IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001297

First-tier Tribunal No: DC/50136/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KUJTIM PONARI
(aka GEZIM PONARI)

Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr A. Papasotiru of Richmond Chambers LLP

Heard at Field House on 12 June 2023

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (Mr Ponari) appealed the respondent's (SSHD) decision dated 10 May 2021 to deprive him of British citizenship on the ground that he obtained citizenship by means of fraud, false representation, or the concealment of a material fact. The appeal was brought under section 40A(1) British Nationality Act 1981 ('BNA 1981').

3. The appellant claimed asylum in 1997 in the name of Gezim Ponari, born on 01 January 1970 and claiming to have been born in Rahovec, Kosovo i.e. a citizen of Yugoslavia. The respondent concluded that his true identity is likely to be Gezim Ponari, born on 01 January 1970 in Tropoje, Albania. In fact, it seems that there was still some question mark over his identity because in written submissions

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made by previous representatives the appellant said that his real name was Kujtim Ponari. An Albanian family certificate obtained by the respondent provides both names indicating that Gezim (DOB: 01/01/70) and Kujtim (DOB: 17/04/74) might be siblings.

4. At the time when the appellant claimed asylum there was a clear advantage to commit fraud by claiming to be from Kosovo, because people genuinely fleeing the conflict were highly likely to be granted refugee status in the UK. As a result of the fraud, the appellant was granted Indefinite Leave to Remain ('ILR') as a refugee. The appellant repeated the fraud in 1999 when he applied for a travel document. The appellant repeated the fraud in 2003 when he applied for naturalisation as a British citizen. But for the repeated fraud, the appellant would not have qualified for naturalisation as a British citizen.

5. The respondent became aware of a potential fraud after immigration officers attended the appellant's car wash business. The appellant produced a British passport stating his place of birth in Kosovo whilst his father produced an Albanian passport. The respondent asked the appellant to respond to the allegation that he used a false identity to obtain British citizenship in a letter date 17 May 2007. The appellant's then legal representative responded in a letter dated 07 September 2007 in which the appellant sought to deny responsibility for the fraud by blaming the legal representative who assisted him to make the asylum claim. Despite this weak excuse, the appellant admitted that he was aware of the fact that the details on his ILR papers were not correct at the point when he made the application for naturalisation. After some further correspondence in 2008, no further action appears to have been taken by the respondent until a letter was sent to the applicant on 17 March 2021 asking him to put forward mitigating factors. Further representations were made by his legal representative on 07 April 2021 pointing out his length of residence, strong family and private life ties in the UK, and asserting that he would have qualified for long residence in any event (without recognition of the fact that such fraud might still have acted as a bar to leave to remain on grounds of long residence under the immigration rules). It was submitted that given the lapse of time it would be unreasonable to deprive the appellant of citizenship. The applicant was issued with a notice of intention to deprive him of citizenship on 10 May 2021.

6. First-tier Tribunal Judge Bart-Stewart ('the judge') allowed the appeal in a decision sent on 31 March 2023. The judge outlined the appellant's immigration history and summarised the reasons given in the decision letter [2]-[14]. The judge found that the appellant's explanations had shifted and that this undermined his credibility. She also agreed with the respondent that his attempts to blame others was not credible [19]. She rejected the attempt made at the hearing to suggest that the appellant was simply mistaken in perceiving the area of Albania where he lived was one in the same as Kosovo. That did not explain why he claimed to have been born in Rahovec in Kosovo. The fact that the appellant was still making excuses for the fraud indicated no genuine remorse and undermined his claim to be of good character. She made clear that fraud and deception are serious offences [20].

7. Turning to consider the case within the relevant legal framework, the judge took a structured approach to her findings, following the guidance of the Upper Tribunal in *Ciceri (deprivation of citizenship appeals: principles) Albania* [2021] UKUT 238 [23]. The judge concluded that the condition precedent was satisfied because the

appellant had used a false identity and made false representations on repeated occasions to obtain status that he would otherwise not be entitled to [24]-[25].

8. The judge went on to consider what the reasonably foreseeable consequences of deprivation might be, including whether the decision amounted to a disproportionate breach of the appellant's rights under Article 8 of the European Convention. She referred to the principles outlined in the recent Upper Tribunal decision in *Muslija (deprivation: reasonably foreseeable consequences)* [2022] UKUT 00337 [26]. The judge made clear that she was not considering what the consequences might be of potential removal because no such suggestion was made at this stage of the proceedings. She considered the fact that the respondent was in correspondence with the appellant in 2007-2008, and even if she accounted for some time to make further enquiries after that, the delay in contacting the appellant again was at least 12 years. The judge noted that the appellant had a wife and children who were British nationals and considered that 'he may well be granted some form of discretionary leave' [27]. The judge made clear that the appellant acknowledged the deception when challenged in 2007 although she still did not 'consider that he was full and frank.' She also noted 'the extreme delay' and went on to consider the principles outlined in *EB (Kosovo) v SSHD* [2008] UKHL 41. The judge's key finding was as follows:

> '31. There has been no explanation for the extraordinary delay. The submission appeared to be that there is no need for an explanation as delay offers no immunity. It is however highly relevant to the issue of proportionality. A delay of 12 years in making a decision after the Secretary of State has evidence and an admission of wrong doing (sic) is unreasonable. Having heard nothing more for over 12 years, taking 2009 as a reasonable time for the Secretary of State to have made a decision, I consider that it was not unreasonable for the appellant to consider that the Secretary of State was not going to take further action and to continue with his life. He had another child many years after the last notification from the Home Office.'

9. In her conclusion, the judge considered the fact that the appellant had a wife and three children in the UK and the impact that a further period of limbo, in addition to the period since 2007, might have on the family. She found that if the public interest in deprivation was so strong, 'a decision should have been made at a much earlier point in time.' For these reasons, she concluded that deprivation would amount to a disproportionate breach of Article 8 and allowed the appeal.

10. The Secretary of State applied for permission to appeal to the Upper Tribunal on the following grounds:

    (i) The First-tier Tribunal was procedurally unfair because the appellant did not argue delay or a 'diminishing sense of impermanence' in any meaningful way in his submissions. The respondent was not given a fair opportunity to deal with the issue.

    (ii) The First-tier Tribunal made a material mistake of fact and/or gave inadequate reasons for its decision. The Tribunal erred in finding that there was no explanation for the delay when the respondent's policy states that there is no time limit for making a decision. The Court of Appeal's analysis of *EB (Kosovo)* in *Laci v SSHD* [2021] EWCA Civ 769 was only focussed on the second of Lord Bingham's examples i.e. the diminishing sense of impermanence. The decision in *Laci* was made without regard to the Supreme Court's decision in *R (Agyarko) v SSHD* [2017] UKSC 11. The

respondent was denied an opportunity to make submissions on the effect of delay and the weight to be given to the public interest.

(iii) The First-tier Tribunal was irrational and/or failed to give adequate reasons for placing weight on the position of the appellant's wife and children when no evidence had been produced to show what the effect would be. The findings went beyond what was reasonably foreseeable on the evidence.

11. I have considered the First-tier Tribunal decision, the limited evidence that was before the First-tier Tribunal (which did not include an appellant's bundle), the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but I will refer to any relevant arguments in my findings.

Decision and reasons

12. It is likely that another judge might have taken a different view on the facts of this case, given the appellant's repeated fraud and refusal to take full responsibility for his actions even by the date of the hearing. The question that I must ask is whether the judge directed herself properly to the relevant legal framework, considered relevant matters, and made a decision that was within a range of reasonable responses to the evidence.

13. The first ground alleging procedural unfairness is an improper argument on the facts of this case. The respondent's decision letter addressed submissions on delay. It is also clear from the appeal form that the appellant mentioned a delay of 14 years albeit it was not particularised properly by his then representative as a matter that went to the proportionality of the decision. The respondent's review that was prepared for the First-tier Tribunal hearing referred to the appellant's argument 'in relation to delay'. The appellant's skeleton argument also referred to the 14-year delay before a decision was made. In the circumstances, it is wholly unarguable that there was any procedural unfairness. The respondent was on notice that the issue of delay was relied upon. In any event, it was self-evident that it might be a relevant issue on the facts of the case.

14. The second ground as drafted was rather confused and did not develop any coherent argument as to why the First-tier Tribunal decision involved an error of law with reference to the decisions in *Laci, EB (Kosovo)*, or *Agyarko*. The point was not developed to any meaningful way at the hearing. It is difficult to see what relevance the decision in *Laci* had save for the fact that, in that case, the Court of Appeal upheld a First-tier Tribunal decision in which there had also been a significant delay with reference to *EB (Kosovo)*. The judge in this case did not purport to rely on the decision in *Laci*.

15. The second ground appears to be limited to a proposition that delay was irrelevant to the issue of proportionality because the respondent had no policy to decide a case within a specific timeframe. The section of the Supreme Court decision in *Agyarko* relied upon in the grounds makes a trite statement of law relating to the margin of appreciation. The reference appears to be used to support an assertion that it is for the respondent to decide where a fair balance lies for the purpose of Article 8. However, the case law makes clear that it is open to a court or tribunal to decide that issue for itself.

16. Ms Cunha argued that it did not matter whether an explanation was given for the delay because the policy did not provide a time limit. That is a question that goes to the lawfulness of the decision with reference to the policy, but in my assessment, the question of delay was still a relevant matter in assessing whether deprivation was proportionate. Nothing in *EB (Kosovo)* or *Laci* precluded the judge from considering whether the lengthy delay impacted on the weight to be given to the public interest in deprivation.

17. It was open to the judge to consider whether the decision to deprive was proportionate. If a decision had been made promptly, it is unlikely that any case could be made to show that the decision would be disproportionate. The key issue was whether the 'extreme delay' was sufficient to outweigh the obvious public interest in deprivation.

18. The judge did not conduct a proleptic assessment. She cautioned against looking too far ahead to the possibility of removal. She confined her assessment to the effect of deprivation in the immediate and foreseeable aftermath of the decision. It was open to the judge to give weight to the long delay before the decision was made in assessing the overall impact that a further unknown period of limbo might have on the appellant and his family. Even if the respondent's policy sets no time limit, it was also open to the judge to take note of the fact that no explanation had been offered for such an extraordinary delay. The judge was entitled to observe that if the public interest was so strong, one might have expected the respondent to act promptly. It was open to the judge to conclude that public interest in deprivation was significantly diminished by such a long delay.

19. The appellant's personal circumstances did not appear to be in dispute. Although there was no specific evidence from the family, it was reasonable for the judge to infer that further delay and uncertainty about their husband/father's position was likely to have an adverse effect on a long-established family with children who were born and brought up in the UK. It is clear from an overall reading of the decision that the mere fact of the delay was the factor that tipped the balance. The judge did not place undue weight on this issue even if the precise impact had not been particularised. Having rejected the first two grounds of appeal, I find that the third is not sufficiently strong to disclose an error of law that would have made any material difference to the outcome.

20. Many would consider the judge's decision generous given the finding that the appellant was still not being entirely candid. However, I conclude that the decision was within a range of reasonable responses to the evidence in view of the extraordinary length of the unexplained delay before a decision was made to deprive the appellant of citizenship. The grounds amount to little more than a disagreement with the outcome of the appeal.

21. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law.

The decision shall stand.

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 June 2023