



**Upper Tribunal
(Immigration and Asylum Chamber)
DC/00031/2020 (P)**

Appeal Number:

THE IMMIGRATION ACTS

**Determined on the papers pursuant to Decision & Reasons
rule 34 Promulgated
On 11 October 2021 On 12 November 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR GENTIAN LULAJ

Respondent

DECISION AND REASONS

BACKGROUND

1. The Secretary of State is the appellant in this appeal. For ease of reference, however, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Khosla promulgated on 7 June 2021 (“the Decision”). By the Decision, the Judge allowed the Appellant’s appeal against the Respondent’s decision dated 26 February 2020 giving notice of her intention to deprive the Appellant of his British citizenship due to his use of a false date of birth and nationality when claiming asylum in the UK, when obtaining indefinite leave to remain (“ILR”) and when applying for naturalisation.

2. When he entered the UK in March 2001, the Appellant claimed to be a national of Kosovo born on 17 February 1986. He is in fact an Albanian born on 17 May 1984. Whilst he would have been a minor when he arrived in the UK (just), he was granted exceptional leave to remain based on his claimed age of fifteen at a time when he was in fact eighteen. The Respondent also asserted that, if she had been aware of the Appellant's true nationality and date of birth, he would not have been granted ILR and citizenship.
3. In the course of the hearing before Judge Khosla, it was conceded by the Appellant's legal representative that the obtaining of ILR and citizenship was obtained by means of the deception. That concession is recorded at [39] of the Decision as follows:

"In his skeleton argument and indeed at the commencement of the hearing Mr Seelhoff accepted that the Appellant had obtained his indefinite leave to remain and his British citizenship by deception. As to whether the Appellant obtained his Exceptional Leave to Remain by deception, he submitted that this was not obviously so but submitted that in the light of the Appellant's acceptance that he obtained his indefinite leave to remain and citizenship by deception whatever the answer to that issue, it was largely immaterial."

4. Judge Khosla then proceeded to set out the law as regards the acceptance of concessions, having recorded at [40] of the Decision that he was "in some doubt that this was a concession which [Mr Seelhoff] could properly make". At [49] of the Decision the Judge recorded his consideration "whether there would be any prejudice to the Respondent in going behind the concession, and whether there would be any wider injustice to either party in doing so". He concluded there would not be as there was no dispute as to the facts relating to the concession and that the Respondent had prepared her case without knowledge of the concession. The Judge asserted that "[t]here is no indication that the Respondent would have put her case any differently had the concession not been made". The Judge did not however consider whether the Respondent might have sought to develop her case before him orally in relation to materiality if the Judge had indicated that the concession was not or might not be accepted.
5. Importantly, there is nothing in the Judge's analysis which suggests that he had indicated to either party in the course of the hearing that he was minded not to accept the concession which had been made. Whilst the Judge rightly records at [50] of the Decision that the Tribunal is not bound to accept a concession made by one of the parties if it is not properly made (at least in relation to the law), in fairness to both parties, the Judge ought to have given them the opportunity to address him on that issue rather than taking the point of his own volition and without any notice that he was minded to follow that course.
6. Unsurprisingly, therefore, the Respondent appealed on the basis that the Judge acted in a way which was procedurally unfair, not simply to the Respondent but also to the Appellant since the Judge had failed to make findings on the case which he was advancing rather than based on the one

he had conceded. The Respondent makes the point that she was not given the opportunity to reply to any of the points taken by the Judge. He should have put the parties on notice and invited submissions.

7. The other two grounds challenge the Decision based on the Supreme Court decision of R (oao Begum) v Special Immigration Appeals Commission; Begum v Secretary of State for the Home Department [2021] UKSC 7 (“Begum”). The Supreme Court in Begum provided guidance about the way in which a court or tribunal should approach the exercise of discretion in deprivation cases. Although Begum was concerned with a deprivation on national security grounds, this Tribunal in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC) has provided guidance indicating that the same approach applies equally in deprivation appeals under section 40(3) British Nationality Act 1981 (“Section 40(3)”). The Respondent asserts in her grounds that the Judge has therefore erred by deciding for himself how discretion is to be exercised. The Decision post-dates Begum. Judge Khosla indicated at [80] of the Decision that he did not decide the point whether Begum applied. That was because at [79] of the Decision, he found that the Respondent had failed to make out her case in relation to the power to deprive under Section 40(3).

8. Permission to appeal was granted by First-tier Tribunal Judge Ford on 5 July 2021 in the following terms so far as relevant:

“... 2. It is arguable that the Tribunal erred in:-

- a. Going behind the concession made by the Appellant that his deception as to nationality and identity was material to the grant of citizenship on the basis that this was not a concession that could properly be made
- b. Denying the Respondent the opportunity to make submissions on this matter before making its decision
- c. Not considering the basis on which the Appellant’s appeal was actually argued, namely that it was no longer reasonable to deprive the Appellant of citizenship

3. The grounds are arguable. There is an arguable material error of law.”

9. Following the grant of permission, the Appellant’s representative filed a Rule 24 response in the following terms (so far as relevant):

“We confirm that we do not oppose the application for permission to appeal and would suggest that the matter be remitted to the first-tier to be heard by a judge other than Judge Khosla.

For the sake of clarity, we confirm that the concession that citizenship was obtained by deception was based on the fact that the applicant was an adult at the date he applied for citizenship and that he concealed his true identity, and date of birth in that application.

The concession was made because we accept that in concealing his identity he would have frustrated background checks and concealed the historic deception he made albeit as a minor in securing previous grants of leave to remain. We accept it is unlikely the Respondent would have been granted [sic] citizenship had they known all the circumstances at the time.

