



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00100/2019

THE IMMIGRATION ACTS

Heard at Field House
by Microsoft Teams
On 6 July 2021

Decision & Reasons Promulgated

On 12 August 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**A S R (aka B Z M)
(IRAQ)
[ANONYMITY ORDER MADE]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Steven Park of Counsel, instructed by Walters & Plaskitt Solicitors

For the respondent: Mr Toby Lindsey, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of A S R aka B Z M who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 18 September 2019 to deprive him of British citizenship pursuant to section 40(3) of the British Nationality Act 1981. The appellant is a citizen of Iraq.
2. Between the grant of permission and the present error of law hearing, the Supreme Court considered the question of deprivation of citizenship in *Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor* [2021] UKSC 7 (26 February 2021) (*Begum*) and gave guidance on the correct approach, which is relied upon by the respondent in these proceedings.
3. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. There were no significant technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

Background

4. The appellant entered the United Kingdom illegally in 2002 and claimed asylum on 23 July 2002 in the BZM identity, giving a date of birth of 1 January 1975. A week later, he made an asylum claim in the same identity with the same date of birth, identifying his spouse as NMA born in 1980 in Iraq. The appellant identified his father as ZM and his mother as FA, both born in Iraq in 1939. The risk he asserted he faced was in a town in Kirkuk. The appellant maintained his fictitious identity at the asylum interview on 16 October 2002.
5. On 22 November 2002, the respondent refused international protection but granted the appellant exceptional leave to remain until 22 November 2006, based on his origin in Kirkuk. On 23 November 2002, the appellant applied for a travel document in the BZM identity, signing a declaration that the information given was true to the best of his knowledge.
6. On 25 October 2006, the appellant applied for indefinite leave to remain in the BZM identity. The form included a declaration that:

“I am aware that it is an offence under the Immigration Act 1971, as amended by the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002 (as amended), to make to a person acting in execution of any of those Acts a statement or representation which I know to be false or do not believe to be true, or to obtain or to seek to obtain leave to remain in the United Kingdom by means which include deception.”

Indefinite leave to remain was granted in the BZM identity.

7. On 29 May 2008, the appellant applied for British citizen status by naturalisation, still in the BZM identity. He signed the following two declarations in that application:

“To give false information on this form, knowingly or recklessly, is a criminal offence punishable with up to 3 months’ imprisonment or by a fine not exceeding £5000 or both (section 46(1) of the British Nationality Act 1981, as amended). ...

I understand that a certificate of citizenship may be withdrawn if it is found to have been obtained by fraud, false representation, or concealment of any material fact, or if on the basis of my conduct the Home Secretary considers it to be conducive to the public good.”

8. The appellant’s wife successfully applied to join him in the United Kingdom for settlement. Two children were born to them in 2009 and 2010, and registered as British citizens, the father’s name being given in the BZM identity. The appellant’s wife obtained indefinite leave to remain on the basis of her marriage to the appellant.
9. In 2012, the appellant’s mother-in-law in Iraq was seriously ill. The appellant, his wife and two children, returned to live in Erbil with his wife’s family. In 2015, the appellant’s wife gave birth to their youngest child, a son. In 2016, the appellant returned to the United Kingdom for just under two months, then returned to Iraq until 2018. In Iraq, the appellant resumed his birth identity of AYR.
10. In 2016, the appellant applied for his Iraqi identity card, in the AYR identity. His own family moved back to Erbil in 2016. In 2016, the appellant returned to the United Kingdom for just under two months, using the British passport in the BZM identity.
11. The appellant and his two older children returned to the United Kingdom for good in September 2018, for the beginning of the school year. The children began to attend school here. The appellant’s wife remained in Erbil with their youngest son, who was 3 years old.
12. During 2018, the appellant saw a solicitor and executed a Deed of change of name, reciting that he had been a British citizen since birth, and changing his name from the BZM to the AYR identity, described in the Deed as an assumed name. It appears that the appellant did not disclose to his then solicitor that he had been born in Erbil, Iraq, not the United Kingdom, nor that AYR was his birth name, rather than an assumed name.
13. The appellant’s deception came to light in 2019, when he submitted counterfeit passport documents to HM Passport Office in connection with a passport application for his youngest child. His Iraqi passport gave his identity as AYR born in Erbil, not Kirkuk.
14. The respondent interviewed the appellant, who admitted that his true identity was that of AYR with a date of birth of 5 January 1975. On 3 June 2019, the respondent wrote to the appellant saying that she had reason to believe that he had obtained his British citizen status as a result of fraud.

