Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00103/2019
UI-2022-000836

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2022	**On 30th January 2023**

Before

THE HON. MR S JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE FRANCES

Between

FATION SHUTI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Georget of Counsel, instructed by Malik and Malik
For the Respondent: Mr Clark, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge Burnett, promulgated on 10 February 2022, upholding Mr Shuti's appeal under section 40A of the British Nationality Act 1981 ("BNA 1981") against a decision of the Secretary for State, made on 5 September 2019, to deprive him of his British nationality pursuant to section 40 (3) of the Act. The Judge allowed the appeal on

the basis that "the respondent has not applied her policy lawfully in seeking to deprive the Appellant of his British nationality".

2. For ease of reference, the parties are referred to as they were in the First Tier Tribunal.

Background

3. The Appellant is a citizen of Albania. He arrived in the United Kingdom in 1999, submitting an application for asylum on 4 October 1999, in the name of Fation Shuti. He gave his date of birth as 5 May 1985, which made him 14 years old and an unaccompanied minor. He gave his place of birth as, Has, Kosovo.

4. On 15 September 2000, his asylum claim was refused by the Secretary of State on the basis it was not credible that he was the age he claimed to be. He appealed, successfully, to the First Tier Tribunal, leading to a decision that he was a minor from Kosovo who could not be expected to return there. He was granted asylum on 8 February 2002.

5. On 23 November 2004, he submitted an application for naturalisation as a British citizen. He maintained the same name, date and place of birth, which made him, by then, 19½ years old.

6. On 21 March 2005, he was issued with a certificate of naturalisation as a British citizen.

7. Subsequently, the Respondent received information from the British Embassy in Tirana which indicated that the Appellant was Albanian.

8. By a decision dated 5 September 2019, the Secretary of State deprived him of his British citizenship, pursuant to section 40 of the BNA 1981.

The legal framework

9. The legal framework was common ground.

10. Section 40(3) of the BNA 1981 provides that:

> *"(3) 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—*
>
> *(a) fraud,*
>
> *(b) false representation, or*
>
> *(c) concealment of a material fact."*

11. On any appeal against a decision by the Secretary of State to deprive, the Tribunal must first establish whether the relevant condition

precedent specified in section 40(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 ("the condition precedent question").

12. In answering the condition precedent question the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum v SIAC [2021] UKSC 7. In paragraph 71, Lord Reed assesses the role of SIAC on an appeal against a decision under section 40(2) of the Act. He describes SIAC as having a number of important functions to perform. Relevantly he stated:

> *"First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held.*
>
> *…*
>
> *In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State……"*

13. Chapter 55 of the Secretary of State's Nationality Instructions is titled: 'Deprivation and Nullity of British citizenship' ('the Policy'). It provides guidance to decision makers on deprivation on grounds of fraud, false representation or concealment of material fact. Relevant extracts provide as follows:

> "*55.7* ***Material to the Acquisition of Citizenship***
>
> *55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.*
>
> *55.7.2 This will include but is not limited to:*
>
> *…*

- *False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration.*

55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.

...

55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:

- *Where fraud **postdates** the application for British citizenship it will not be appropriate to pursue deprivation action.*

- *If a person was a minor on the date at which they applied for citizenship we will not deprive of citizenship*

- *If a person was a minor on the date at which they acquired indefinite leave to remain and the false representation, concealment of material fact or fraud arose at that stage and the leave to remain led to the subsequent acquisition of citizenship we will not deprive of citizenship. However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.*

55.7.6 Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship.

*55.7.8 **Complicit***

55.7.8.1 If the person was a child at the time the fraud, false representation or concealment of material fact was perpetrated, the caseworker should assume that they were not complicit in any deception by their parent or guardian.

55.7.8.2 This includes individuals who were granted discretionary leave until their 18th birthday having entered the UK as a sole minor who can not be returned because of a lack of reception arrangements. Such a minor may be granted ILR after they reach the age of 18 without need to succeed under the Refugee Convention or make a further application but the fraud was perpetrated when the individual was a minor.

55.7.8.3 ***However,*** *where a minor on reaching the age of 18 does not acquire ILR or other leave automatically and submits an application for asylum or other form of leave which maintains a fraud, false representation or concealment of material fact which they adopted whilst a minor, they should be treated as complicit.*

55.7.8.4 In the case of an adult, the fact that an individual was advised by a relative or agent to give false information does not indicate that they were not complicit in the deception.

55.7.8.5 All adults should be held legally responsible for their own citizenship applications, even where this is part of a family application. Complicity should therefore be assumed unless sufficient evidence in mitigation is provided by the individual in question as part of the investigations process."

14. Case studies are set out later in the chapter, which include the following:

"If. Miss G (then aged 11) was included in her family's asylum application in 1999. She was granted refugee status in 2003 as a dependent of her father. She applied for naturalisation under section 6(1) and was granted in July 2006. Miss G has now admitted that she was in fact born in Albania, and not Kosovo as was claimed in all applications with IND/BIA.

Recommended Decision - The deception in this case was material to the grant of ILR, and therefore to Miss G's ability to meet the residence requirements. However, as Miss G was a minor at the time her family entered the UK, she could not be regarded as having been complicit in the deception as minors are expressly excluded from the scope of the policy."

The Secretary of State's decision

15. The decision letter states that:

"3. Following our investigation, and on the basis of the evidence presented the Secretary of State has decided that your British citizenship was obtained fraudulently. The Secretary of State has decided that you should therefore be deprived of British citizenship for the reasons outlined below."

16. The letter sets out extracts from Chapter 55 of the Policy and summarises the Appellant's immigration history and the discovery as to the false information provided by the Appellant upon arrival in the UK. The letter considers the application for citizenship and the relevant sections of the form dealing with good character, before stating as follows:

“19 ….You concealed your genuine country of birth and had this deception been known the Nationality caseworker would have refused the application because you would not have met the good character requirement by maintaining that you were a Kosovan national. Therefore, (sic) deliberately concealing material facts regarding your entire immigration footprint.

20. Whilst it is accepted that you were a minor when you were granted asylum and that you should have been treated as a minor during the asylum process, therefore you were not complicit in the deception ***at that time****. However, you were an adult age 19 when you applied for Naturalisation and as an adult you are complicit in the ongoing deception, which continued throughout your application for citizenship. It is reiterated that had the Nationality caseworker been aware that you had omitted facts about your genuine country of birth to the Home Office and continued to conceal this information, you would not have met the good character requirement. Consideration of the good character requirement is dependent upon the person applying for naturalisation to be truthful, otherwise the Secretary of State for the Home Department (SSHD) cannot possess relevant information necessary to make an informed decision. By withholding material evidence, you denied the SSHD information that would have resulted in refusal of your application. It is considered that the omission was deliberate and that you were not truthful when you completed your naturalisation application form.*

21. Given the information that emerged about your genuine country of birth it is clear that your entire asylum application was based on false information. If the IJ at your Appeal had been aware that you were a minor from ***Albania*** *as opposed to Kosovo, they may well have come to a different decision regarding your appeal. Due to the issues in Kosovo at that time, removal of minors was not considered a viable option due to a lack of reception arrangements within Kosovo for minors to return. However, reception arrangements for minors within Albania were not the same as those in Kosovo, therefore it may have been possible to seek your removal to Albania. The IJ accepted correctly that you should have been treated as a minor, but their understanding was that you were a minor from Kosovo not Albania. Although at the time of your appeal you were 15 years of age and still classed as a minor, it is considered that the deception you continued to employ during your appeal was material to obtaining British citizenship. The IJ did not have all the relevant facts at hand and their judgement was made solely on what they were presented with at Court.*

……

26. Evidence provided by the Albanian authorities together with your own admission you are Albanian confirms without doubt that

you provided false details to UK immigration. It was only when the evidence was put to you that you had concealed your genuine country of birth, did you admit to the deception. Even though you were a minor when you originally entered the UK and obtained leave to remain, you maintained the deception as an adult. There is no evidence to show that you had ever attempted to reveal the truth prior to receiving the letter from SRU when you were notified that your genuine details had been confirmed.

27. For the reasons given above it is not accepted there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application(s) would have been unsuccessful if you had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship."

The First-tier Tribunal decision

17. The decision sets out 55.7.5 of the Policy before stating that:

"49. The appellant clearly falls within the third bullet point. He acquired his ILR as a minor on the basis of the false representation as to his place of birth and Nationality. The policy states that the SSHD will not in general deprive British Nationality in the circumstances listed. The starting position set out in the policy is not addressed in the refusal letter."

"50. The policy goes on to state the following about complicity

[the judge sets out 55.7.8.1 before continuing]

51. Mr Ojo particularly relied upon this to state that this did not apply to the appellant as he was unaccompanied and he was complicit in his actions as an adult. Mr Ojo sought to draw a distinction. He did not specifically address the example in the policy and to which his attention was drawn. The policy provides examples of cases to assist with decision making. It states at example (f):

[the judge sets out the example of Ms G before continuing]

52. In this example it states that the deception was material but was committed when the person was a minor. This is the case also with the appellant. It is stated that minors cannot be complicit as they are specifically excluded. Likewise for the appellant in this case. The example further identifies that the individual was granted naturalisation in 2006. The person could have been 18 on the basis of the scenario facts at that time. It is not expressly stated. The

example provided reinforces the third bullet point of paragraph 55.7.5 as set out above.

53. I consider that the policy implies that the starting point for the appellant, as he acquired his indefinite leave to remain as a minor, is that the SSHD has stated that in general the appellant would not be deprived of his nationality as a British Citizen. The respondent did not start from that position in the reasons given in this case. The respondent did not further identify why in the appellant's particular case that he would be deprived of his citizenship. I conclude that the SSHD has failed to have proper regard to a relevant and material factor and apply it to the appellant's case. The decision to deprive is thus unlawful on public law grounds as identified in paragraph 71 of the case of ***Begum*** *set out above."*

The Respondent's grounds of appeal

18. The Respondent submits that the Judge of the FTT misdirected himself as to Chapter 55 of the Policy. The Judge appropriately found that the appellant falls under the third bullet point of 55.7.5 of the Policy but failed to distinguish the appellant's circumstances at the time of his application for naturalisation from those set out in the second bullet point of 55.7.5 of the Policy, which states that an individual will not be deprived of citizenship if they were a minor at the date of the application. The Judge is said to have failed to give consideration to the fact that the appellant was no longer a minor when he submitted his application. He submitted his application for naturalisation as an adult and is responsible for, or at least complicit, in his actions and the false information provided. The Judge therefore failed to consider the good character requirement for acquisition of British nationality and the relevant deception, failed to give adequate consideration to whether the condition precedent for deprivation is satisfied in relation to the application for naturalisation and has failed to give adequate reasons for concluding that the Secretary of State had not applied her policy lawfully.

Discussion

19. The issue which arises in this case is how the Secretary of State ought to approach deprivation of citizenship in circumstances where an adult applicant for citizenship continues a deception begun as a minor by failing to divulge his conduct as a minor on the application form. There is no express consideration of the point in Chapter 55 of the Policy.

20. For the Appellant, Mr Georget submits (and did so before the First Tier Tribunal) that the answer to the question raised by this appeal is to be found in the third bullet point of 55.7.5 which provides that the starting point is that the Secretary of State will not seek to deprive the Appellant of British citizenship. Mr Georget criticises the Secretary of

State for not referring to the third bullet point despite setting out other relevant aspects of the Policy. For the Respondent, Mr Clarke submits that the answer lies in 55.7.8.5 (all adults are responsible for their citizenship applications). By the end of the hearing, it was common ground that the validity of Mr Georget's criticism depends on the Tribunal's view of the policy. We agree.

21. In the grounds of appeal, the Respondent conceded that the Appellant falls within the third bullet point in paragraph 55.7.5. It appears from the Respondent's decision letter that her view, at that stage, was that the leave to remain led to the subsequent acquisition of citizenship, a further aspect of the third bullet point*:*

> *"16. On 8 Feb 2002, you were issued with a Grant of Asylum letter (Annex M – refers), which meant that you could meet the requirements to apply for British citizenship."*

22. Before us, Mr Clarke sought to withdraw the concession on the basis that the bullet point refers to deception arising at the stage of acquisition of ILR and here the Appellant applied as an adult and his deception arose at that stage. Mr Clarke pointed us to paragraph 55.7.8.5 (all adults should be held legally responsible for their own citizenship applications and complicity should be assumed) which he said the FTT judge had not taken account of.

23. In response, Mr Georget submitted that there is nothing in the policy which indicates that 55.7.8.5 simply displaces 55.7.5, which opens by stating that "In general the Secretary of State will not deprive of British citizenship in the following circumstances', before setting out the three relevant bullet points including the third bullet point which is of relevance in the present case. Mr Georget also submitted that the third bullet point must be read as applicable to an application for citizenship by an adult because otherwise it is no different to the second bullet point.

24. Our initial response to the case put by Mr Clarke, or at least as we understood it, was to reject his submission that the Appellant did not fall within the third bullet point simply because he had engaged in deception as an adult. It seemed to us that Mr Clarke was simply ignoring the element of deception engaged in by the Appellant as a minor when the Secretary of State's policy is clearly to be more forgiving of the conduct of minors. Our view was that Mr Georget's response (set out above at 22) to the case put by Mr Clarke had force.

25. Having reserved our decision and reflected, we were prepared to accept a reading of the third bullet point which presents more difficulty for the Appellant. Our interpretation of the bullet point would be as follows. In order to benefit from the starting point in the third bullet point, any deception by an applicant for citizenship must <u>only</u> occur when the applicant is a minor and not as an adult ('if a person was a

minor on the date at which they acquired indefinite leave to remain and the false representation… arose at that stage and the leave to remain led to the subsequent acquisition of citizenship, we will not deprive of citizenship'). In other words, so long as the adult applicant for citizenship owns up to his or her previous deception as a minor, then the starting point is that their conduct (deception) as a minor will not be held against them.

