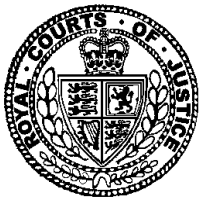

Neutral Citation Number: [2021] EWHC 408 (Admin)

Case No: CO/2513/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2021

Before :

Mr Timothy Corner, QC
Sitting as a Deputy High Court Judge

- -

Between :

R (on the application of Edmir Xhelilaj)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Eric Fripp (instructed by Rashid & Rashid) for the **Claimant**
Zane Malik (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 16th February 2021

- -

Judgment Approved

Timothy Corner, QC:

1. In this matter the Claimant seeks judicial review of the Defendant's refusal to return his British passport to him.

BACKGROUND

2. The Claimant is a British citizen whose stated place of birth is now in the Republic of North Macedonia. The Claimant states that he was born on 20th January 1986 at Sells Tetova in the Socialist Republic of Macedonia, a component of the former Republic of Yugoslavia. He is of Albanian ethnicity.

3. On 14th August 2001 the Claimant entered the United Kingdom and in October 2001 he sought asylum. This was refused, but exceptional leave to remain was granted, and on 21st December 2005 the Claimant was granted indefinite leave to remain. Later he applied for naturalisation as a British citizen, and this was granted on 1st September 2010. He applied for a British passport on 15th September 2010 and was asked to attend an interview to confirm his identity. On 5th October 2010 a British passport (no 466493570) was issued to the Claimant.

4. On 14th July 2018 a son was born to the Claimant and an application was made for a British passport in the son's name. This was rejected on 7th September 2018 on the basis that the counter-signatory on the form was not accepted. A new application was made and on 13th September 2018 the Defendant wrote to the Claimant seeking a copy of his own passport for use in processing the application for his son. The Claimant provided his passport to the Defendant. On 27th November 2018 the Defendant wrote to the Claimant requesting a copy of his birth certificate.

5. The Claimant's solicitors wrote to the Defendant on 29th November 2018 saying

> "Our client has not changed his name before or after entering the UK, nor his date of birth. However, he wishes to inform you that when he entered the UK he was a minor and did not have the birth certificate on arrival. Since he has now spent most of his life in the UK having left Yugoslavia during the civil war, he does not possess, nor is he able to obtain the birth certificate from the time of his birth and it is unlocatable due to the turmoil of war."

6. Attached was a statutory declaration from the Claimant, stating amongst other things that

> "I hereby confirm unequivocally that I have been honest with all information provided to the authorities and notwithstanding this, as I have entered the UK as a minor and due the turmoil of the civil war, I do not have in my possession a birth certificate….."

7. On 7th January 2019 the Defendant wrote to the Claimant informing him that she had concerns about his identity and that it had been decided that his British passport was to be retained and not returned.

8. On 4th February 2019, the Defendant wrote to the Claimant asserting that she possessed information suggesting that he had provided false information to obtain British nationality and notifying him that she was considering depriving him of his

British citizenship by exercise of the power under section 40(3) of the British Nationality Act 1981 ("the 1981 Act"), setting out the consequences of any such decision and inviting the Claimant to provide documents proving his Macedonian origin.

9. The Claimant's MP wrote to the Defendant regarding the case on 12th March 2019 and on 8th April 2019 a letter before claim was sent the Defendant with medical evidence (a letter from his General Practitioner dated 18th March 2019) concerning the effect on the Claimant's health of delay in determining his status.

10. On 2nd July 2019 the Claimant attend an interview at the Defendant's premises relating to the contemplated decision to remove his British citizenship. On 5th July 2019, the Defendant wrote to the Claimant requesting further documentation, which the Claimant provided in August 2019. By letter dated 16th August 2019, the Defendant set out the main concerns;

"On 2nd July 2019 your client attended an interview at HM Passport Office in London where it was put to him that there was no record of his birth in Macedonia, in order to allow him the opportunity to confirm his identity.

He claimed that as he was born at home and as such his birth was not registered.

He did not provide any identification or other documentation from prior to his entry into the UK.

His British passport shows extensive travel to Albania within 2 months of its issue in 2010 up to an entry stamp on 10th April 2016. The passport does not show any travel to Macedonia. There is no exit stamp from Albania which indicates that he may hold a further passport other than his British passport, this is denied by your client who states that he presented his passport to immigration and cannot explain why there is no stamp present.

Following our letter to you and your client dated, 05 July 2019, no further documentation was submitted to support your client's identity and a suggestion to your client to approach the Macedonian authorities for assistance does not appear to have been acted upon."

11. By letter from his solicitors dated 29th August 2019 the Claimant provided evidence of his travel history obtained from the Albanian authorities. On 16th September 2019 the Defendant wrote to the Claimant suggesting that the copy travel record was "not particularly clear", asserting that there were discrepancies between the entries in the travel record in the stamps in the Claimant's passport, and asking for any other passport used in the relevant period.

12. On 30th September 2019, the Claimant's solicitors wrote to the Defendant enclosing a more legible copy of the travel record and translation and saying;

"You..stated that there appear to be 24 entries on the schedule but that there is no translation and there are only 13 stamps in the passport including entry and exit stamps. Our client instructs and reiterates that he has no other passports aside from his British passport and has always used the latter to travel outside the country. With

regard to the stamps it is our client's submission that the only explanation to this is that his British Passport might not always have been stamped on entry or exit. He has provided a translated version of the copies for your ease of information and reference."

13. In a letter to the Defendant of 14th October 2019 the Claimant's solicitors reiterated;

"…the Home Office is…aware that the client explained that his birth was not registered in Macedonia as he was born at home. He entered the UK as a minor as the Home Office is already aware but never presented any form of identification because he had none."