There was no discussion of the basis of the concession at the hearing. We consider that the concession was properly made and that it was unfair on the Respondent for the judge to go behind it.

We accept that the presenting officer was denied an opportunity to make submissions on the issue which we would professionally have been bound to support had we been asked to clarify the basis of the concession.”

The Rule 24 Response also indicated that the firm acting for the Appellant is closing and that the Appellant would be seeking alternative representation. This has no bearing on the issues before me, however, since the Appellant must have been advised by the firm of reputable immigration solicitors in relation to both the concession before Judge Khosla and in the Rule 24 response and given instructions in both instances for those concessions to be made.

- 10.** Although the Rule 24 response does not expressly invite the Tribunal to find an error of law and remit the appeal to the First-tier Tribunal in a decision on the papers, it is implicit in the response that no hearing was considered to be necessary to resolve the error of law issue.
- 11.** Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“Rule 34”) permits the Tribunal to make any decision without a hearing. When considering whether it is appropriate to do so, the Tribunal is required to have regard to the views of the parties. As I have already indicated, I read the Rule 24 response as impliedly consenting to the error of law issue being determined without a hearing. There has been nothing filed with the Tribunal from the Respondent since the Rule 24 response, but I cannot see any basis on which the Respondent could object to a determination without a hearing in circumstances where her appeal is being allowed.
- 12.** I have considered whether the judgment of Fordham J in The Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin) (“JCWI”) has any bearing on my decision to consider the error of law issue on the papers. The JCWI case was concerned with whether a practice direction given by the President during the pandemic gave rise to an ‘overall paper norm’. It is not concerned with whether Rule 34 permits the making of a decision on the papers in individual cases.
- 13.** In any event, since the JCWI case, this Tribunal has issued guidance concerning the use of Rule 34 in EP (Albania) & Ors (rule 34 decisions: setting aside) [2021] UKUT 233 (IAC). I have had regard to the principles set out in that decision. The essential question is whether it is procedurally fair to determine the appeal in issue without a hearing. In deciding that question, I have also had regard to the overriding objective contained in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. That is to say that I am required to deal with a case fairly and justly in a way which includes having regard to cost and resources, the avoidance of delay and the use of flexibility when deciding the case.

- 14.** In the instant case, the Appellant has conceded that there is an error of law in the Decision. His current representatives who have made the concession on his behalf have explained the basis of the concession made previously and have conceded that the appeal should be remitted. Those representatives will no longer be able to represent the Appellant as the firm has closed. That has no bearing on either of the concessions made since the Appellant must have given instructions in order for those concessions to be made. The impact of the course of action adopted by Judge Khosla is that there is accepted to have been procedural unfairness in the First-tier Tribunal's hearing. There will therefore need to be a further hearing before the First-tier Tribunal. If the Appellant's new representatives are of the view that it is not appropriate to repeat the concession made before Judge Khosla it is open to them to withdraw that concession (although I make clear that I am not inviting the Appellant to do so). The Appellant is therefore not prejudiced by the setting aside of the Decision in the event that future representatives take a different view of his case. Obviously, the Respondent would need to be put on notice if the concession is to be withdrawn but that is a matter to be dealt with by the First-tier Tribunal following remittal.
- 15.** The nub of the error conceded to be made by Judge Khosla is in any event unconnected to the substance of the concession but is a procedural one based on his rejection of the concession without notice to the parties.
- 16.** The listing of a hearing to deal with the error of law issue would only serve to increase the cost to the Appellant of instructing representatives orally to make the concession already made in writing that the Decision must be set aside. There would be no benefit to him of that course. It would also prolong the course of the appeal unnecessarily.
- 17.** For those reasons, I am satisfied that it is fair and just to deal with the error of law issue on the papers.
- 18.** Turning then to the substance of the challenge to the Decision, I am persuaded that the Respondent's grounds establish that there is an error of law. That is based on the unfairness of the procedure adopted by Judge Khosla. He gave no indication at the hearing that he was not intending to accept the concession. He did not invite submissions once he had decided on that course. Whilst the Respondent may well have prepared her case on the basis that there was no such concession (although the grounds point out that the Appellant's skeleton argument containing the concession was served months before the hearing), she points out that her Presenting Officer would have been able to seek to persuade the Judge as to the correctness of the concession. The Appellant's representative would also have had the opportunity to explain the basis of the concession as has been done in the Rule 24 response.
- 19.** The issue in any event is whether the procedure is objectively fair. I am satisfied that the lack of opportunity given to make submissions before the concession was rejected rendered the process unfair.

20. I am less persuaded by the Respondent's other grounds. At [80] of the Decision, the Judge found there to be considerable force in the Presenting Officer's submissions regarding the effect of Begum. However, he considered that he did not need to decide the point as his conclusion was that the precedent fact in Section 40(3) was not met. As he indicated at [79] of the Decision, he had for that reason not gone on to consider the exercise of the discretion as that would be relevant only once the condition precedent was established. There may be an error in the legal approach adopted bearing in mind that the task of the Tribunal is now understood to be a review function. However, I do not need to decide that issue as I am satisfied that the Judge has erred in relation to his conclusion concerning the condition precedent based on the course he took when refusing to accept the concession.

CONCLUSION

21. For the foregoing reasons, I am satisfied that there is an error of law in the Decision. Since that is one based on a lack of procedural fairness, it is not appropriate to preserve any of the Decision. I therefore set it aside in its entirety. Also given the basis for the error of law found, and in accordance with the request of the Appellant, I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Khosla.

DECISION

The Decision of First-tier Tribunal Judge Khosla promulgated on 7 June 2021 involves the making of an error on a point of law. I therefore set aside the Decision and remit the appeal for re-hearing before a Judge other than Judge Khosla.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 11 October 2021