Upper Tribunal
(Immigration and Asylum Chamber)

Case Nos: UI-2022-001463

First-tier Tribunal No: DC/50017/2020

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

26th October 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

VYACHESLAV DOSTENKO
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Burrett, counsel
For the Respondent: Mr Tufan, Home Office Presenting Officer

Heard at Field House on 4 October 2023

DECISION AND REASONS

The Appellant

1. Upper Tribunal Judge Keith made a precautionary anonymity order on 15 September 2023. He did so on account of the appellant's documented mental health problems. As Mr Burrett acknowledged before us, however, the appellant was previously tried in public and there is no evidence to suggest that the publication of his name in connection with these proceedings would have an impact on his mental health. We therefore discharge the order made by Judge Keith and the appellant will be identified in these proceedings by his full name.

2. The appellant states that he was born on 13 October 1967 in Belarus and was originally a national of that country. He appeals against the decision of Judge of the First-tier Tribunal Monson sitting at Taylor House on 11 January 2022. The judge dismissed the appellant's appeal against a decision of the respondent dated 16 September 2022 to deprive the appellant of his British citizenship pursuant to section 40 (3) of the British Nationality Act 1981. The appellant arrived in the United Kingdom on 16 September 1999 and submitted a claim for political asylum four days later which was granted on appeal. The appellant was recognised as a refugee and granted indefinite leave to remain on 8 August 2003. On 11 July 2005 the appellant applied (for a second time) for naturalisation on form AN and on 8 December 2005 he was naturalised as a British citizen.

The Respondent's Decision

3. In a letter which ran to 14 pages the respondent set out her reasons why she intended to deprive the appellant of his British citizenship. The respondent decided that the appellant's British citizenship was obtained fraudulently. When completing form AN the appellant was asked at question 4.11: "have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?". The appellant replied "no" and signed a declaration that the information given in the form was correct. The application was approved on 31 October 2005.

4. On 7 September 2010 he was sentenced to 7 years imprisonment at Croydon Crown Court for defrauding the public revenue. The appellant had claimed tax repayments from HMRC to which he was not entitled, the amount obtained exceeded £1.6 million. The respondent stated it was a matter of public record that the appellant was engaged in defrauding the public revenue from 19 May 2005 and that this activity continued at the time his application was approved on 31 October 2005. The deception which the appellant practised exerted a direct bearing over the decision to grant him British citizenship. His actions had been a clear attempt to undermine the United Kingdom's immigration system and obtain status to which he was not entitled. There was no plausible innocent explanation for the misleading information he had given.

5. In relation to article 8 while the loss of citizenship would impact on the appellant's identity the effects of deprivation had to be weighed against the public interest. It

was considered reasonable and proportionate to deprive the appellant of his British citizenship.

The Decision at First Instance

6. At [2] to [4] of the determination the judge set out the relevant legislative and jurisprudential framework citing the headnote to the Upper Tribunal authority of Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC), a presidential panel. At [52] under the sub-heading "Condition Precedent," the judge stated that the issue was whether the respondent had made out her case that citizenship had been obtained by a deliberate and dishonest answer to question 4.11 on form AN. The judge noted the appellant's conviction at Croydon Crown Court and his PNC record. The first count for which the appellant was convicted related to the period 19 May 2005 to 21 August 2008, the second count related to the period 21 August 2008 to 15 December 2008. The appellant with another person ran a business which was a vehicle for cheating public revenue through fraudulent tax repayment claims. The appellant had denied any involvement in the fraud. The appellant and his business associate were both involved at a very high level in the fraud.

7. At [23] to [28] the judge summarised the notice of intention to deprive and noted the medical evidence supplied on behalf of the appellant including the diagnosis of post-traumatic stress disorder said to be resulting from his traumatic experiences that occurred whilst he was imprisoned in Belarus. The judge recorded the submissions made on the appellant's behalf. The appellant did not believe that he had lied when completing the AN form, as far as he was concerned he was giving an honest answer to question 4.11. The respondent had not taken into account the appellant's mental ill-health; not only the impact on him of the deprivation decision but also how it may have impacted on his state of mind at the time of completing the AN form. There was no reasonable excuse for the delay on the part of the respondent in depriving the appellant of his citizenship.

8. At [52] the judge began his findings. Despite the appellant's protestations of innocence he had been found guilty on both counts. The appellant had engaged in fraud for the entirety of the period covered by count one. It was therefore entirely reasonable for the respondent to draw the inference that the appellant knowingly and deliberately gave an untruthful answer to the question posed at 4.11. The appellant would have known that if he answered that question truthfully that is to say if he had admitted that he was carrying out a fraud at the time he completed the form, he would not have been granted naturalisation. There was no protection for the appellant from self-incrimination in such circumstances, the judge citing the authority of **Walile [2022] UKUT 00017**.