14. In a letter also dated 14th October 2019 the Defendant stated its position that;

"on the documentation and information available, HM Passport Office is unable, on balance, to establish [the Claimant's] identity and therefore not in a position to return to issue a new passport at this time."

15. On 6th November 2019, the Claimant issued judicial review proceedings challenging the Defendant's delay in addressing the question of whether to exercise her section 40(3) 1981 Act power and continued retention of his passport. Permission to apply for judicial review was granted on 18th February 2020. On 11th March 2020 the Defendant wrote to the Claimant;

> "On 04 February 2019 we wrote to you to advise you that the [Defendant] was considering depriving you of your British citizenship on the grounds that it had been obtained as result of fraud, false representation, or concealment of material fact.
>
> Your case was referred to us because it was believed that you had obtained British citizenship using a false identity. The full facts and any mitigating circumstances that you have presented have now been considered in accordance with our policy.
>
> I am now writing to inform you that the [Defendant] has decided not to deprive you of citizenship because your case does not fall within our policy."

16. The judicial review claim was then resolved by consent on the basis that the Defendant had issued a decision not to deprive the Claimant of British citizenship, the Claimant had leave to withdraw the claim and the Defendant would pay the Claimant's costs. The Order by Consent was signed on 25th March 2020.

17. On 30th March 2020 the Claimant wrote to the Defendant requesting the return of his passport.

18. The Defendant responded on 29th April 2020, stating;

"Her Majesty's Passport Office… accepts that your client was and remains a British Citizen. The issue is with [his] identity not his status. HM Passport office must maintain the integrity of the passport so that people have confidence in the details presented with it."

19. The letter went on to state that the Defendant was not in a position to return the passport "at this stage" due to concerns regarding the Claimant's identity set out in the Defendant's letter of 16th August 2019.

20. In response to further letters of claim, the Respondent stated in a letter of 6th July 2020;

"I note that your challenge relates to the fact that Her Majesty's Passport Office… has refused to return the British passport of [the Claimant]. I have since reviewed this matter on your behalf, and I am satisfied that the action taken.. in retaining the passport has been appropriate and in accordance with policy.

"For clarification there is no statutory right to have access to a British passport. HM Passport Office will only issue a passport once satisfied on the balance of probability as to an applicant's identity, nationality and entitlement.

Although the [Claimant's] passport was initially issued in good faith due to his Certificate of Naturalisation as a British Citizen, routine checks have subsequently raised doubts about his identity requiring HM Passport Office to reassess his entitlement. [reasons for doubts then outlined]

Since doubts have been raised about [the Claimant's] identity and no independent documentary evidence has been provided to substantiate his claimed identity, HM Passport Office cannot rely on his naturalisation certificate.

HM Passport Office has a duty to protect the integrity of the British passport. It cannot reach that duty to allow [the Claimant] to remain in possession of his British passport when he has not met the criteria as to identity, nationality and entitlement.

I find that [the Claimant] has been afforded numerous opportunities to evidence his identity and establish his claim on the balance of probability to British passport facilities. As he has failed to do so I find the decision made by HM Passport Office to retain your client's passport to be the correct one.

The matter is distinct from the decision not to deprive your client of his British Citizenship. The nationality status of [the Claimant] does not comprise all the provisions of passport facilities as set out in the Ministerial Statement of the Secretary of State for the Home Department. This confirms that passports are issued when the Home Secretary is satisfied as to:

1.<u>The identity of an applicant</u>; and

2. The British nationality of applicants, in accordance with relevant nationality legislation; and

3. There being no other reasons (as set out below) for refusing a passport…

Your client's identity remains in doubt for the reasons discussed. As a result, Passport 466493570 will not be returned to him until his entitlement to hold that passport in the identity provided has been established….."

21. This application for judicial review was filed on or about 14th July 2020 and permission was granted by Bourne J on 25th November 2020.

RELEVANT LAW AND POLICY

Law and policy on passports and nationality

22. The grant or withdrawal of the passport is an exercise of the Royal Prerogative but the High Court has jurisdiction to review such a decision; R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett [1989] 1 QB 811 at 817C and R (XH and AI) v Secretary of State for the Home Department ("SSHD) [2017] EWCA Civ 41.

23. Lang J summarised the law on issuance of passports and the relationship with nationality in R (Easy) v SSHD [2015] EWHC 3344 at [29]-[38]

"[29] In his submissions, the Claimant did not clearly distinguish between the issue or renewal of a passport and the grant or withdrawal of British Citizenship…

[30] Thus, although under section 3(9) of the Immigration Act 1971, a person seeking to enter and remain in the UK can rely on his passport as proof of British citizenship, this provision is not determinative of the issue in this case, namely whether or not the passport was properly issued or ought to be renewed….

[31] The Claimant is also incorrect to submit that a passport can only be withdrawn if citizenship is withdrawn under section 40 of the British Nationality Act 1981, as decisions as to the grant of a passport are separate from decisions as to citizenship.

[32]…..The power to issue passports is derived from the prerogative…However, in modern times, the executive does not exercise the power arbitrarily or capriciously. Passports will generally be issued to those who have established that they are British citizens, unless there are exceptional circumstances not to do so.

[33] Statements have been issued by HM Government from time to time on the manner in which the prerogative will usually be exercised. Most recently, on 25th April 2013, the Defendant laid a written ministerial statement in the House of Commons. I set it out below, with emphasis added to relevant passages;

> 'The British passport is a secure document issued in accordance with international standards set by the International Civil Aviation Organisation. The British passport achieves a very high standard of security to protect the identity of the individual, to enable the freedom of travel for British citizens and to contribute public protection in the United Kingdom and overseas.
>
> There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.