Deprivation decision

15. On 3 June 2019, the respondent asked the appellant to show cause why his British citizen status should not be removed. She said this:

“The Secretary of State has received information that indicates that when you claimed asylum in the United Kingdom, that you presented a false identity consisting of [BZM] 5 January 1975, born Kirkuk, Iraq. When you applied for your son’s British passport, it is noted that you presented documents to the passport office which show that your name, date of birth and place of birth have all been changed. In addition, it is noted that you have provided an Iraqi passport, [reference no provided] which confirms that your true identity is [AYR] date of birth 5 January 1975, born Erbil, Iraq.

This amended identity means that when your application for asylum was considered, you were granted exceptional leave to remain in the United Kingdom on account of your perceived place of birth of Kirkuk, which at the time of your application was part of what was termed Government-controlled Iraq and as such you could not be returned to there and you had intimated that you could not be returned to the Kurdish Autonomous Zone (KAZ) at that time due to what you claimed was your father’s membership of the Ba’ath Party. It is therefore believed that the fraud that you have perpetrated was *material* and that had your true identity have been known at the time your application was considered, it is likely that your application would have been refused, and attempts would have been made to remove you to the Kurdish Autonomous Zone as you had originated from there.”

16. The appellant was given an opportunity to make representations, which he did. The appellant responded in a manuscript letter dated 7 June 2019. He said that he was frightened of the Saddam Hussein government in Iraq: many Kurds had been forcibly Arabised. He had been too afraid to give his correct name when he arrived in the United Kingdom in 2002.
17. His wife was being badly treated by her family, who considered that the appellant had abandoned her. He was afraid for her and she was at risk of honour killing. The appellant considered that since admitting his true identity in September 2018, he had been sufficiently punished: he had a full-time job working for FEDEX, and asserted that he had no criminal record and was of good character.
18. On 18 September 2019, the respondent gave notice of her decision to deprive the appellant of his acquired British citizen status. His children were then 10, 9 and 4 years old: their British citizen status, and the indefinite leave to remain for his wife, were not affected. The respondent acknowledged that she had a discretion to exercise in such cases, and gave her reasons for exercising it against the appellant, which she considered to be both reasonable and proportionate.
19. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

20. On 6 December 2019, First-tier Judge Jones dismissed the appeal. The judge found the appellant's core account totally lacking in credibility. She considered that the appellant had not given the true reasons for using and maintaining the BZM identity in the United Kingdom. She considered the appellant's evidence to be a fabrication to explain a deliberate falsehood, maintained over many years.
21. The First-tier Judge reminded herself that the decision should not be challenged by proleptic analysis. Should a decision to remove later be made, Article 8 ECHR proportionality would be considered then and the appellant would have an in-country right of appeal:

"43. Deprivation of the appellant's citizenship [status] will not affect the citizenship rights of his children in the United Kingdom, nor the rights of his child in Iraq, who is a British citizen by descent. It will not affect his family life with his wife or children. there is no evidence that it will impact on the rights of his children in the United Kingdom to education, housing, financial or other support. It will not impact on their contact with the appellant. The respondent acknowledged that the decision may have an emotional impact on them, given the seriousness of what the appellant has done, but considers the decision is a reasonable step to take. The best interests of the appellant's children are a primary, but not the paramount consideration. I am satisfied the respondent has properly taken them into account.

44. Having regard to all the circumstances, including the best interests of the appellant's children, I find the respondent's decision to deprive the appellant of his British citizenship [status] is a proportionate interference with the appellant's rights to a family and private life under Article 8 ECHR."

22. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

23. First-tier Judge Pooler in May 2020, at the height of the Covid pandemic, granted leave to remain on the basis that it was arguable that the First-tier Judge had failed to consider the reasonably foreseeable consequences of deprivation (the 'proleptic analysis' issue) and/or that there was no real prospect of the appellant being deported; that the false name and place of birth which the appellant gave was an irrelevant matter which the judge should not have taken into account; and that the judge failed to have regard to the respondent's policy.

24. The decision continued:

"4. The grounds are arguable. The appellant's family circumstances are complex: his wife had been living in Iraq (from where her ability to enter the United Kingdom as a returning resident and bring her youngest child might be compromised) and the two older children were living in the United Kingdom with the appellant. All of the children were British citizens. Arguably the judge failed to make findings as to the

reasonable foreseeability or otherwise of the appellant's removal from the United Kingdom."

Rule 24 Reply

25. Following triage directions from Upper Tribunal Judge McWilliam, Mr Tony Melvin of the respondent's Specialist Appeals Team filed a Rule 24 Reply. He contended that the proleptic analysis as to future removal was a speculative assessment as to future actions and contrary to the proper *ex nunc* assessment of risk on return which the international protection Conventions require.
26. As a matter of law, the appellant would not lose his British citizenship until the conclusion of the present appeal. Should any removal decision then be made, he would have a further right of appeal against that. No evidence showed that his wife had made any application to come back to the United Kingdom and rejoin the appellant since they returned to Erbil in 2012.
27. The First-tier Judge had not erred in taking account of the appellant's use of, and reliance upon, a false name and date of birth. As regards the challenge to the First-tier Judge's consideration of the respondent's Chapter 55 policy guidance, that was unparticularised and the respondent had given clear reasons for her decision thereunder.
28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. For the appellant, Mr Park reminded me that the elder two children were British citizens and could not be required to leave the United Kingdom, and contended that their continuing separation from their mother was self-evidently contrary to the children's best interests. No evidence was required to prove that. The appellant would rely on *Begum* at [120]-[121], which was applicable to the children and their relationship with their mother. The First-tier Judge had failed to carry out a full proportionality assessment and the appeal should be allowed.
30. For the respondent, Mr Lindsay relied upon and adopted Ms Cunha's written submissions, in particular as to the effect of *Begum* in jurisdictional terms: as a decision of the Supreme Court, it was a comprehensive and binding review of the law. The section 40 discretion was for the Secretary of State, not the Tribunal, to exercise and the question for the Tribunal was not whether the respondent's decision was proportionate, but whether it was arbitrary (see *Begum*, at [64]). A proleptic analysis was not appropriate: it was not relevant to examine the reasonably foreseeable consequences of deprivation. Procedural safeguards existed: see K2 [2017].
31. *Begum* now represented a comprehensive and single course of correct procedure in this area. The respondent relied particularly on the section headed *Jurisdiction and powers of SIAC*, which was equally applicable to the Upper Tribunal, and *Jurisdiction*

and role of court, which dealt with the roles of the Court of Appeal and Divisional Court.

32. Mr Lindsay reminded the Tribunal that the First-tier Judge had not been satisfied to any standard that the wife was at risk of honour killing in Iraq, nor that her circumstances were as claimed. The appellant would struggle to show that the *status quo* following deprivation, but without any deportation order, would interfere with his Article 8 ECHR rights. His wife had not made any attempt to rejoin him in the United Kingdom since 2012. The First-tier Judge had omitted nothing in his careful decision, which was neither perverse nor *Wednesbury* unreasonable.
33. The meaning of the statutory language in subsections 40(2) and 40(3) of the British Nationality Act 1981 was plain, the purpose being to deter others and promote public confidence in the immigration system. The Secretary of State's assessment was to be accorded respect, by reason of her institutional capacity and democratic accountability, which was equally applicable in the present case.
34. The grounds in the present appeal were really no more than a disagreement with a legitimately reached decision, within the respondent's discretion. There was no evidence on which a conclusion could be reached that the best interests of the appellant's two children in the United Kingdom would be prejudiced by returning to live in Iraq, where their mother and younger brother were living. Their British citizen status would be unaffected by the appellant's loss of his citizenship.
35. There was no error of law in the decision of the First-tier Tribunal and the appeal should be dismissed.
36. I reserved my decision, which I now give.

Section 40 and 40A British Nationality Act 1981

37. The right of appeal to the First-tier Tribunal and Upper Tribunal from decisions under section 40 of the British Nationality Act 1981 arises from section 40A(1) of the Act. Section 40(5) requires that before a deprivation order can be made, notice must be given to the person against whom a decision to deprive has been taken, stating that the respondent has decided to make a deprivation order, giving reasons and notifying the person of their right of appeal under section 40A(1) or section 2B of the Special Immigration Appeals Commission Act 1997. It is not disputed that the respondent has done that in this appeal.
38. The relevant provisions for our purposes are to be found in sub-sections 40(2) and 40(3) of the 1981 Act:

"40. ...(2) The Secretary of State *may* by order deprive a person of a citizenship status if the Secretary of State is *satisfied that deprivation is conducive to the public good*.

(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.*" [Emphasis added]

39. As Mr Lindsay contended, section 40 gives the respondent a discretion to deprive a person of citizenship status, where she is satisfied of the matters set out in each subsection cited above. In this appeal, the respondent relies on subsection 40(3), not subsection 40(2): it is not her case that deprivation of citizenship status is conducive to the public good, but that the appellant's naturalisation was obtained by fraud, false representation, and/or concealment of a material fact.

***Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor* [2021] UKSC 7 (26 February 2021)**

40. Neither the First-tier Judge who decided the appeal, nor First-tier Judge Pooler, who granted permission to appeal, had the benefit of the later consideration of section 40 by the Supreme Court in the *Begum* case. The opinion of the Supreme Court in *Begum* was given by Lord Reed PSC, with whom Lord Hodge JSC, Lady Black JSC, Lord Lloyd-Jones JSC and Lord Sales JSC agreed, and binds the Upper Tribunal.