9. The appellant's argument was that he had incorporated his company on 19 May 2005 and was not involved in fraudulent activities from May 2005 until 8 December 2005. The judge rejected that argument at [56] stating that the appellant was found guilty of engaging in fraudulent activity from the date of the company's incorporation on

19 May 2005. It was reasonable to treat this finding in the criminal case as being conclusive in the deprivation proceedings. On the issue of proportionality, the reasonably foreseeable consequences of deprivation did not extend beyond the immediate effect that it would have on the appellant's mental health. The core question for the judge was whether there were one or more exceptional features or circumstances inclusive of delay which meant that the respondent's discretion under section 40 (3) should have been exercised differently and/or that the impact on the appellant of deprivation would be unjustifiably harsh and disproportionate. The fraud was blatant not marginal.

10. The judge acknowledged that there was no explicit discussion of the appellant's mental health issues in the decision letter but there were no reasonable grounds for believing there was a real risk of the appellant committing suicide because of the decision to deprive him of his citizenship. The respondent had considered the impact of statelessness when deciding to deprive the appellant of British citizenship but the appellant would not be stateless as a result of deprivation. The judge dismissed the appeal.

The Onward Appeal

11. The appellant appealed against this decision on grounds settled by Counsel who had appeared at first instance and who appeared before us. The grounds made three main points. The first was that the burden of proof was on the respondent to prove fraud on the appellant's part at a time when what the grounds referred to at paragraph 18.5 as "the activities" of the appellant had only just begun. There was no explicit finding that deception had motivated the acquisition of citizenship. The authority of **Walile** was only issued after the hearing and thus the judge had not had the benefit of argument on it. The second ground was that the medical health issues of the appellant had not been considered by the respondent in the decision to deprive citizenship. The respondent had issued guidance as to the situation when mental impairment impacted on an applicant's judgement at the time of a fraud. The third ground argued that the consequences for the appellant of deprivation had not been considered within an Article 8 framework by the judge. It was no answer to say that the appellant could apply again for asylum. The delay by the respondent had not been considered nor the fact that the appellant would be de facto stateless.

12. Permission to appeal was refused by the First-tier Tribunal but granted on renewal by Upper Tribunal Judge Kamara who wrote that there was no indication in the respondent's decision that the appellant's mental health difficulties had been considered in line with the respondent's own guidance. The judge could or should arguably have identified a public law error in the decision letter.

13. The respondent issued a rule 24 letter following the grant which argued that the grounds of appeal were merely a disagreement with the judge's conclusions. The judge was aware of the appellant's mental health and his immigration history in reaching the conclusion that it was reasonable for the respondent to draw an

inference that the appellant knowingly and deliberately gave an untruthful answer to question 4.11.

The Hearing Before Us

14. In consequence of the grant of permission the matter came before us to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then we would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

15. In oral submissions counsel for the appellant argued that the respondent had to show that the appellant exercised deception when completing form AN. The company was set up by the appellant on 19 May 2005. The conviction referred to a very long period over which the fraud was committed. There had to be more evidence before the judge to entitle him to rely on the assumption that the appellant had engaged in criminal conduct from May 2005. There was no evidence of when the fraud actually commenced, it was up to the respondent to establish that. In relation to ground 2, Counsel indicated he was not arguing that the appellant's mental health absolved the appellant's criminal conduct but the respondent had failed to consider the appellant's mental health when depriving him of his citizenship. Counsel conceded that there was no material put to the respondent about this when the appellant had had an opportunity to do so in 2018. In relation to ground 3 counsel acknowledged that was the weakest ground but it was important that the appellant should not be made stateless as a result of the respondent's decision. It was for the appellant to show evidence that deprivation would worse worsen his mental health.

16. We indicated to Mr Tufan that we only needed to hear from him response to the first ground. He submitted that the judge had looked at the question of when the VAT fraud had taken place, the appellant was guilty of fraud from the date of incorporation of his company. The condition precedent was clearly established.

Discussion and Findings

17. In an appeal against deprivation of citizenship, the duty of the tribunal is to consider whether the respondent's decision under appeal was one that the respondent could lawfully take. Did the respondent properly consider all relevant evidence in arriving at her decision? It is apparent that the judge understood that to be his task, since he cited what was said in Ciceri (Deprivation of Citizenship Appeals: Principles) [2021] UKUT 00238 (IAC) at [4] and he stated at [54] and [56] that the respondent had reached a 'reasonable' conclusion in relation to the appellant's involvement in criminality when he applied for naturalisation.

18. The respondent's case turned on whether at the time the appellant applied for British citizenship (in fact the on the second occasion he did so) the appellant exercised deception when replying to question 4.11 to the effect that he was of good character.

The respondent would not consider an applicant to be of good character if they were not prepared to abide by the law, were or were suspected of being involved in crime and/or had practised deceit in their dealings with HM revenue and Customs.

19. The appellant's argument on this point turns on a narrow issue, the conviction shown on the PNC which indicates that the appellant was convicted of defrauding HMRC from May 2005. The appellant says that it is for the respondent to prove that he was engaging in fraudulent activities on or about 11 July 2005 when he answered question 4.11 in the negative. The appellant seeks to argue that reliance on the PNC and the respondent's quotation from the judge's sentencing remarks are insufficient. At the very least the full sentencing remarks should have been produced.