This Written Ministerial Statement updates previous statements made to Parliament from time to time on the exercise of the Royal Prerogative and sets out the circumstances under which a passport can be issued, withdrawn or refused. It redefines the public interest criteria to refuse or withdraw a passport.

A decision to refuse or withdraw passport must be necessary and proportionate. The decision to withdraw or refuse a passport and the reason for that decision will be conveyed to the applicant or passport holder. The disclosure of information used to determine such a decision will be subject to the individual circumstances of the case.

The decision to refuse or withdraw a passport under the public interest criteria will be used only sparingly. The exercise of this criteria will be subject to careful consideration of a person's past, present or proposed activities.

For example, passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organised criminal activity.

This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes has become increasingly apparent with developments in various parts of the world.

Operational responsibility for the application of the criteria for issuance or refusal is a matter for the Identity and Passport Service (IPS) acting on behalf of the Home Secretary. The criteria under which IPS can issue, withdraw or refuse a passport is set out below.

Passports are issued when the Home Secretary is satisfied as to:

i the identity of an applicant; and

ii the British nationality of applicants, in accordance with relevant nationality legislation; and

iii there being no other reasons (as set out below) for refusing a passport. IPS may make any checks necessary to ensure that the applicant is entitled to a British Passport.

A passport application may be refused or an existing passport may be withdrawn. These are the persons why may be refused a British passport or who may have their existing passport withdrawn;

i a minor whose journey was known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence or care order had been made or who has been awarded custody; or care and control; or

ii a person for whose arrest a warrant had been issued in the United Kingdom, or a person who was wanted by the United Kingdom police on suspicion of a serious crime; or

iii a person who is the subject of

- a court order, made by a court in the United Kingdom or any other order made pursuant to a statutory power, which imposes travel restrictions or restrictions on the possession of a valid United Kingdom passport; or

- bail conditions, imposed by a police officer or a court in the United Kingdom, which includes travel restrictions or restrictions on the possession of a valid United Kingdom passport; or

- an order issued by the European Union or the United Nations, which prevents a person travelling or entering a country other than the country in which they hold citizenship; or

- a declaration made under section 15 of the Mental Capacity Act 2005.

iv A person may be prevented from benefiting from the possession of a passport if the Home Secretary is satisfied that it is in the public interest to do so. This may be the case where;

- a person has been repatriated from abroad at public expense and their debt has not yet been repaid. This is because the passport fee supports the provision of consular services for British citizens overseas; or

- a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment passport facilities is contrary to the public interest.

There may be circumstances in which the application of legislative powers is not appropriate to the individual applicant but there is a need to restrict the ability of a person to travel abroad.

The application of discretion by the Home Secretary will primarily focus on preventing overseas travel. There may be cases in which the Home Secretary believes that the past, present or proposed activities (actual or suspected) of the applicant or passport holder should prevent their enjoyment of the passport facility whether overseas travel was or was not a critical factor.'

[35] The burden is on the applicant to establish his entitlement to a passport and the standard of proof is the civil standard of the balance of probabilities….

[37] In my judgement, it is a legitimate exercise of the Defendant's discretion to issue passports for a limited duration…and to require regular renewal. Renewal applications have to be supported by the required proof of identity and citizenship. This policy enables HMPO to make periodic security checks, for example, that the passport holder is still alive; that his passport has not been stolen; and that he continues to be eligible….

[38] In my judgement, when considering a renewal application, the Defendant ought to exercise her discretion in accordance with the written ministerial statement, which reflects her policy and usual practice, and the ordinary public law principles of rationality, consistency and fairness. The authorities have established that the Defendant must show cogent reasons for refusal:

i) 'having issued one passport, the Defendant would have to show substantial well-founded and cogent reasons for not renewing it' *per Edis J* in R Rahman v Secretary of State for the Home Department *[2015] EWHC 1146 (Admin), at [27]……"*

24. In what follows I refer to the Written Ministerial Statement cited by Lang J as the "WMS".

25. In R (XH) and (AI) v SSHD [2017] 2 WLR 1437 the Court of Appeal stated (see [116] and [118]) that strong or compelling justification had to be given for cancelling a passport on national security grounds.

26. In a number of cases in which an individual claims to be a British citizen (or to have kindred citizenship status) by reason of "automatic" nationality provisions creating citizenship by birth on the territory or descent, questions of precedent fact have arisen. In R (Harrison) v SSHD [2003] EWCA Civ 432, the Court of Appeal (see Keene LJ at [34] and with whom May LJ and Arden LJ agreed) held that where is a dispute about citizenship, the Court will resolve any disputes of fact and find the facts for itself according to the evidence before it.

27. The Court may take oral evidence as to the facts, as in R (Sinha) v SSHD [2013] EWHC 711 (see Eder J at [14]) and R (Salih) v SSHD [2018] EWHC 2539.

28. In R (William) v SSHD [2021] 4 WLR 8, the claimant was found after taking of evidence by the Court to originate from Albania and not from Kosovo as he had claimed. His application for judicial review of the decision to withdraw his passport ("the Decision") was dismissed despite the fact that the Defendant had earlier indicated ("the Citizenship decision") that she did not intend to deprive the Claimant of British citizenship acquired by naturalisation whilst presenting false details about his origins.

29. Morris J dealt with the relationship between citizenship and withdrawal of passports at [13], setting out the following propositions drawn from R (Easy) v SSHD (cited above);

"(1) issue and renewal of the passport, on the one hand, and grant or withdrawal of British citizenship, on the other, are distinct matters.

(2) Because decisions on the former are separate from decisions on the latter, a passport can be withdrawn in circumstances where citizenship is not withdrawn or deprived under section 40 BNA 1981.

