In addition, in my view the phrase "any claimed public interest" reflected that fact that up until the date on which he was deprived of British citizenship the Respondent continued to have British citizenship and the weight to be given to his fraud was still being weighed in the balance.

53. The Home Office Presenting Officer also submitted that First-tier Tribunal Judge made an error of fact in paragraph 52 of her decision, when she found that "apart from the matter of the

initial misrepresentation, the [Secretary of State] has not suggested that the {Respondent] has any other criminal or forensic history". However, it was accurate to note that the Respondent had not committed any criminal offences or been involved in any other court proceedings. It is also clear from paragraph 4 and 5 of her decision that she was aware that the Respondent had also applied for indefinite leave to remain and also British citizenship using the same false nationality.

54. For all these reasons, I find that there were no errors of law in First-tier Tribunal Judge Wyman's decision.

Decision

(1) The Secretary of State's appeal is dismissed.

(2) The decision of First-tier Tribunal Judge Wyman is maintained.

Nadine Finch

Signed Date 23 May 2019

Upper Tribunal Judge Finch