26. This interpretation is consistent with the distinction drawn in the Policy between children and adults when ascribing responsibility for deception. As a starting point, children will not be regarded as responsible for their deception (or deception practiced on their behalf) whereas adults will be. Thus the second bullet point of 55.7.5 provides that deprivation action will not generally be taken where the person was a minor on the date which they applied for citizenship (although see further below on whether minors can apply for citizenship). In contrast, 55.7.8.5 provides that adults are held responsible for their citizenship applications. The Policy also acknowledges that the effects of deception as a minor may continue beyond the minor's 18th birthday. In this regard a further distinction is drawn between a fresh act of deception committed over the age of 18 compared with the consequences of the deception as a minor simply continuing in effect without further action on the part of the applicant. An example of the latter scenario appears in paragraph 55.7.8.2 which states that minors granted discretionary leave until their 18th birthday on the basis of arriving unaccompanied and who cannot be returned, may be granted ILR after they reach the age of 18 without further application. In contrast 55.7.8.3, which Mr Clarke emphasised, provides that where a minor on reaching the age of 18 does not acquire ILR or other leave automatically and submits an application for asylum or other form of leave which maintains a fraud, false representation or concealment of material fact which they adopted whilst a minor, they should be treated as complicit.

27. However, the difficulty with our interpretation, which otherwise appears consistent with the wider policy of the chapter, lies in the case study of Ms G. The case studies are clearly intended to provide examples of the application of the relevant polices. The example of Ms G is the only case study concerning a minor. On the facts of the example, Ms G's family engaged in deception which led to Ms G obtaining leave as a minor. The deception was repeated in her later application for citizenship. Nonetheless she is not deprived of citizenship. Mr Georget submitted that the facts in Ms G's case study are parallel to those of the Appellant once it is acknowledged that any application for citizenship by Ms G must have been when she was an adult. He pointed in this regard to section s6(1) BNA 1981 ('If, on an application for naturalisation…made by a person of full age…') and Mr Clarke did not dispute the proposition.

28. Mr Clarke sought to distinguish the example of Ms G on the basis the case study is concerned with the residence requirement. There is, however, no apparent reason why the same good character criterion relied on by the Respondent in the present case to penalise the Appellant was not at large in the example of Ms G given good character is an aspect of every application for naturalisation (s6(1) BNA 1981 and Schedule 1). In our view, the case study of Ms G suggests that an adult may still be absolved of responsibility in the scenario presented by the Appellant (who applied for naturalisation as an adult and repeated the deception as to his nationality which he had begun as a child). We note in this regard the submission of Mr Georget that the public interest referred to in the third bullet point as nonetheless warranting deportation despite the starting point had to be something other than the deception committed as a minor (given deception was the reason why the third bullet point was in play in the first place). He further submitted that the only additional factor considered in the refusal letter was that the appellant was an adult when he applied for naturalisation, which could not be said to be a public interest factor. We accept that the example of Ms G supports an interpretation that the respondent had to identify public interest factors in support of deprivation over and above the fraud committed as a minor.

29. We have considered carefully the relevant paragraphs of the Secretary of State's decision letter, in particular paragraphs 20, 21 and 26, which acknowledge that the Appellant cannot be treated as complicit for deception as a minor but then go on to conclude that he must take full responsibility for his (adult) deception on the application form. The decision letter does not refer to the third bullet point of 55.7.5 despite the fact that the Secretary of State initially conceded, in the grounds of appeal, that the Appellant falls within the scope of the bullet point. For the reasons explained above, we do not accept the interpretation of the bullet point put forward by Mr Clarke in seeking to withdraw the previous concession by the Secretary of State. We have arrived at an interpretation of the bullet point which would have assisted the Secretary of State on the facts of this case but which does not appear to be an interpretation shared by the Secretary of State, given the case study of Ms G. The decision maker does not grapple with the implications of the case study which, on its face, appears analogous with the position of the Appellant.

30. We remind ourselves that a failure to apply a relevant policy without good reason is unlawful (Mandalia v SSHD [2015] UKSC 59, [29] -[31]). We also bear in mind that in Begum at [71], Lord Reed emphasised the need for the decision-maker to 'bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision'.

31. In conclusion, we have arrived at the view that the Secretary of State's decision letter unlawfully fails to apply her policy. Accordingly,

there was no error of law in the decision of the First-tier Tribunal dated 10 February 2022.

32. For these reasons we dismiss the appeal.

Notice of Decision

The Secretary of State's appeal is dismissed

No anonymity direction is made.

Signed: MRS JUSTICE THORNTON DBE Date: 24 November 2022

The Hon. Mrs Justice Thornton DBE sitting as an Upper Tribunal Judge.