(3) Passports will generally be issued to those who have established that they are British citizens unless there are exceptional circumstances not to do so.

(4) A passport may be refused either because British citizenship is not recognised, or the applicant's identity is in doubt.

(5) The burden is on the applicant to establish his entitlement to a passport, and the standard of proof is the civil standard of the balance of probabilities."

30. Morris J heard oral evidence from the Claimant and decided on the basis of that evidence that the Claimant was not who he claimed to be.

31. However, the Claimant contended that even given the judge's finding that he had not established his identity as a precedent fact, and even though he had concluded that he was not who he claimed to be, the decision to withdraw his passport was invalid on public law grounds, because of a "clear and inexplicable inconsistency" between the Decision and the Citizenship decision. The Claimant based that contention on six grounds.

32. At [58] Morris J said

"…the position here is somewhat unusual and odd. It does appear that following a reference by HMPO, the UKVI was investigating the same issue of identity and appears to have concluded not to have deprived him of his citizenship, possibly, on that basis. It may also be unusual that, on the Defendant's case, the Claimant is a British citizen and yet not entitled to a passport."

33. Nevertheless, the judge rejected the Claimant's argument that the decision to withdraw the passport was invalid.

34. The Claimant's first ground was that it was Wednesbury unreasonable to withdraw the passport whilst at the same time not depriving the Claimant of his citizenship.

35. Morris J said (at [62]) that first, he agreed that the Citizenship decision might appear to import a decision as to the claimant's identity. He added;

"Secondly, however, the claimant does not contend that the Citizenship decision gives rise to an issue estoppel such that the defendant is bound to find that the claimant's identity is established."

36. He added thirdly (at [63]) that there might be a question whether under the terms of the WMS strictly construed "identity" is a ground for withdrawing a passport as opposed to issuing or refusing to issue one. His conclusion was that identity can indeed ground withdrawal, and that the three Roman numeral numbered sub-paragraphs in the WMS applied to issue, refusal and withdrawal.

37. He continued at [64] to [66]

[64] Fourthly, as to the suggestion that a different policy applies to deprivation of citizenship, under section 40 (3) BNA 1981 it was not at the time explained what 'policy' was being replied to the Citizenship decision, and it is still not entirely clear. Only at my prompting in the course of the hearing has the Defendant produced the relevant policy document headed "chapter 55 Deprivation and nullity of British Citizenship." Mr Hansen referred me to a particular example where the Defendant would decide not to deprive a person of citizenship (at paragraph 55.7.13 example (f))

being a case where the passport holder had been a minor at the time of the relevant deception. He suggested that this applied in the present case, because at the time of the relevant deception the claimant was a minor. Certainly, if the relevant deception was when the asylum claim was first made back in 1998 that would be the case. However, there is no evidence that this was the reason of 'policy', for the Citizenship decision (as opposed to a conclusion that there was no fraud or false representation as to identity).

[65] Fifthly however I accept that the two Decisions are distinct and different in nature (see the propositions of law set out in para 13 above). Further, it is undoubtedly the case that legal test for deprivation under section 40 (3) is different from the legal test for issue and/or withdrawal of a passport. In the former case clear fraud or false representation must be established, and the burden of proof is on the Defendant (see the words 'the Secretary of State is satisfied'). Whilst the standard of proof remains the civil standard, it may be that cogent evidence will be required to establish a case of fraud. In the case of identity and passport, the burden is on the claimant positively to establish true identity. Thus, it is possible that whilst the claimant might not discharge the burden on him, it does not follow that the defendant will have discharged its burden to show fraud or false representation. On this basis, a decision that the Defendant is not satisfied that fraud has been established under section 40(3) is not necessarily inconsistent with a decision that the applicant has not established his true identity. Thus, even if there were no separate policy reason for the citizenship decision, I am not satisfied that the two decisions are mutually inconsistent.

[66] Sixthly, on any view, given my conclusion on issue 1 the Decision, of itself, cannot have been *Wednesbury* unreasonable. Having found as a fact that the claimant cannot establish his claimed identity, it cannot have been Wednesbury unreasonable for the defendant not to have been satisfied as to his identity. In those circumstances, the only possibly questionable decision is the Citizenship decision, but if that decision, or maintaining it, is said to be Wednesbury unreasonable, that does not assist the claimant. First, presumably, the claimant has no desire to include that decision, favourable as it is to him. Secondly, even if the Citizenship decision is in some way invalid, as far as the Decision is concerned, it is highly likely, if not certain, that the outcome for the claimant would have been the same."

38. The judge also rejected the Claimant's contention that the Defendant's decision not to deprive him of his citizenship gave rise to a substantive legitimate expectation that that he was entitled to a British passport. He said at [69] that

".. The representation or promise relied on must be a representation that *the Passport* would not be withdrawn or would be returned. A representation that the claimant would not be deprived of his citizenship is not sufficient to create an expectation of non-withdrawal of the Passport. In my judgement, neither the Citizenship decision itself, nor the grant of a passport to his son, amounts to such a representation as to the Passport. In the latter case, the defendant made clear, when issuing a passport to the son, that it was withholding the Passport because it remained concerned about proof of the claimant's identity. In the former case, there is no unequivocal representation in the Citizenship decision that the Passport would be returned."

39. The judge also dismissed the legitimate expectation argument on an additional ground, namely that the Claimant had not given full disclosure of the relevant facts.

