



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00040/2018

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 20th May 2019

Decisions & Reasons Promulgated
On: 26th July 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Xylfikar (aka Zulfi) Belaj
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr D. Sellwood, Counsel instructed by Oliver & Hasani
Solicitors
For the Respondent: Ms Z. Young, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant was born a national of Albania on the 17th July 1971. He appeals with permission against the decision of the First-tier Tribunal (Judge Thorne) to dismiss his appeal against the Secretary of State's decision to deprive him of his British nationality.
2. The background to this appeal is that in 1999 the Appellant arrived in the United Kingdom in the back of a lorry. He claimed asylum telling officers that he was from

Kosovo, and that due to the war in that territory he required international protection. He used the name Zulfi Belaj. In 2001 the Appellant, in that identity, was recognised as a refugee. He was granted indefinite leave to remain. On the 2nd March 2005 Zulfi Belaj was naturalised as a British citizen.

3. In 2007 the Appellant's brother made an application for entry clearance to come and visit the Appellant. He lodged it at the British embassy in Tirana, Albania. As a result of that application enquiries were made and it came to light that the Kosovan named Zulfi Belaj was actually an Albanian national named Xylfikar Belaj. On the 28th July 2008 the Home Office wrote to the Appellant advising him that they were considering stripping him of his British nationality.
4. The Appellant's representatives wrote back making various submissions which they asked to be taken into account.
5. Nothing further happened until the 17th August 2018 when the Appellant received a letter notifying him of a decision to deprive him of his British citizenship under s40 (3) of the British Nationality Act 1981. The reason given was the Appellant's deception in claiming to be Kosovan. But for that deception he would never have been granted refugee status nor ILR, and but for that status he would not have been able to naturalise.
6. The Appellant appealed. Before the Tribunal he admitted to the alleged deception. He explained that he had left Albania due to other difficulties and that once he had established the deception he had to keep it up. He now had a wife and three children in this country. He had his own home, and his own business, working as a self-employed builder. He pointed out that he has a very established Article 8 family and private life in the United Kingdom, and that up until recently the Secretary of State had recognised the importance of that: until 2014 it had been the Home Office's published policy not to pursue deprivation action against persons who had lived in this country for 14 years or more. Had the Home Office not taken ten years to make this decision, the Appellant could have had the benefit of that policy.
7. The First-tier Tribunal began by noting that there was no dispute that the relevant condition precedent in 40(3) was established:

'(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

 - (a) fraud,
 - (b) false representation, or
 - (c) concealment of a material fact.'
8. The Tribunal then went on to properly direct itself that section 40(3) imports a discretion into the decision-making process: the Secretary of State *may* deprive a person of his citizenship status. It then said this: "I can only allow A's appeal if I am

satisfied that the reasonably foreseeable consequences of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently". Before me the parties agreed that this was a valid legal direction in accordance with the principles set out in Deliallisi (British citizen: deprivation appeal: Scope) [2013] UKUT 439 (IAC) and BA (Deprivation of citizenship: appeals) [2018] UKUT 00085 (IAC).