20. We do not agree with that submission. It is difficult to see how the crown court judge at the appellant's trial would have allowed the case to proceed on an incorrect basis particularly given the absence of any evidence (beyond the appellant's own assertion) to show what the appellant says was the date when his fraudulent activities commenced. The appellant denied that he was committing any fraud at all and was not therefore prepared to demonstrate by evidence when the fraud did commence. The fraud was evidently a sophisticated and detailed one. The appellant's failure to be clear about when the fraud commenced and the fact that the appellant was convicted of fraud during the dates in question on the criminal standard of beyond reasonable doubt meant his argument was unsustainable. It was thus open to the judge to conclude, as he did at [53] and [56] ,that the jury must have found the appellant had engaged in fraud for the entirety of the period covered by Count one. This covered the period when the appellant completed form AN.

21. It was entirely reasonable in the judge's view for the respondent to draw the inference that the appellant knowingly and deliberately gave an untruthful answer to question 4.11. That was a conclusion open to the judge on the evidence, he was entitled to find that the respondent's decision was lawful. The judge was also entitled to rely on the authority of **Walile**, even if the authority was promulgated after the hearing at first instance, the common law is retrospective in operation. Had he invited submissions on that authority before finalising his decision, we are satisfied that nothing said would have altered the outcome of the appeal.

22. Mr Burrett did not press the second or third grounds in his oral submissions and we did not need to hear from Mr Tufan on those grounds. For the sake of completeness, however, our conclusions on those grounds are as follows.

23. In relation to the second ground, the judge examined the medical evidence in some detail in the determination. The argument was that the respondent should have taken the appellant's mental health into account in arriving at her decision on whether to deprive citizenship but had not done this. The problem with that argument is that the respondent did not know what the representations in relation to the appellant's mental capacity were likely to be. They had not been raised in the criminal proceedings when the appellant was convicted of fraud and sentenced to 7

years. The concerns regarding the appellant's mental health, raised in a letter dated 26 September 2018 were in the context of a potential judicial review application because of alleged delays in issuing the appellant with a British passport.

24. The respondent's deprivation letter was dated 16 September 2020 but the clinical psychologist's report post dated the respondent's letter being dated 11 May 2021. The Clinical Psychologist instructed had written to the appellant's solicitors to provide them with an update regarding the appellant's mental health and treatment. It follows that if the respondent was not made aware of matters concerning the appellant's mental health at the time of completion of form AN the respondent's decision was a lawful one. The test in a deprivation of citizenship case, following the establishment of the condition precedent is whether the respondent had arrived at a lawful decision open to her on a proper consideration of the relevant evidence.

25. Although permission to appeal was granted primarily on whether the respondent had taken into account her own policy on the mental health of applicants, that issue did not arise in this case because there was nothing for the respondent to take into account when arriving at her decision to deprive. The only potential relevance of the appellant's mental health difficulties would be if he could show that upon receipt of a negative decision his mental health would deteriorate. As the judge pointed out, the respondent had engaged with this issue in the review. Suicidal ideation triggered by the appellant's experiences in Belarus were not a foreseeable consequence of the deprivation of the appellant's British citizenship as any consideration as to whether to grant leave or deport would be made after the deprivation order was made. The appellant would be able to access emergency medical help even following deprivation, the judge relying on the authority of **AB [2016] UKUT 451**. Mr Burrett accepted before us that there was no medical evidence before the judge to suggest that deprivation of citizenship, as opposed to the threat of removal, would worsen the appellant's mental health.

26. It is clear from a fair reading of the determination that the judge considered the article 8 aspects of this appeal in some detail. At [61] the judge noted it was not in dispute that the appellant's rights under article 8 were engaged on private life grounds but there were no features or circumstances inclusive of delay which meant that the respondent's discretion under section 40 (3) should have been exercised differently. The appellant's principal concern was the prospect of removal to Belarus. The appellant was notified of possible deprivation action within a reasonable period of time after he requested a replacement passport. The issue of statelessness was dealt with in the decision letter see for example paragraphs 34 to 39 thereof. The respondent recognised that even if the decision under section 40(3) did have the consequences of rendering the appellant stateless it was reasonable and proportionate to take such a step. The judge agreed with the respondent's conclusion on that and we have heard nothing to indicate that was in error.

27. Overall this was a thorough and carefully drawn determination written by a specialist judge which examined all relevant factors and arrived at conclusions in

relation to the respondent's decision letter which were open to the judge on the evidence. We agree that the onward appeal against the judge's decision in effect amounts to no more than a disagreement with the judge's conclusions and as such we find no material error of law has been shown in the determination. We therefore dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

We have considered the anonymity order made by Upper Tribunal Judge Keith on 30 August 2023. We find there is no public policy reason for continuing the order.

Signed this 11th day of October 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge