Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-000388
UI-2022-000389
(DC/50122/2021, DC/50133/2021)
[IA/14423/2021 & IA/14425/2021]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2022	**On 3 October 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

PJORIN GJELAJ
VALBONA GJELAJ
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms S Anzani, instructed by Connaughts solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against a decision of the First-tier Tribunal promulgated on 15 November 2021 dismissing their appeals against the decisions of the Secretary of State made on 29 April 2021 and 18 May 2021 respectively depriving them of their British citizenship pursuant to Section 40(3) of the British Nationality Act 1981.

2. The first appellant claimed asylum in the United Kingdom most recently in May 1997. On that occasion (and on two previous occasions after which he was removed) he claimed to be an ethnic Albanian from Kosovo. On 9 June 1999 he was granted indefinite leave to remain in the United Kingdom as a refugee and in September 2002 he applied for a travel document again maintaining to be Pjorin Gjelaj born on 22 June 1975 in Kosovo.

3. On 23 October 2003 he applied for naturalisation, did not declare any other names and stated his nationality was Yugoslavian. He also stated his parents were born in Kosovo.

4. On 15 February 2021 the respondent notified the first appellant that she had reason to believe that he had obtained his status as a British citizen as a result of fraud, inviting him to provide further information before making a decision. On 29 April 2021 the appellant was issued with a notice of deprivation.

5. The second appellant arrived in the United Kingdom on 13 July 1997, claiming asylum the following day. She claimed to have been born on 21 March 1979 in Kosovo. She did not make a claim for asylum and was met on arrival by the first appellant. She was interviewed with the first appellant on 4 September 1997 and was granted ILR on 1 October 1999.

6. On 26 September 2002 she applied for a travel document under her married name making reference to a previous surname (Deda) stating the reason for this change of name was marriage. She applied for naturalisation on 23 October 2003, confirming her date of birth, place of birth, noting the change of name which was said to be owing to marriage. In the application she said that her father and mother were Yugoslavian, and her husband's place of birth was Kosovo.

7. On 3 March 2021 the respondent notified the second appellant that she had reason to believe that she had obtained British citizenship as a result of fraud, invited her to provide further information. On 18 May 2021 the respondent served notice of decision to deprive her of her nationality pursuant to Section 40(3) of the British Nationality Act 1981.

The Respondent's Case

8. The respondent's case is set out in detail in the relevant refusal letters. In brief, the respondent contacted the Albanian authorities and found that the first appellant's genuine identity was Pjorin Gjelaj but that he had been born on 22 June 1975 in Shkodër, Albania. The respondent considered and applied Chapter 55 of the relevant guidance, concluding that the appellant had deceived the Home Office in order to receive a grant of ILR based on being a refugee from Kosovo and had failed to provide the Secretary of State with an opportunity to consider the true circumstances of his case. Had these been known, his application for ILR would have been refused and this fraud had a direct bearing on the grant of citizenship.

9. The respondent was satisfied that the first appellant had made a conscious choice during his asylum applications and the Home Office Travel Document applications and other communications not to provide his genuine details and that his deception was deliberate. She considered also the concealment of his true identity damaged his good character and, had the relevant information been known, he would not have met the good character requirement and the application would have been refused. The respondent considered also that this decision was not in breach of the appellant's Article 8 rights, noting also that his three children were over the age of 18.

10. With respect to the second appellant, it was noted that the Albanian authorities had confirmed the appellant's genuine identity is Valbona Gjelaj, born 21 March 1980 in Lexhë, Albania. The Secretary of State noted that on entry she was in fact an Albanian minor aged 17 years and 3 months, not an undocumented Kosovan adult. She considered that the second appellant had had ample opportunity during her asylum applications and otherwise to provide her genuine details but she had not done so.

11. Having had regard to Chapter 55.7 of the guidance, the Secretary of State considered that this did not apply to the second appellant and that she should be deprived of citizenship as she could, having appointed legal representatives once over the age of 18, have provided the true details and that she should have been held legally responsible for her own citizenship application.

The hearing before the First-tier Tribunal

12. The judge heard evidence from both the appellants noting [59] that the second appellant said her applications for a travel document and for naturalisation were "a follow through" of what had been claimed in the past and she was scared to mention anything at that late stage. It is recorded that "She understands that she consciously maintained the lie, which caused her a lot of anxiety and a sense of shame, but she was never brave enough to tell the truth". She said also she did not recall instructing solicitors, but she had not instructed them to make representations or applications on her behalf.

13. At [82] the judge directed herself in line with Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 finding that the first appellant had admitted his fraudulent conduct, that he could have revealed his true nationality and the true circumstances at any time from 1996 onwards [86] and that there were no mitigating circumstances for the deception [93]. She considered also [91] to [92] that any interference with his right to private and family life occasioned by the loss of citizenship was not disproportionate, the period between loss of citizenship and a further decision to remove or grant leave will be relatively short.

14. With respect to the second appellant the judge considered the guidance at paragraph 55.7.5 noting [99] that the fraud arose before the grant of ILR made on 1 October 1999 and that on the basis of her reading of the guidance [101] that the appellant was not a dependant in an application by her parents, the position addressed in paragraphs 55.7.8.1 to 3, paragraph 55.7.8.2 not applying as she had not been granted discretionary leave until her 18th birthday and that the case study (f) taken from the guidance and upon which the appellant relied was materially different on the facts of this case. The judge noted [103]:

> "I have been unable to find any guidance that addresses the particular circumstances of this case and the guidance at paragraph 55.7.5 makes clear that even where a person is a minor there will be cases when the public interest will not prevent deprivation".

15. The judge also found that the appellant had the opportunity to give the respondent the correct details in connection with the grant of ILR when she had instructed solicitors but did not do so [104] finding [105] that she was not satisfied that the appellant falls within the criteria set out in the policy document and accordingly can be deprived of citizenship.

16. The judge also found, for reasons similar to the situation of the first appellant, that any limbo period was not disproportionate.

Grounds of Appeal

17. In respect of the second appellant it is averred that the judge failed properly to interpret Chapter 55 of the deprivation and nullity of British citizenship guidance in that although paragraph 55.7.8.1 refers to a child not being complicit in any deception "by their parent or guardian", it clearly anticipates deception by minors themselves and that the attempt by the judge to distinguish paragraph 55.7.8.2 from the appellant's circumstances was incorrect, in that she failed to note that the issue was whether the person in question was a minor at the time of the fraud being perpetrated. It was averred further that case study (f) is not materially different from the appellant's circumstances and that while paragraph 55.7.5 makes it clear that there will be cases where the public interest would not prevent a deprivation even where the person was a minor, the judge failed to provide reasons why that would apply in this case, the judge not suggesting the fraud was repeated thereafter.

18. In respect of both appellants it is averred that the findings with respect to the Article 8 rights are unreasonable and/or irrational in that having noted that the notice of decision in respect of both appellants suggested that the inevitable limbo would be relatively short, that is eight weeks, it was accepted that the information did not accord with that obtained from a Freedom of Information request stating it took on average up to 303 days to grant temporary leave.

19. It is averred also that the judge erred in finding that this would be disproportionate given the appellants' evidence that they would be unable to work, rent property or access medical treatment or other vital services, this assertion not being challenged at the hearing.

20. Permission to appeal in respect of ground 2 was granted by First-tier Tribunal; permission to appeal on ground 1 in respect of the second appellant was granted on a renewed application to the Upper Tribunal on 5 April 2022.

The hearing before the Upper Tribunal

21. Ms Anzani accepted that the facts of the second appellant's case did not neatly fall within the guidance but that it was of note that in this case ILR was granted automatically. She submitted that the judge had erred in not considering the deception actually perpetrated by the appellant herself but sought to distinguish the circumstances as she was not an unaccompanied asylum seeking child and not granted discretionary leave to remain until 18 but got indefinite leave to remain without more. She submitted that that was not the relevant issue and that paragraph 55.7.8.2 was relevant in the situation where the fraud was not perpetrated by the minor herself.

22. Ms Anzani submitted further that there is nothing here highlighted either by the respondent or the judge as to why the spirit of the guidance should not be applied and thus that the deception should be disregarded. She submitted further that having instructed representatives was not a relevant matter, was not part of the policy as what had been submitted by the solicitors was simply stating that they were on record and informing the change of address; no further representations were made. Ms Anzani submitted that the Secretary of State had failed to follow her own policy.

23. With respect to ground 2, Ms Anzani submitted that the judge acted irrationally in stating that a delay of 303 days was not disproportionate even though the first appellant could lose his job and not be able to continue serving in the TA and that this was a significant period of time that they would be without means of support. She accepted that it was a rationality challenge and this was a high threshold to meet but it could not be said from the unreported decision upon which Mr Whitwell sought to rely it had not been disproportionate.

24. Mr Whitwell submitted that the judge had not erred in her approach to the relevant policy and that even if that were the case, it was not material given that the fraud had been maintained with respect to the travel document application in which she had said the information she had given was true and also the declaration in the naturalisation form at 3.13. Both of these applications had been made when she was an adult. Further and in any event, the appellant could not have met the good character requirement.