9. Turning to the facts the Tribunal noted that there had been a substantial delay in the Respondent coming to his decision. It recognised that there had, until August 2014, been a policy that "in general" deprivation action would not be taken where 14 years long residence was established. The Appellant had established such long residence in November 2013. The Tribunal was not however satisfied that this aided the Appellant's case. The delay had not been malicious - it had resulted from the Respondent awaiting the outcome of litigation (in another case - Hysaj v Secretary of State for the Home Department [2017] UKSC 82). Nor had it been established that the delay had deprived the Appellant of some certain advantage: the policy made it clear that the concession was not automatic, and its application depended on the seriousness of the deception. The Tribunal was satisfied that the Secretary of State was correct to have applied the policy in force at the date of his decision: this offered no such concession. These were the findings that led the Tribunal to conclude that there were no exceptional features in the evidence.
10. As to human rights the Tribunal noted that the Respondent had not yet determined whether he would pursue deportation action against the Appellant. As such the reasonably foreseeable consequences of deprivation of citizenship did not include removal. They were limited to the following matters:
 - a) The Appellant may not be able to work
 - b) The Appellant will not be able to vote
 - c) He would no longer be able to use his British passport
 - d) He may not be able to drive in the United Kingdom
 - e) It will be difficult for the Appellant to access rental property and free health care
 - f) He will be under stress 'in limbo' awaiting the decision of the Respondent in respect of deportation.
11. The Tribunal was not satisfied that these factors could cumulatively render the decision disproportionate. As to (c) and (d) the Appellant had not demonstrated that he would be unable to obtain alternative Albanian documentation. As to (e) he owns his own home and the evidence indicates that he is fit and well. Nor was there evidence sufficient to demonstrate that his wife and adult children could not work to support him: (a). As to the stress of limbo there was no medical evidence to establish

that this would have any psychological or physical impact on the Appellant. The appeal was accordingly dismissed.

The Appeal

12. The Appellant submits that the First-tier Tribunal decision is flawed for the following errors of law (I have re-ordered the grounds for convenience):
 - i) Material misdirection in that First-tier Tribunal Thorne conducted a *Wednesbury* review of the Secretary of State's decision rather than making its own merits based assessment of how the discretion should have been exercised;
 - ii) The Tribunal erred in considering that the delay needed to have resulted from bad faith on the part of the Respondent;
 - iii) There are a number of mistakes of fact including:
 - a) the finding that the Appellant would not have had the benefit of the policy;
 - b) the finding that the Appellant "may" not be able to work;
 - c) the finding that he could be supported by his family.
 - iv) There was a failure to take material evidence into account including the impact upon the Appellant of living 'in limbo', and the practical and psychological difficulties that he and his family would face should his citizenship be removed.
13. The Respondent defended the decision of the First-tier Tribunal and resisted the appeal on all grounds. I reserved my decision.
14. Shortly after the hearing the Court of Appeal decision in RA (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 850 became available. This was a case which addressed, albeit in a different context, the relevance of applicants being left in 'limbo' in this country. Lord Justice Haddon-Cave summarised the issues arising for such individuals in his opening introduction to the decision [§1] :

"[the case] concerns the Appellant's so-called 'limbo' status, that is to say a continuing *stasis*, whereby a person is prevented by continuing circumstance from being deported, but also prevented by lack of leave to remain from working, receiving normal State benefits, renting or buying property, or accessing the full range of NHS benefits, which together are said to constitute a disproportionate interference with family or private life under Article 8 of the Convention."

Counsel for RA, Mr D Chirico, put it as follows [§27(3)]:

"The interference thus includes (i) criminalisation of P's presence in the UK (see e.g. s.24 of Immigration Act 1971); and (ii) effects on P and P's family of P's inability to participate fully in society: prohibitions on employment, obtaining accommodation, a bank account, a driving licence or secondary healthcare, and so on. This interference requires weighty justification."

15. Observing that these practical difficulties were on all fours with the concerns raised in this case, on the 8th June 2019 I wrote to the parties inviting their submissions on the potential relevance of RA to my decision, and specifically to Mr Sellwood's ground 2 [at his §16, at my §12(iv) above]. Submissions in writing were received by both parties on the 26th June 2019.
16. In brief summary the Appellant submits that the decision in RA can be distinguished on the facts in that the 'limbo' under discussion therein arose in a completely different context. RA was an individual who was subject to a deportation order because he was a serious criminal, but could not be removed to Iraq because he was undocumented. There was an uncertainty about whether his deportation could ever in fact be affected, but the public interest in keeping it as an option was clear. By contrast no decision has yet been taken in this case as to whether it would breach Mr Belaj's Article 8 rights.
17. The Secretary of State focuses on the Court's conclusions at its §71:
- "The principal basis on which it might be said that the public interest in continued 'limbo' may be so weakened, such that Article 8 rights or other Convention rights might tip the balance, will normally only arise in cases where it is clear that the public interest in effective immigration is extinguished because, in practical terms, there is no realistic prospect of effecting deportation within a reasonable period (see above)."

Adopting this reasoning, the Secretary of State submitted that this cannot be said to be a case "where it is clear that the public interest in effective immigration is extinguished".

Discussion and Findings

Did the First-tier Tribunal impermissibly apply a Wednesbury standard of review?

18. It is common ground that in reaching its decision the First-tier Tribunal was tasked with conducting a full merits based review of the Respondent's decision: Deliallisi (British Citizen: deprivation appeal: scope) [2013] UKUT 00439 (IAC). Mr Sellwood submits that this is not however what the Tribunal did. He points to the following passage, where the Tribunal considers the relevance of the now withdrawn Home Office policy. Having found that the delay had arisen because of the Hysaj litigation, and that the old policy was in any event couched in discretionary terms such that the Secretary of State could legitimately have taken deprivation action even if it was still in force, the Tribunal concluded [at its §27]:
- "It seems to me therefore that R was correct to exercise her discretion in relation to her published policy as at the date of decision under appeal before me and not at some notional date in the past..."

This, submits Mr Sellwood, indicates that the Tribunal here restricted itself to assessing whether the decision of the Secretary of State not to give the Appellant the benefit of the old policy was irrational.

19. I do not accept that this is what the Tribunal did. There was no question of the Secretary of State 'applying' a policy which no longer existed. At its highest this argument ran as follows. The Appellant could, between the dates of November 2013 (when he accrued 14 years' continuous residence) and August 2014 (when the policy was superceded by new guidance), have legitimately expected that his case would be reviewed in line with the published policy, which stated that where 14 years' long residence was established, deprivation action would not normally have been taken. The fact that the Secretary of State did not take his decision within those 9 months deprived the Appellant of that substantive benefit. That is a matter to be taken into account when assessing whether there are exceptional features in this case. It is relevant because there has been a delay, and but for that delay the Appellant would not find himself in this position. It is further relevant because it indicates that at one time at least, the Home Office recognised that very long residence is capable of tipping the balance in favour of the citizen concerned.
20. I am not satisfied that the First-tier Tribunal failed to engage with those submissions. The Tribunal gives substantive reasons, at its §24-27, why it does not consider the argument to be a good one. The formulation "correct to exercise her discretion" is consistent with that: the Tribunal simply agrees with the Respondent that the point about the delay, and the old policy, takes the case no further.

Was there a requirement that the delay result from bad faith?

21. The answer, plainly, is no. There is no authority for the proposition that delay will only diminish the public interest where it can be shown to be 'malicious'. If the First-tier Tribunal thought that was the case, it did indeed err in law. It may be that it had in mind the third factor identified by the appellant committee in EB (Kosovo) [2008] UKHL 41:

"16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes ..."

But dysfunction does not amount to malice.

22. In this case the delay appears to have been almost entirely attributable to the passage of the appeal in Hysaj making its way through the higher courts. That decision was handed down on the 21st December 2017 and the Secretary of State took the decision in the present matter on the 17th August 2018. That is acknowledged by the Tribunal at its §25.
23. That being the case, it is difficult to see the materiality of the alleged error. It was not the Appellant's case that the delay resulted from bad faith, or indeed any dysfunction at the Home Office. Any comments to that effect by the First-tier

Tribunal are therefore irrelevant. The relevance of the delay, as far as Mr Sellwood was concerned, was that it had the potential to dramatically change the outcome for the Appellant, because as I discuss above, had the decision been taken in the 9 months between November 2013 and August 2014, there would have been an operative presumption that no action should be taken. It is clear from the determination that the First-tier Tribunal understood that: its response is at its §26 where it points out that the presumption was not enough. The policy still permitted the Secretary of State to take deprivation action, depending on the seriousness of the deception. In this case Judge Thorne considered that the serious, deliberate and repeated nature of the deception, coupled with the Appellant's implication of his wife and children in the deceit (they also obtained status in false names etc) would have been a sufficient basis to rebut the presumption and for deprivation action to be pursued. In that way the relevance of the policy fell away. This brings me to Mr Sellwood's next ground.

Does the determination contain material errors of fact amounting to errors of law?

24. The first complaint under this head relates to the findings discussed in the foregoing paragraph. The First-tier Tribunal in effect found that the old policy would never have assisted the Appellant, and so it was of little consequence. It is submitted that this was a fundamental misunderstanding of the terms of the policy. The Appellant does not dispute that the Secretary of State had a discretion to exercise, but submits that the Tribunal was simply wrong to find that the Appellant would not have benefitted from the policy.
25. The presumption is set out at 55.7.2.5 of the policy:
- 'In general the Secretary of State will not deprive of British citizenship in the following circumstances:
- If a person has been resident in the United Kingdom for more than 14 years we will not normally deprive of citizenship'
26. At 55.7.2.6, under the heading 'deprivation on fraud grounds regardless of length of residence' it read:
- 'Although the Secretary of State will not normally deprive someone of their British citizenship where they have more than 14 years residence in the United Kingdom (long residence), circumstances in which the Secretary of State may still proceed to deprive of British citizenship include, but are not limited to, where:
- Deception has been used more than once in an individual's dealings with UKBA - e.g. multiple frauds using different identities, rather than repeat episodes of the same factual deception at different immigration stages;
 - ...
- These criteria are not intended to be exhaustive and the Secretary of State may still proceed to deprive of British citizenship regardless of the subject's length of residence depending upon the facts of a particular case.'

The policy then went on to give examples of where discretion would be exercised against the subject: one is an individual who had concealed a criminal conviction and cheated in the 'Life in the United Kingdom' test; another is a people trafficker. Caseworkers were instructed to consider whether the deception was deliberate, whether the individual was complicit in it, whether there were any mitigating factors, and ultimately whether the decision is proportionate.

27. Having read that guidance, the Tribunal held as follows:

“In A’s case there was serious, deliberate, repeated deception using forged documents and involving him being complicit in his wife and children obtaining immigration status in the United Kingdom under false names”

28. I accept that what happened here, as far as the Appellant is concerned, is that there was simply “repeat episodes of the same factual deception at different immigration stages”. As such it cannot be equated with the example given in the guidance of an individual who uses “multiple identities”. That said, I am not satisfied that this was material. That is because, as Mr Sellwood rightly notes, this was a ‘merits based’ review: Judge Thorne was entitled to reach his own view on the matter. The examples given in the guidance were not exhaustive. The First-tier Tribunal found that the extension of the deception to include the Appellant’s family was what elevated it above a ‘run of the mill’ deception. I entirely agree. Expecting children to assume false identities is in my view a factor that carried considerable weight. It is obviously contrary to a child’s best interests to teach a child to lie, or to allow a child to be confused about his own nationality or identity. As such I find that Judge Thorne was rationally entitled to conclude that the policy would not, had it been in operation, of been of any assistance to the Appellant.

29. I would add this. That the reliance on the policy could never be more than one factor to be considered. The policy had long since ceased to be in operation and the case in effect rested on there being some prejudice to the Appellant in the fact that the case did not fall for consideration in a very specific 9 month period. Beyond that the only point to be made was that once upon a time the Secretary of State had been of the view that in most cases people with 14 years’ residence should get to keep their British passports. That was, at best, a factor of limited importance today.

30. The next matter in issue under this heading was whether the Tribunal erred in its conclusion, at §31, that the Appellant “may” not be able to work. Mr Sellwood strongly contested this finding on the basis that the unequivocal position, in the ‘hostile environment’ was that an individual without status in this country will not be able to lawfully find employment. There is no ‘may’ about it. Similarly the finding that he could otherwise be supported by his family is criticised for failing to have regard to the evidence that in fact his wife and three adult children all rely on him.

31. For the Respondent Ms Young accepted that Mr Sellwood was correct about these matters. She submitted however that any error identified would be irrelevant, because it was nowhere stated that the Appellant’s wife was actually unable to work.

Her statement says that she suffers from anxiety, and that she is understandably worried that she is next in line for deprivation action being taken against her, but in fact there is no explanation offered as to why she, or indeed any other member of the family, could not take or increase their level of employment. I agree. It might also be said that the Appellant is here protesting that he is not being permitted to continue to enjoy the benefits of his deception: a patently unattractive argument.

Does the Tribunal err in failing to have regard to the foreseeable consequences of the Appellant being left in 'limbo'?

32. That leaves the questions posed by Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884: what are the reasonably foreseeable consequences of deprivation and do they render it a disproportionate interference with the Appellant's Article 8(1) rights? In seeking to answer these questions Mr Sellwood submitted that there would be immediate, and medium-term issues for the Appellant and his family. Unless and until the Respondent saw fit to regularise the Appellant's position he would be in a position of uncertainty that could have practical, and emotional, consequences for him and his family.
33. In that period of limbo he would be in the dark about whether or not the Respondent in fact intended to remove him from the United Kingdom. In his submissions Mr Sellwood emphasised that the Appellant was entitled to view that prospect with some apprehension, given that he had already spent ten years wondering whether the Respondent was going to try and take his citizenship away. This period would therefore be immensely stressful for the whole family. The Appellant would not be permitted to work and his savings are meagre: that would mean that members of his family who have hitherto not worked, or earned enough to support themselves, would have to start doing so, because the shortfall would not be met by benefits. All the matters relied upon in RA's case would also pertain (the grounds had asserted that the family may be at risk of losing their home, but Mr Sellwood withdrew that ground upon instruction that in fact the mortgage has been paid in full). The Appellant's final ground is that the First-tier Tribunal failed to have regard to these material factors in its balancing exercise.
34. At paragraph 30 the Tribunal lists the reasonably foreseeable consequences of deprivation. These include that "he will be under stress in limbo awaiting the decision of R whether to initiate deportation proceedings. At paragraph 31 it says this:

"A has not established that he will be incapable of obtaining an Albanian passport which will allow him to travel abroad. A has not established that he will be incapable of obtaining an Albanian driving licence which will allow him to drive in the United Kingdom. He does not need to rent as he owns his own home. He may lose the right to vote, work and access to free health care but evidence establishes that he and his family have savings, he is fit and well and here is inadequate evidence to establish that his wife and adult children cannot work and support him financially. In addition he may feel under stress 'in limbo' awaiting the decision of R whether to initiate deportation proceedings. However, he is the author of his own misfortune in this respect and there is no medical

evidence to establish that the 'limbo' has any psychological or physical effects on him and his family".

35. That paragraph, it appears to me, is a complete answer to Mr Sellwood's concerns: the Tribunal plainly did consider whether the period of 'limbo' could be said to so adversely affect the Appellant so as to render deprivation disproportionate.
36. As to the potential relevance of RA, it is this. The Court there confirmed [at §69] that the focus for enquiry is first what the impact will be on the individual. This, as the passage I cite above illustrates, the Tribunal has done. Second, it must balance that impact against the public interest in making an order. In RA the public interest was informed by the appellant's criminality; in this deprivation case it is in the maintenance of immigration control. It is a different factual matrix, but the principles underpinning the assessment are the same. There is a strong public interest in removing the citizenship of individuals who only obtained that status through fraud. At §71 the Court indicated that the adverse consequences of *statis* will only be likely to tip the balance in the appellant's favour where the period in question is likely to be prolonged or indefinite. That is not so here, where the Respondent has indicated that a decision will be made within 8 weeks of the deprivation order being signed, which in turn will be within 4 weeks of the Appellant exhausting his appeal rights.

Decisions

37. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.
38. There is no order for anonymity.



Upper Tribunal Judge Bruce
23rd July 2019