41. *Begum's* case combined a statutory appeal against a decision to deprive Ms Begum of United Kingdom citizenship status, and judicial review of the respondent's refusal to grant her entry clearance to return to the United Kingdom and pursue her appeal in-country. At [62], when considering the extent of SIAC's powers on a statutory appeal, Lord Reed cited with approval the analysis of Lord Hoffman in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, wherein he held that the discretion exercised by the Home Secretary was based on:

"...the advantage of a wide range of advice from people with day-to-day involvement in security matters which [SIAC], despite its specialist membership, cannot match. ...In such questions, an appellate body traditionally allows a considerable margin to the primary decision maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained."

42. At [62] in *Begum*, Lord Reed said this:

"62. Finally, Lord Hoffmann explained at para 62 that a further reason for SIAC to respect the assessment of the Secretary of State was the importance of democratic accountability for decisions on matters of national security:

"It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

These points have been reiterated in later cases, including *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (“A”) and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945.”

43. At [64], Lord Reed acknowledged that:

“64. ...many appeals will raise issues under the Human Rights Act...in particular, that the appellant must be able to challenge the legality of the measure taken against him, its compatibility with absolute rights such as those arising under Articles 2 and 3 of the ECHR, and the proportionality of any interference with qualified rights such as those arising under Article 8. ...

A more limited approach has been adopted in cases concerned with deprivation of citizenship.

The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. *In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant.*

In determining arbitrariness, the Court considers *whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49-50 and 54-61.”

[*Emphasis added*]

44. And at [68]:

“68. ... appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). *They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.”

[*Emphasis added*]

45. The procedural safeguards mentioned in *K2 v United Kingdom* [2017] are set out at [52ff] and relate principally to the difficulty of pursuing an appeal while excluded from the jurisdiction, and the problems arising out of the Special Advocate procedure in SIAC, neither of which applies in this appeal.

46. The Supreme Court in *Begum* held that it had not been open to the Court of Appeal to make its own assessment of the requirements of national security, but rather to

respect the respondent's assessment, 'given that it is the Home Secretary who has been charged by Parliament with responsibility for making such assessments, and who is democratically accountable to Parliament for the discharge of that responsibility'.

Analysis

47. The First-tier Tribunal correctly declined to conduct a proleptic analysis of whether an appellant would be likely to be deported or removed to Iran in the future (see *Aziz and others v Secretary of State for the Home Department* [2018] EWCA Civ 1884 (08 August 2018), [2019] WLR 266). If such a decision were to be made, a full right of appeal including Article 8 ECHR proportionality would arise. At [41] the Tribunal correctly held that the principle of no proleptic analysis applied equally to deprivation of citizenship status on section 40(3) grounds.
48. The First-tier Judge held that the decision to deprive the appellant of citizenship status did not necessarily entail removal or deportation of the person the subject of that decision and accordingly, was likely to have minimal effect on the person's family life and/or the best interests of his children. It was also open to the judge to conclude, as she did, that mere deprivation would have no effect on the appellant's family life with his two older children, or his more remote family life with his wife and child in Iraq.
49. The grounds of appeal assert that the 'reasonably foreseeable consequences of deprivation of citizenship' which the First-tier Judge should have considered include that he would be prevented from sponsoring his wife's application for entry clearance as a returning resident, to rejoin him and their two older children along with the youngest son. However, she has not applied for entry clearance since 2012 and her indefinite leave to remain will have lapsed because she has been so long outside the United Kingdom.
50. Finally, the appellant has contended that his actions in using a different name and place of birth were immaterial to the decision to grant him citizenship, or exceptional leave to remain leading eventually to naturalisation, and that the First-tier Judge erred in law in finding that they were relevant. That argument cannot succeed, for the reasons set out in the decision letter: if the appellant had disclosed that he was born in Erbil, rather than Kirkuk, he would not have been granted discretionary leave and the process which led to citizenship would not have begun. The appellant maintained his false identity for many years, when he was already in a place of safety and there was no reason to do so. The First-tier Judge was entitled to have regard to that.
51. Overall, I concur with Mr Lindsay that these the grounds of appeal are really no more than a disagreement with the outcome of the appeal. They do not challenge the comprehensive negative credibility finding as to the core account and the matters they do raise are unarguable.

52. The grounds of appeal disclose no arguable error of law in the decision of the First-tier Judge, which is upheld.

DECISION

53. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 5 August 2021