40. At [76] he dealt with the Claimant's argument that the decision to withdraw his passport infringed his private life under art 8 ECHR;

> "The claimant… contends that the withdrawal of the Passport has caused him significant hardship in his life, including financial expenditure, an adverse on his business, upon his ability to apply for credit and obtain a mortgage, and the consequence of facing criminal prosecution. I have no reason to doubt the factual impact to which he refers. However, even if withdrawal of a passport is capable of engaging article 8 ECHR as an interference with private life, (which I do not determine in these proceedings), and even if there has, on the facts here, been interference with those rights, that has been done in accordance with the law and is justified by the defendant's legitimate and proportionate aim to have a policy designed to ensure that only those entitled to a British passport are granted such a passport and to ensure that those not so entitled have their passports withdrawn."

41. At the hearing I was provided with the ministerial policy on Deprivation and Nullity of British Citizenship referred to in Morris J's judgement. It states (at 55.3) that the Secretary of State "may" deprive a person of citizenship under section 40 of the 1981 Act where the person acquired the citizenship or status as a result of his registration or naturalisation on or after 1st January 1983 and the registration or naturalisation was obtained by means of fraud, false representation or concealment of any material fact. Those terms are defined in the policy. Deprivation is discretionary and the relevant caseworker must consider, for instance (55.7.10) the seriousness of the fraud, misrepresentation or concealment and (55.7.11) any mitigating circumstances, as well as (55.7.11.16) the impact of deprivation on the individual's rights to private and family life under the European Convention.

Issue estoppel in public law cases

42. It was common ground at the hearing that it is now established that issue estoppel applies in the area of public law, including immigration. The Court of Appeal applied those principles very recently in R (Al-Siri) v SSHD [2021] EWCA Civ 113.

43. That case concerned whether the Defendant could decide under paragraph 334 (iii) of the Immigration Rules that the claimant in that case ("YAS") did not qualify for refugee status because there were reasonable grounds for regarding him as a danger to the security of the United Kingdom within Article 33(2) of the Refugee Convention ("the Convention").

44. The Court of Appeal decided that the Defendant was precluded from making the impugned decision because of a previous decision of the First Tier Tribunal of the Immigration and Asylum Chamber (upheld on appeal by the Upper Tribunal) that YAS was not excluded from the Convention under Article 1F (c) of the Convention and that he was a refugee.

45. Phillips LJ, with whom the other Lords Justices agreed, said that

> "[46] In my judgement the *ratio* of the decision in *TB (Jamaica)* was not restricted in the manner suggested by Mr Tam, but was (as the Judge held) in recognition of the broad principles of finality and proper use of process (or power), applicable in the public law sphere just as in the private law context: a party must bring before the

court their entire case, will be bound by the resulting decision and will not be permitted to re-open that decision on the basis of matters which could have been raised, but which were not.

[47] The fundamental importance of those principles was explained in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 by Lord Bridge of Harwich (with whom all other members of the House agreed) at p.289:

> 'The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa.' These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle, they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction of the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

[48] In *Arnold v National Westminster Bank plc* [1991] 2 AC 93, Lord Keith of Kinkel, giving the leading speech, emphasised that there was no logical difference between 'a point which was previously raised and decided and one which might have been but was not' (p.108), but recognised that p.109 that

> '… there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result…'

[49] In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 Lord Sumption JSC summarised the effect of *Arnold* in relation to issue estoppel as follows at [22]:

> '… Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised, but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances been raised."

[50] In *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7, the claimant had been detained pending deportation pursuant to an Order made under the [Nationality, Immigration and Asylum Act], having lost his appeal against such determination, before the [Asylum and Immigration Tribunal]. It was subsequently determined that the Order was ultra vires with the effect that the deportation order and the detention were unlawful. Lord Carnwath JSC, referring to the above authorities,

expressed the view that, even in the case of illegal detention, the principles of res judicata and issue estoppel could have been invoked by the Home Secretary to debar the claimant from pursuing a claim for damages based on that illegality, the claimant having failed to challenge the validity of the Order before the AIT and being bound by its decision that his deportation was lawful."

46. In another recent decision (albeit issued a few days before the judgement in Al-Siri), Fordham J, sitting in the Upper Tribunal (Immigration Tribunal) in R (Balhav Singh) v SSHD (Case No: JR/5767/2019) also concluded that issue estoppel applies in public law. He said at [33];

"The two essential points for the purposes of the present case, in my judgement come to this. (1) There is a strong role of public policy which establishes that the issue of determination relating to the legal right of a public authority to take action should be given finality. (2) A court or tribunal in subsequent proceedings in the public law arena may disapply that rule of public policy in the interests of justice, as where material relevant to the correct determination of a point involved in earlier proceedings has become available to a party and could not by reasonable diligence have been adduced in the earlier proceedings."

SUBMISSIONS

47. The Claimant, by his counsel Mr Fripp, says that the critical facts are these;

i) The Claimant became a British citizen by naturalisation on 1st September 2010;

ii) Notwithstanding any subsisting question regarding the Claimant's place of birth and/or nationality by birth, the Defendant confirmed on or by11th March 2019 both that the Claimant was then a British citizen and that the Defendant had decided not seek to remove the Claimant's citizenship by use of her power and the section 40(3) of the 1981 Act;

iii) That confirmation by the Defendant was central to the previous judicial review application in relation to which permission was granted on 18th February 2020;

iv) The previous proceeding was resolved by consent on or about 25th March 2020 as a consequence of the letter of 11th March 2020, the Order recording the agreement coming into being "UPON the Defendant issuing a decision on 11 March 2020, not to deprive the Claimant of British citizenship."

48. The Claimant argues that because of the Defendant's conduct in relation to the previous judicial review proceedings, this is not a case where the issue of the Claimant's identity should be treated as a preliminary issue for the court to determine on the basis of oral evidence. In William (see the judgement in that case at [5]) it was common ground that the issue of identity was to be treated as one of precedent fact, but the Claimant did not agree to identity being so treated in the present case, because of the Defendant's decision of 11th March 2020. Because of that decision, bar fundamental change of circumstances the Defendant is now prevented from maintaining that there is any ground capable of justifying deprivation of nationality or his passport-including his identity.

49. The Claimant's contentions can in my judgement be summarised as follows.

50. First, the Claimant contends that given the Defendant's decision not to remove his citizenship, it would be Wednesbury unreasonable for him now to withhold his passport.

51. Secondly, the Claimant says that the Defendant is prevented by issue estoppel from now withholding the Claimant's passport because of doubts about his identity. The fact that the Defendant remains unsatisfied as to a detail of the Claimant's identity (birthplace or kindred fact) is irrelevant to the passport question, because the primary question of British citizenship (including its retention) has been decisively answered.

52. Thirdly, the Claimant argues that for the Defendant to withhold the Claimant's passport because of concerns about his identity would be contrary to the WMS, because the Defendant has previously stated that she would not seek to deprive the Claimant of his citizenship.

53. The Claimant also says that even if an issue of wider identity that does not affect entitlement to nationality is capable of justifying withholding a passport, this is not made good in the present case, where the "height of the Defendant's expressed reservation is suspicion, and the Claimant has offered extensive response to concerns."

54. Overall, the Claimant argues that the withholding of his passport is unlawful in domestic public law terms, and in parallel it represents a disproportionate breach of article 8 of the ECHR.

55. The Defendant, represented by Mr Malik, contends that contrary to the Claimant's case the issue of the Claimant's identity and entitlement to British citizenship is a matter for this court to decide on the basis of the evidence before it, following the approach in such cases as Harrison and William. The Defendant says, relying on Sinha at [14], that the burden of proof is on the Claimant to establish his case on the balance of probability.

56. The Defendant noted in her skeleton argument that the Claimant had not provided a witness statement and had stated that he would not attend Court for cross examination (although at the hearing that did not appear to be the Claimant's case, as I say below). In the absence of evidence from the Claimant, says the Defendant, "[t]he only inference that can be drawn is that the Claimant's case on the facts is not true. The Court should attach no (or very little weight) to the factual assertions made in the pleadings."

57. In relation to the documentary evidence adduced by the Claimant, the Defendant states that this evidence should have been exhibited to witness statements with an explanation of each documents. Given that this was not done, no or very little weight should be attached to this evidence. It is for the Claimant to show that the documentary evidence adduced by him is reliable and he cannot do so without giving oral evidence and tendering himself for cross examination.

58. The Defendant notes the following particular points arising from the investigation into the Claimant's identity;

(1) Checks with the Macedonian authorities had confirmed that there was no trace of Edmir Xhelilaj in the details presented, and that it was "highly likely" that the Claimant was using a "fabricated identity in the UK".

(2) The Claimant had not provided his Macedonian birth certificate on the Defendant's request.

(3) The Claimant was interviewed by the Defendant, but was unable to provide any identification or documentation from before his entry to the United Kingdom.

(4) The Claimant had not taken advantage of the Defendant's repeated suggestions to approach the Macedonian authorities for help.

(5) The Claimant's travel schedule reported travel to and from Albania and he was also referred to as a citizen of that country with a middle name of "Isuf."

59. The Defendant relies on McVey v Secretary of State for Health [2010] EWHC 437 (at [25]-[35]) for proposition that the basic rule in judicial review claims subject to exceptions not applicable to the present case is that the facts or evidence adduced by a public body are assumed to be correct and there was no reason to doubt the evidence of the Defendant's witness Christopher Hanson (now Litigation Team Manager at the Home Office and previously an Investigation Officer in the Counter-Fraud Investigations Team). Alternatively, if the court takes the view that the Defendant's actions are amenable to challenge only on conventional public law grounds the retention of the Claimant's passport is entirely justified for reasons set out in Mr Hanson's statement. The Defendant is not satisfied as to the Claimant's true identity or that he is entitled to a British passport in the identity presented.

60. In those circumstances, the Defendant argues that even if the retention of the Claimant's passport is capable of engaging article 8 of the ECHR, it is in accordance with the law and is justified and proportionate.

ASSESSMENT

61. The Defendant's case is that for reasons set out in the earlier sections of this judgement she is not satisfied as to the identity of the Claimant. She is not satisfied that he is who he says he is. It was common ground between the parties that although the burden is on the Claimant to prove on the balance of probabilities that he is entitled to a passport, where a passport has previously been issued to a person the Defendant will need to show substantial, well-founded and cogent reasons for withdrawal or failure to renew that passport (see Easy at [38] and the cases there referred to).

62. The Claimant's primary contention in response is that the Defendant is prevented from impugning the Claimant's identity because of his previous decision not to remove the Claimant's citizenship. His case relies on the action the Defendant took in relation to his previous judicial review proceedings. On 11th March 2020 the Defendant wrote to him saying that

"your case was referred to us because it was believed that he had obtained British citizenship using a false identity. The full facts and any mitigating circumstances that you have presented have now been considered in accordance with our policy.

I am now writing to inform you that [the Defendant] has now decided not to deprive you of citizenship because your case does not fall within our policy."

63. The Claimant argues that I should conclude that the Defendant's acceptance in her letter of 11th March 2020 that she would not deprive the Claimant of citizenship, which led to the Consent Order in the previous judicial review proceedings, deprives the Defendant of the ability to challenge the Claimant's identity in the context of withholding his passport.

64. The Claimant argues that this is a wholly different case from those in which those in which the issue was whether the Claimant could prove that he was a particular person and thus entitled to British citizenship. The present case is crucially different, says the Claimant, in that the Defendant has accepted that the Claimant is a British citizen.

65. Before examining the different ways in which the Claimant puts his case it is appropriate to examine what the Defendant decided on 11th March 2020.

66. The Defendant's decision not to deprive the Claimant of citizenship was not a judgement or other decision which was clearly based on particular conclusions as to the issues. Rather, the decision was an administrative decision in the exercise of discretion, whose reasons were not made explicit either in the Defendant's letter of 11th March or in any reasons given (none were in fact given) for the Consent Order, beyond stating that the case "does not fall within our policy."

67. The relevant policy is as referred to above, Chapter 55: Deprivation and Nullity of British Citizenship. From that policy it is clear that even where fraud, false representation or concealment of material fact is established, the Defendant will not necessarily take citizenship away. Thus, the Defendant's decision not to deprive the Claimant of citizenship was not necessarily based on a concession in relation to the issue of identity, but could just as easily have been for other reasons. Those considerations could, for example, have related to mitigating circumstances. They could also have related to the difficulty of establishing a case under section 40(3) of the 1981 Act, in circumstances where (see William at [65]) the burden of proof was on the Defendant, albeit substantial, well-founded and cogent reasons would have to be shown by the Defendant for not renewing or withdrawing a passport previously issued.

68. With that context, I begin with the Claimant's contention that it is Wednesbury unreasonable for the Defendant now to withhold his passport, when she has decided not to seek to remove his citizenship. After all, said Mr Fripp, the points previously relied on by the Defendant in proposing to remove the Claimant's citizenship were the same as those on which she now relies to withhold his passport.

69. I do not accept the Claimant's contention. The two decisions, removing citizenship and withholding a passport, are distinct and different in nature. Also, the legal test for deprivation under section 40(3) is different from the legal test for issue and/or withdrawal of a passport. In the former case clear fraud or false representation must

be established and the burden of proof is on the Defendant. In that regard Morris J referred to the words "the Secretary of State must be satisfied."

70. However, in the case of identity in relation to a passport, the burden is on the Claimant positively to establish his entitlement, though substantial, well-founded and cogent reasons have to be shown by the Defendant for not renewing or for withdrawing a passport already issued. It is therefore possible that whilst a Claimant might not discharge the burden upon him, it does not follow that the Defendant will have discharged its burden to show fraud or false representation. On this basis, as Morris J said, a decision that the Defendant is not satisfied that fraud has been established under section 40(3) of the 1981 Act is not necessarily inconsistent with a decision that the applicant has not established his true identity.

71. In any event and quite apart from considerations as to the burden of proof, as I have said above it is not clear why the Defendant took the decision not to remove the Claimant's citizenship. It may have been because although she was, in fact, satisfied that fraud had been established, she considered that mitigation factors applied.

72. I therefore cannot conclude that the Defendant's decision to withhold the Claimant's passport was made Wednesbury unreasonable by her prior decision that she would not remove his citizenship.

73. The Claimant also contends that the Defendant cannot raise the issue of identity as a reason for withholding his passport, because of issue estoppel. As Mr Fripp says, this point was not argued in William.

74. It is of course true that the issue of identity was at the heart of the Defendant's decision to consider depriving him of British citizenship. Further, there is no suggestion in the present case that the Defendant now has information to challenge the Claimant's identity claim which she did not have previously and could not have discovered with reasonable diligence.

75. However, as set out above, we simply do not know why the Defendant decided not to remove the Claimant's citizenship, apart from the fact that she told the Claimant in her letter of 11th March 2020 that "your case does not fall within our policy." We do not know why she considered that the case did not fall within her policy, and in particular whether it was because she decided fraud was not established or because of mitigating circumstances.

76. For that reason, this does not seem to me a situation to which the guidance given in the cases on issue estoppel applies. I do not think this is a case where (to use Fordham J's words in Balhav Singh) there has been determination of a legal right of a public authority to take action, and where that determination should be given finality.

77. I should add for completeness that my conclusions on this issue do not rest on the fact that it is the "Home Office" that deals with the revocation of citizenship and the "Passport Office" that deals with withholding of passports. As Mr Fripp pointed out, these are both organs of the Defendant.

78. The Claimant also contended that the nature of the remaining issue on identity meant that for the Defendant to withhold the Claimant's passport on that ground would not

accord with the WMS. The WMS states that passports are issued where the Defendant is satisfied as to

"(i) the identity of an applicant; and

(ii) the British nationality of applicants, in accordance with relevant nationality legislation; and

(iii) there being no other reasons…for refusing a passport."

79. Mr Fripp contended that identity could be a reason for refusing (or withholding) a passport only where the identity issue concerned went to the question of citizenship and that in the present case the identity issue raised did not go to the question of citizenship as that question had been resolved by the Defendant's decision not to remove the Claimant's citizenship.

80. I do not accept that submission. The WMS does not in my view mean that once British nationality has been established no issue of identity can arise when the Defendant is considering the issue, refusal or withdrawal of a passport. As Mr Malik said for the Defendant, if that were the case there would be no point in having (i) and (ii) as separate considerations for the Defendant to take into account in making a passport decision.

81. I therefore conclude that the Defendant is not prevented from challenging the Claimant's identity in the context of the present proceedings, despite having previously said that she will not seek to remove his citizenship.

82. Where does that leave this claim? In correspondence the Defendant has repeatedly raised questions about the Claimant's identity. In letters written on his behalf by his solicitor, the Claimant has responded to the points raised by the Defendant and has put forward explanations for what appear to the Defendant to be discrepancies.

83. It appears that he satisfied an earlier concern about the pregnancy of his wife. The remaining issues essentially concern the fact that he has no birth certificate and the lack of entry/exit stamps on his passport.

84. It has been stated on his behalf that he has no birth certificate because he was born at home and his birth was not registered (see letter from his solicitors of 14th October 2019) or that he did not have and could not obtain any birth certificate because he left the then Yugoslavia during the civil war (see letter from his solicitors of 29th November 2018). In respect of the lack of stamps on his passport, it has been said for him that his passport was not always stamped on exit or entry.

85. These explanations may be true. However, other than the statutory declaration submitted with his solicitors' letter of 29th November 2018 there is little before the Court from the Claimant himself. In particular, the Claimant has not provided a witness statement for these proceedings, let alone offered himself for cross examination as invited by the Secretary of State.

86. There was discussion at the hearing of what approach I should take to these matters. The Defendant invited me to treat the issue of identity as one for me to determine as a

fact, as in William. Mr Fripp for the Claimant appeared to disagree with this approach. However, if the issue of identity is not to be determined as a fact by me, I think the approach would have to be the conventional judicial review question of whether the Defendant could reasonably have formed the view that she did. This seems to me to be less favourable to the Claimant and I propose to deal with the matter as one of fact to be determined by the Court.

87. My approach should be on the basis that although the burden of proof of entitlement to a passport is on the Claimant as applicant, given that this is a case of withdrawal or withholding of a passport already issued the Defendant has to have substantial, well-founded and cogent reasons for doing so.

88. On the basis of the information I have seen, the Defendant has indeed produced substantial, well-founded and cogent reasons for withholding the Claimant's passport. The lack of a Macedonian birth certificate is a matter for concern, as is the fact that the Claimant does not appear to have sought help from the Macedonian authorities to deal with this. Also of concern the lack of entry and exit stamps on the Claimant's passport.

89. These points call for explanation. I find it worrying that although explanations have been put forward by the Claimant's solicitors (together with a statutory declaration from the Claimant which gives one of the two explanations referred to in paragraph 84 above for his not having a birth certificate), there has been no evidence from the Claimant thus far and he has not acceded to the Defendant's invitation to give oral evidence. I was not offered any convincing explanation for this failure to provide evidence to support his case. If this situation were to remain, with the Claimant continuing provide no evidence, I would consider it appropriate to draw adverse inferences from this, to such an extent that I would consider it necessary to dismiss the claim. I would reach the same conclusion if I were to approach the identity issue using a conventional judicial approach of asking whether the Defendant had grounds for withholding the Claimant's passport that were Wednesbury reasonable, having regard to her need to produce substantial, well-founded and cogent reasons for doing so.

90. The Claimant's contentions in relation to article 8 of the ECHR would not change that conclusion. The Claimant contends that the decision under challenge infringes his right to private life. On the assumption that withdrawal of a passport can engage article 8 rights as an interference with private life and even if there has in fact been an interference with those rights, any such interference would in my judgement have taken place in accordance with the law and would be justified by the Defendant's legitimate and proportionate aim to have a policy pursuant to which only those who are entitled to a British passport are granted such a passport and to ensure that those not entitled to a British passport have their passports withdrawn.

91. It follows that in the absence of evidence from the Claimant I will dismiss the claim.

NEXT STEPS

92. Mr Fripp asked that if I decided that the Defendant is not prevented from withholding the Claimant's passport by stating that she would not remove his citizenship and if I were not satisfied as to the Claimant's identity on the material before me, I should

offer the Claimant the opportunity of providing evidence before making a final disposal of the claim.

93. Mr Malik argued that it would be disproportionate for the Claimant to be given that opportunity. He pointed out that the Defendant's Detailed Grounds of Defence (dated 13th January 2021) had drawn attention to the lack of evidence from the Claimant and asked that the Claimant provide a witness statement and tender himself for cross examination, as happened in William. The Claimant had had ample opportunity to do both, and had not taken it. It would be disproportionate for the Claimant now to be given a further chance. He would not be prevented from dealing with the issue of his identity in subsequent proceedings, because he could commence proceedings for a declaration as to his identity even if I dismissed the present claim.

94. In my view the right course is to give the Claimant the chance to provide evidence, including oral evidence if he wishes. If he does not express the intention to give evidence within a limited period (7 days from the date of the Order), then this action will be dismissed. However, if he does express that intention, directions can be given for the future course of the action, in particular as to time for production of any witness statement and directions for any further hearing.

95. I agree with the Defendant that the Claimant has had ample opportunity to give evidence already. However, I do not think an Order as I propose it would add disproportionately to the burdens of this claim. If following my Order the Claimant does not indicate that he will provide evidence, his claim will be dismissed. If he does wish to provide evidence, then if I dismiss this claim without giving him that opportunity, it is likely that he will commence the declaratory action which Mr Malik said would be open to him. The new proceedings would be likely to add to the costs and time taken to dispose of the issues arising between the parties, even more than a further hearing in the present action. Also, if the Defendant considers the Claimant has behaved unreasonably in the present action, it will be open to her to seek compensation in costs.

CONCLUSION

96. I conclude that the Defendant's statement that she will not remove the Claimant's citizenship does not prevent her from raising the issue of identity in relation to his passport. On the basis of the material before me the Claimant's claim would fail.

97. However, I will give the Claimant the opportunity of providing evidence to support his case, and invite the parties to agree an appropriate Order. The Order should give the Claimant 7 days from the date of the Order to indicate that he wishes to provide evidence, provide for dismissal of his claim if he does not so indicate within that period, and provide for further conduct of this action if within that period he does so indicate.

98. If agreement as to the form of the Order cannot be reached within 14 days from the date on which this judgement is handed down, the parties have a further 7 days to make submissions in writing, after which I will decide the form of the Order.

99. Any further hearing of this matter should be reserved to me, because of my familiarity with the facts and issues.