25. Mr Whitwell submitted further that the policy set out at Chapter 55.7.5 was simply normative in that it referred to an assumption that "should" be made. He submitted that it was not open to an appellant to say that if she had committed a fraud by lying about her date of birth and nationality whilst a minor she was shielded at any point from the consequence of that if she continued to maintain that deception.

26. In respect of ground 2, Mr Whitwell submitted that the evidence relating to the 303 days was a mean average which could be skewed by complex or long cases. Further, it covered the period ending on 21 December 2020 thus was not relevant to the date of decision as by that point it was eighteen months old and looked at a period skewed by Covid. Whilst he accepted that there was little about the appellants' circumstances as regards accommodation or savings, that was a matter for the appellants. He submitted further that it was only rare that a limbo argument would win, referring to Hysaj (deprivation of citizenship: delay) [2020] UKUT 00128 (IAC at [93].

27. In response Ms Anzani submitted that proper construction of the policy was that minors were expressly excluded from the scope relying in particular on bullet point 3 of 55.7.5 and that where, as here, leave to remain from the asylum claim was granted automatically. She submitted that the travel document application did not fall foul of the policy nor did the good character requirement if the fraud had been perpetrated at the point when she was a child.

28. She submitted further that in any event on any view the delay in this case would be likely to be considerably greater than eight weeks.

The Law

29. We adopt the approach set out in Ciceri, the headnote to which is as follows:

> "Following KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884, Hysaj (deprivation of citizenship: delay) [2020] UKUT 00128 (IAC), R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows:
>
> (1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 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. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider

whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually ECHR Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

(a) the Tribunal must determine the reasonably foreseeable consequences of deprivation; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom; and

(b) any relevant assessment of proportionality is for the Tribunal to make, on the evidence before it (which may not be the same as the evidence considered by the Secretary of State).

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159. Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of EB (Kosovo).

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3)

and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good.

30. We have also taken into account the relevant policy. Viewing it as a whole, with particular reference to paragraph 55.7.8 and case study (f), there is merit in Ms Anzani's submission, that the thrust of the policy is to exempt those who were minors at the time the fraud was perpetrated should not if the matter comes to notice later, be deprived of citizenship.

31. Most of the relevant material in the policy is directed to circumstances in which a child is under the care of parents or guardians and refers to complicity. There are, we consider, good policy reasons for not penalising those under the age of 18 for decisions or actions taken on their behalf by adults by their parents or guardians. It is less easy to discern that that should be the position where, as here, the deception was directly practised by someone who was, as it now turns out, under 18 at the time but we do find that the judge's reasoning on that point is unsafe. To that limited extent, we consider that the judge's decision is in error in her interpretation of the policy but we do not consider that the error is material. That is because, as Mr Whitwell submitted, the deception was repeated by the appellant in her travel document application. It was also repeated in the naturalisation application.

32. We do not, however, consider that much can be taken from the fact that the appellant did not voluntarily offer the information at another point; that is not an observation which exists in the respondent's policy and indeed, as it would be true of anybody who had previously undertaken a deception, it is difficult to see how the policy would have any purpose whatsoever.

33. That said, as prefigured above, the error of the judge was material given that the appellant had at a later date repeated the deception in the application form for a travel document in which she gave the false information and entered a declaration that the evidence she had said was true. Similarly, this is the case with the naturalisation form.

34. On that basis alone, it could not be said that the Secretary of State's decision to deprive the appellant's citizenship was irrational or otherwise vitiated by any public law error.

35. Accordingly, and applying the principles set out in Ciceri, there was no material error on the part of the judge, contrary to what was averred in ground 1.

36. Turning next to ground 2, it was for the appellants to show that, as they asserted, they would be left without accommodation and funds. The judge was entitled on the evidence before her to conclude that that had not been shown and to conclude that it had not been shown that the delay question would be excessive. We find that although the evidence from the Freedom of Information request letter indicates an average of 303 days,

that is a figure which can easily be distorted by shorter periods or longer periods.

37. There is merit also in Mr Whitwell's submission that this figure could well have been distorted by Covid and we note that the period in question ended a significant period of time before the appeal in this case. The judge gave adequate and sustainable reasons for not finding that the delay would be excessive nor the effects disproportionate. Accordingly, we find no merit in ground 2.

38. In conclusion, for the reasons set out above we consider the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Notice of Decision

(1) The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

(2) No anonymity direction is made.

Signed Date 23 August 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul