



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00018/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 4 May 2021

Decision & Reasons Promulgated
On 28 May 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDUART DOCI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms. S Cunha, Senior Presenting Officer

For the Respondent: Mr. D Sellwood, Counsel, instructed by Vanguard Solicitors

DECISION AND REASONS

Introduction

1. The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.
2. The Secretary of State appeals against the decision of Judge of the First-Tier Tribunal Athwal ('the Judge') who allowed the claimant's appeal against a decision to deprive

him of British nationality. The decision of the Judge was sent to the parties on 16 December 2020.

Remote Hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. No anonymity direction was issued by the Judge and no application for such direction was made before me.

Background

5. The claimant is a citizen of Albania. He was born on 14 January 1978 and is aged 43.
6. He entered the United Kingdom and claimed asylum in April 2001. He was aged 23 at the date of his claim but falsely informed the United Kingdom authorities that he was born on 1 January 1984 and aged 17. In addition, he falsely asserted that he was an ethnic Albanian national of the Federal Republic of Yugoslavia who had resided in Presheve before travelling to this country. He asserted that he had fled persecution at the hand of Serbian dominated security forces, detailing that in January 2000 he had been subject to a stop and search by security forces that resulted in his being tortured for two hours and left to die. He further asserted that in March 2001 he returned home to find the presence of Serbians who threatened to kill him. He subsequently left the country.
7. The claimant states that he was informed by an agent who helped him travel to this country that if he revealed his true identity he would be deported back to Albania and sent to prison. The claimant asserts that he followed the advice of his agent.
8. The Secretary of State refused the claimant's application for international protection on 8 August 2001 but granted him exceptional leave to remain for four years. The claimant was granted indefinite leave to remain on 7 December 2005 and naturalised as a British citizen on 12 February 2007.
9. The claimant applied for a British passport which was issued to him on 14 August 2007.

10. The claimant's then fiancée, now wife, made an application to enter this country in 2007 and provided the claimant's true personal details with her application. The application was refused.
11. The claimant travelled to Albania and married his wife on 16 October 2007. Shortly afterwards his wife made an application for entry clearance as a spouse. She submitted the claimant's original Albanian birth certificate, accompanied with a translation. The claimant states that to date his wife has not received a decision upon her application.
12. The claimant's wife subsequently entered this country clandestinely in 2011 and the couple have two children, both of whom are minors and are British citizens. His wife enjoys leave to remain in this country.

Decision to deprive nationality

13. The Secretary of State wrote to the claimant on 15 November 2019 confirming that there was reason to believe that the claimant had obtained British citizenship as a result of fraud. The claimant's then legal representatives, Blackstone Law, wrote to the Secretary of State on behalf the claimant by a letter dated 6 December 2019. They confirmed the claimant's true identity, namely that he was an Albanian national born in January 1978. The letter detailed representations as to why it would be unreasonable and unfair for the claimant to now be deprived of his British citizenship. Reference was made to the claimant being frightened when he came into this country and his acting upon the instructions of his agent. Reliance was placed upon both his and his family's protected human rights, and it was noted that he had contributed to the British economy through his employment.
14. On 11 February 2020 the Secretary of State served notice of decision to deprive the claimant of British nationality under section 40(3) of the British Nationality Act 1981. The Secretary of State concluded that the claimant had obtained his British citizenship fraudulently. Reliance was placed upon what the Secretary of State identified as various instances where the claimant provided false personal details, initially when seeking international protection and then when seeking a travel document, indefinite leave to remain and naturalisation. In respect of the latter application reliance was placed upon the claimant not having been able to meet the 'good character requirement' if his true personal history and identity had been known to the Secretary of State at the relevant time:

'24. It is important to note that you have perpetrated a deliberate fraud against the UK immigration system, where you employed deception to obtain status that would not have been granted to you if the truth had been known. Parliament has provided the power to deprive British citizenship status if the Secretary of State is satisfied that naturalisation was obtained by means of fraud, false representation or concealment of a material fact, which is clearly the case here, and it is

a balanced and proportionate step to take. As you would not have satisfied the Good Character Requirement had your deception been known your application to naturalise would have therefore been refused. Chapter 18 the Good Character Requirement, Section 6 Deception, section 6.1 states, *“It should count heavily against an applicant who lies or attempts to conceal the truth about an aspect of the application for naturalisation - whether on the application form or in the course of enquiries. Concealment of information or lack of frankness and any matter must raise doubt about an applicant’s truthfulness in other matters”* (Annex R, page 15. Sections 6.1. & 6.2).

Decision of the First-tier Tribunal

15. The appeal came before the Judge sitting at Birmingham on 11 December 2020. The appellant attended and gave oral evidence.
16. By her decision sent to the parties on 16 December 2020 the Judge observed that the letter confirming the grant of exceptional leave to remain in 2001 did not provide any detail as to why the appellant was granted such status, save for noting:

‘However, because of the particular circumstances of your case, it has been decided that it would be right to grant you exceptional leave to remain in the United Kingdom until 08/08/05’.

17. The Judge undertook an examination as to what policy was applied to the claimant by the Secretary of State in respect of the grant of exceptional leave to remain in 2001, at [33]-[40] of her decision. She concluded that there was insufficient evidence placed before her to establish whether the initial decision by the Secretary of State to grant the claimant exceptional leave to remain was taken under a policy. Consequently, she determined:

‘41. It is for the respondent to prove on a balance of probability that the appellant’s naturalisation was obtained by fraud or false representation that was directly material to the decision to grant citizenship. In the deprivation of citizenship notice sent in February 2020, the respondent submitted that the appellant was granted ELR on the condition that he was a minor, but for the reasons set out above, she has failed to prove that this was the case. That the respondent has completely failed to establish upon what basis ELR was granted. In these circumstances I do not accept that the SSHD have [sic] the power under section 40(3) of the British Nationality Act 1981 to make an order depriving the appellant with British citizenship.

Grounds of Appeal

18. Judge of the First-tier Tribunal Beach granted permission to appeal by a decision dated 22 January 2021. Judge Beach summarised the Secretary of State’s grounds concisely:

'2. The grounds assert that the First-tier Tribunal Judge failed to make findings with regard to the respondent's argument that the appellant's character and conduct excluded him from the grant of British citizenship. The grounds further state that the First-tier Tribunal Judge failed to give any or any adequate reasons for accepting the appellant's argument that his case fell within the parameters of *Sleiman (deprivation of citizenship; conduct)* [2017] UKUT 367 (IAC). The grounds further state that the First-tier Tribunal Judge misapplied the case of *Sleiman*. The grounds state that *Sleiman* is not authority for a grant of leave under the legacy (or otherwise).'

19. In granting permission to appeal, Judge Beach reasoned:

'3. The First-tier Tribunal Judge refers to the respondent's position at paragraph 6 of the decision and notes that the respondent's position included an assertion that the appellant would not have been naturalised had his deception been known because of the good character requirements. It is arguable that the First-tier Tribunal Judge does not make any findings regarding this issue and that the failure to do so also means that consideration has not been given to whether the appellant's case could be distinguished from the principles in *Sleiman*.'

Rule 24 response

20. The claimant sought to file a rule 24 response on the morning of the hearing. The filing of a response is not mandatory, but if relied upon rule 24(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Procedure Rules') confirms that it is to be filed no later than one month after the date on which notice of permission to appeal having been granted was sent to the parties. In this matter such time expired in February 2021.
21. Mr. Sellwood informed me that he was instructed to draft a rule 24 response in place of a skeleton argument on Friday 30 April 2021. Consequent to this hearing being listed on a Tuesday following a Bank Holiday, Mr. Sellwood received his instructions on the last working day prior to the hearing.
22. The rule 24 response was filed and served by the claimant's solicitors at 11.11 on the morning of the hearing, which was listed to be heard at 14.30.
23. Field House receives a considerable amount of email correspondence during the day, and any reasonable professional working in this field would expect a time delay in the internal forwarding of correspondence. Despite the best endeavours of administrative staff at Field House, the skeleton argument was forwarded onto me at 13.19. I had a full list on the day of the hearing, including a resumed hearing, and only became aware of the document a matter of minutes before the hearing commenced. I did not have the opportunity to consider the document before starting the hearing.
24. I observe that Ms. Cunha represented the Secretary of State in all matters in my list on the day of the hearing, including the resumed hearing, and the late service of the

response required her to consider the document in the short time available between hearings.

25. Whilst observing the professional care he had taken as to drafting the content of the rule 24 response, and stating the aid it would provide to the Tribunal, Mr. Sellwood was unable to provide a cogent explanation as to why his instructing solicitors had significantly delayed in instructing him to author the document, or as to why its filing and service at 11.11 on the morning of the hearing was considered to be an act complying with the obligation placed upon legal representatives by rule 2(4) of the 2008 Procedure Rules to help this Tribunal to further the overriding objective and to cooperate with the Tribunal generally.
26. In the circumstances, I refused to exercise discretion and extend time for the filing of the rule 24 response.
27. As to the approach adopted by Vanguard Solicitors to instruct Mr. Sellwood so late in the day to author a rule 24 response in substitute for a skeleton argument, despite having been on the record throughout and further having been aware of this hearing since 31 March 2021, I share the exasperation of the High Court in its recent judgment of *Ahmed v. Ahmed* [2021] EWHC 1021 (Ch). There is no reasonable basis for the holding of a belief that the very late service of a skeleton argument, or in this case a rule 24 response, will aid a judge in his or her preparation for a hearing.
28. Advocacy is the art of persuasion through communication. A carefully drafted written submission can, when skilfully used at the oral hearing, enhance the impact of argument. In the hands of skilled practitioners such as Mr. Sellwood it can be a golden opportunity for an advocate to seek to persuade a judge of the merits of a case before they enter a court room. At its core, written submissions should properly be a crafted instrument of persuasion designed to inform, educate, elucidate and persuade a judge both in advance of and in conjunction with oral argument.
29. However, as a tool designed to be persuasive, its usefulness is significantly, if not fatally, undermined when it reaches the desk of a judge minutes before a hearing commences. The adoption by certain legal practitioners, though thankfully a minority, of a practice of very late filing establishes an unhelpfully mechanical approach to the production of written submissions, rather than abiding by its primary role of aiding a judge and consequently advancing their client's case. In this matter, at the very least the approach adopted by Vanguard Solicitors was designed, whether intentionally or not, to delay the commencement of the hearing as there was no reasonable basis for believing that a judge with a busy list would be able to consider and digest the written submissions minutes prior to the hearing. Such practice is not consistent with the professional obligation of advancing their client's case to the best of their professional ability.

30. It remains a truism that written submissions handed to a judge on the day of hearing do not have the same effect as that presented to a judge with the case papers earlier in the week.
31. Consequent to the poor practice of Vanguard Solicitors, the claimant may well have paid for detailed written submissions from experienced counsel, who I have no doubt put considerable effort into drafting what he considered to be a persuasive document, which ultimately was not read by the judge in this matter. I am unable to see how the adoption of such practice by Vanguard Solicitors aids either their client or the Tribunal, particularly when the filing of a skeleton argument two or more days before the hearing would have been beneficial.

Decision

32. I confirmed at the conclusion of the hearing that the decision of the Judge would be set aside for procedural unfairness and lack of adequate reasoning.
33. In her decision, the Judge set out the claimant's case as detailed within the grounds of appeal and a subsequently filed statement of issues. Submissions made on behalf of the claimant are detailed in the decision and the Judge's observations as to the claimant's case run to 7 paragraphs over almost 2 pages.
34. The Judge noted the documentary contents of the Secretary of State's bundle and summarised the Secretary of State's decision letter. In respect of the Secretary of State's oral submissions, the Judge adopted a simple approach at [26] of observing that she had noted the parties' submissions in the record of proceedings and had taken them into account. No more detail is provided.
35. I observe that the record of proceedings confirms that the Secretary of State's representative at the hearing before the Judge, Ms. Tasnim, disagreed with the claimant's contention that he could rely upon the reported decision of the Tribunal in *Sleiman (deprivation of citizenship; conduct)* [2017] UKUT 367 (IAC), the headnote to which details:

'In an appeal against a decision to deprive a person of a citizenship status, in assessing whether the appellant obtained registration or naturalisation "by means of" fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship.'
36. There is no express or implied consideration of the Secretary of State's submission on the applicability of *Sleiman* in the Judge's decision. She simply proceeds on the basis that *Sleiman* is relevant and considered the appeal by unilaterally adopting the approach requested by the claimant.
37. I find that the Secretary of State has simply not enjoyed a fair crack of the whip. After the Judge summarises the decision letter, the Secretary of State becomes no more than a bystander when the Judge embarks upon the detailed findings and reasons section

of her decision, save for being criticized for not identifying whether a policy was applied when the claimant was granted exceptional leave to remain in 2001. In the circumstances the Secretary of State was treated unfairly by not being provided with a fair opportunity to advance her case, which is a fundamental requirement.

38. The unfair process adopted to the consideration of the Secretary of State's submissions impacts upon the Judge's reasoning. It is trite that adequate and intelligible reasons must be given for judicial decisions: *Anya v. University of Oxford* [2001] EWCA Civ 405, [2001] I.R.L.R. 377, at [12].
39. I am satisfied, upon careful consideration of the decision, that the lack of express engagement with the Secretary of State's submissions, not only in respect of the application of *Sleiman* but also with regard to the 'good character' consideration relied upon both in the decision letter and orally before the Judge, results in anyone reading it being unable to understand how the matter was decided as it was and how conclusions were reached on the 'principle controversial issues': *South Bucks District Council v. Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953, per Lord Brown, at [36]. The only true answer to the Secretary of State's complaint is that as the aggrieved party she has genuinely been substantially prejudiced by the failure of the Judge to provide an adequately reasoned decision.
40. Mr. Sellwood sought, with notable patience, to address questions from the bench and to seek to establish that the decision reached was the only true one that could be made in the circumstances. However, the combination of a lack of procedural fairness and a lack of adequate reasoning has led to substantial prejudice to the Secretary of State, striking at the roots of justice, and consequently the decision must properly be set aside.
41. I observe that a relevant issue arises in this matter, namely the potential impact of the Supreme Court judgment in *R (Begum) v. Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 W.L.R. 556 on 'section 40(3)' appeals concerned with the deprivation of British nationality. As I have determined above that the decision of the Judge must be set aside, the operational import of the *Begum* judgment can properly be considered at the resumed hearing.
42. A further issue that can properly be addressed at the resumed hearing is the continued applicability of the *Sleiman* decision post-*Begum*. At the resumed hearing the parties should properly be expected to address the conclusion of the Upper Tribunal in *Pirzada (deprivation of citizenship: general principles)* [2017] UKUT 196 (IAC), [2017] Imm AR 1257 namely that the central consideration in a section 40(3) appeal is whether the deception referred to motivated the grant of citizenship, and not whether it materially affected prior grants of leave to remain.

Remittal

43. In addition to the failing in respect of the *Sleiman* consideration, I observe Mr. Sellwood's acceptance that the Judge failed entirely to consider the 'good character' issue that was before her. In the circumstance, both parties agreed that this is a matter that could properly be remitted to the First-tier Tribunal for the decision to be remade.
44. I agree with the representatives that remittal is the appropriate course in this matter. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2(a). I observe the fundamental nature of the material error identified and conclude that the effect of the error has been to deprive the Secretary of State of a fair hearing before the First-tier Tribunal. Consequently, I set aside this decision and remit it back to the First-tier Tribunal at Birmingham.
45. The future listing of this appeal is solely a matter for the First-tier Tribunal. However, I take this opportunity to observe that I indicated to the parties at the hearing that if the matter had remained in the Upper Tribunal the resumed hearing would have been heard by a panel. The application of the Supreme Court judgment in *Begum* and its potential impact upon the reported decision in *Sleiman* are issues that would have been suitable for a panel consideration in this Tribunal.
46. The Secretary of State should properly be expected to aid the First-tier Tribunal as to whether she applied a policy to the claimant when granting him exceptional leave to remain in 2001. The relative importance of this issue will be a matter for the First-tier Tribunal to consider at the remitted hearing.

Notice of Decision

47. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision sent to the parties on 16 December 2020 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
48. No findings of fact are preserved.
49. The decision is to be remade by a Judge other than Judge Athwal sitting in the First-tier Tribunal at Birmingham.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 11 May 2021