



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DC/00136/2019

THE IMMIGRATION ACTS

**Heard at Field House via Skype for Decision & Reasons
Business Promulgated
On 27th April 2021 On 20th October 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**BESNIK SINANI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Smith, instructed by AG Law Ltd

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 27th November 2019 depriving him of British citizenship under section 40 of the British Nationality Act 1981, as amended.

2. The judge dismissed his appeal in respect of the challenge to the deprivation decision but allowed it under Article 8 of the European Convention on Human Rights.
3. Following challenges to the judge's decision in respect of which permission was granted, following an error of law hearing on 11th December 2020 I allowed both the appellant's challenge in a Rule 24 response to the judge's decision dismissing the appeal against the deprivation decision and also allowing the Secretary of State's appeal against the Article 8 decision.
4. It was common ground between Ms Smith and Mr Clarke that the correct version of the relevant extracts from Chapter 18 of the respondent's guidance was that attached to Ms Smith's skeleton argument.
5. In his submissions Mr Clarke relied upon and developed the points made in his skeleton argument.
6. It was clear that the decision of the Supreme Court in Begum [2021] UKSC 7 had made quite a significant change in the law with respect to deprivation and the Upper Tribunal's jurisdiction. Although Begum was a section 40(2) conducive grounds appeal, it was argued, and appeared to be common ground, that the same reasoning applied equally to section 40(3) appeals. It was clearly set out in Begum that administrative law principles apply to the review of the Secretary of State's decision-making in a deprivation case rather than it being a question of the Tribunal remaking the decision. Reliance was placed on paragraphs 66 to 69 of Begum in particular.
7. It was also common ground that the condition precedent, in this case whether or not there had been fraud, was a matter for the Tribunal.
8. With regard to what Ms Smith said at paragraph 16 in her skeleton concerning paragraph 81 in Begum and the "flexible standard" she referred to, it was argued that materiality did not exist in a vacuum but it would be necessary to consider the scope of the Secretary of State's consideration. It was common ground that the Tribunal could only apply administrative law principles to the question of whether the decision was lawful.
9. Reliance was also placed on what was said in Mr Clarke's skeleton at paragraph 8 with respect to paragraph 124 of Begum and the correct approach to considering policies within the context of a review. The test was one of irrationality.
10. With regard to the detailed chronology set out in Mr Clarke's skeleton, it was argued that the appellant and his wife had colluded in fraudulent claims in the United Kingdom and this fed into the materiality of the fraudulent nature of the appellant's citizenship application. The dates set

out in the chronology were taken from the decision letter and were correct. Thus the appellant's initial application on 10th February 1999 was in a false identity and in a false nationality. Although his subsequent application on 28th November 1999 was made in his correct identity, it was again on the basis that he was a Kosovan refugee, and at that time he was accompanied by his wife, who was claimed to be his sister and who was also claimed to be a Kosovan refugee. As a consequence of his wife being granted British citizenship, the appellant had made an entry clearance application in 2006 and was granted a two years visa and after he had remained for a while he was granted indefinite leave to remain as being married to a settled person, in 2008, but it was notable that, as observed in the refusal letter, he had ticked the box "no" when asked if he had engaged in activities which would indicate he was not of good character.

11. As a consequence, it was argued that there was a line from the fraud in which the appellant had colluded and that had necessarily led to his wife's grant of indefinite leave to remain and there had been no break in that leading up to the grant of citizenship. If the fraud had been known of when his wife was granted indefinite leave to remain the appellant would not have been granted entry clearance nor would he have obtained the benefits of indefinite leave to remain and nationality subsequently.
12. Mr Clarke also relied on paragraph 20 of the refusal letter set out at paragraph 12 of his skeleton argument with regard to the appellant's character and conduct. These were adverse matters to the appellant, so even if the chain of causation were broken as Ms Smith argued, if it had been known of at the time when nationality was considered the appellant would have been refused.
13. Reliance was placed on the family ILR policy APU Notice 4/2003 dated October 2003, which had been in effect when the appellant's wife was granted indefinite leave to remain. It should be noted that the terms of exclusion under that policy were mandatory. It was known that his wife had made two applications in different identities, one as a dependant on the appellant and one in her own right. So she would have fallen for exclusion. She had also applied in multiple identities. Hence, if the fraud had been known at the time, the appellant would not have been granted entry clearance and therefore placed on the path to citizenship, and he had been party to his wife's fraud. He was the lead applicant in one of those applications.
14. Mr Clarke placed reliance on the unchallenged findings of the First-tier Tribunal with regard to the chronology as set out at paragraphs 14 to 16 of the skeleton argument. Ms Smith argued in her skeleton argument that because there was a discretionary policy in play for the grant of leave to the wife, it was argued that that presumed the Secretary of State would have known and made a concession as to the fraud but she had not known and reference was made to the terms of the policy. The decision in JS [2007] UKAIT 00080 was referred to but it could not properly be relied on

by the appellant since it did not set out fully the exclusionary provisions of APU Notice 4/2003.

15. As regards the policy, paragraph 9.1 quoted at Mr Clarke's paragraph 19 was of relevance. The appellant had not been truthful concerning his history and attempts to deceive the Secretary of State with regard to his applications nor those of his partner. He had maintained the fraud. In his nationality application he had said his wife was Kosovan. So, even if the Tribunal disagreed about causation, in her application of discretion it was open to the Secretary of State to refuse. Given the extent of the fraud perpetuated and the collusion in order to obtain status, the decision was open to the Secretary of State.
16. In addition, it was recognised that the materiality of fraud to the grant of citizenship was a necessary consideration under the Chapter 55 policy guidance. Materiality was made out. The decision in Sleiman [2017] UKUT 00367 (IAC) was to be distinguished as set out at paragraphs 25 to 28 of Mr Clarke's skeleton. It was of very limited scope and was a chain of causation case only. There had been no reliance by the Secretary of State on deception being relevant to the grant of indefinite leave to remain in that case.
17. Although there was largely agreement between Mr Clarke and Ms Smith as to the relevant legal principles, he did not accept what she said about KV (Sri Lanka) [2018] EWCA Civ 2483 and her argument about a flexible standard. It was agreed that what was said in Begum did not affect Article 8 being a matter for the Upper Tribunal, but it was clear that KV was wrong as to the proper approach as later decided in Begum, but as regards the argument about flexibility it was not accepted, as had been argued in Mr Clarke's previous skeleton. It was said in KV that it would be an unusual case for the applicant to complain where it did no more than take him back to where his position would have been if he had not been fraudulent. The position might be contrasted if rights had been lost. So even there the weight of the public interest was significant. If it were an rationality test, even on the KV points of reference the challenge came nowhere near establishing irrationality.
18. As regards the Article 8 issue, Mr Clarke had set out relevant case law guidance at paragraphs 30 to 33 of the skeleton. It was agreed that the test was one of reasonably foreseeable consequences. As had been said in Aziz, it was not for the Upper Tribunal to guess or make an anticipatory analysis of whether the appellant would be likely to be deported at a later stage. The appellant had three British citizen children and it could be seen that that would reduce the weight of the public interest in deportation if it came to that point. In Mr Clarke's view he would have a fairly strong argument against removal.
19. As regards the limbo issue, addressed in Hysaj [2020] UKUT 00128 (IAC), there were a number of similarities between that and this case. The

appellant's wife was British and there was no reason why she could not obtain a tenancy if needed or work if needed. There were safety nets for the children also, as noted towards the end of paragraph 109 in Hysaj. The offence in Hysaj was committed after the British citizenship grant, so it had little relevance to proportionality. The appeal should be dismissed under Article 8 also.

20. In her submissions Ms Smith relied on and developed the points made in her skeleton argument. It was agreed that Begum had the impact set out by Mr Clarke. The context was, however, different as there was a different public interest since national security was not in issue in this case and that was relevant. Mr Clarke appeared to accept that whether the condition precedent was met or not was for the Tribunal on the evidence. As regards the general standard it was accepted that administrative law principles applied, but it was argued that this was on a flexible standard and depending on the circumstances including which public interest was in play. It was also clear from Begum that the Secretary of State was required to consider the policies in place at the time of the decision, and the application of any policy was required to be rational.
21. KV had not been considered in Begum and that was perhaps unfortunate as it was a significant decision, and it was argued that the principles there had not been overturned by the Supreme Court in Begum, certainly with regard to the approach to Article 8 and it was agreed that that was a matter for the Upper Tribunal. Also, with regard to the exercise of discretion it could be reviewed on a flexible Wednesbury standard.
22. It was argued that the condition precedent in section 40(3) of the British Nationality Act 1981 was not made out in this case, as there had to have been deception and it had to be directly material to the grant of citizenship. It was accepted that the appellant had made false asylum claims while in the United Kingdom, but when he had returned to Albania and applied for entry clearance he did so in his true identity with his birth certificate and with his wife's Albanian nationality and birth certificate also. There had therefore been a break in the chain of causation and that brought the principles set out in Sleiman into play albeit that the facts were different. However, that decision was relevant as regards the need to show that any fraud was directly material to the grant of citizenship and it would not be material if there had been a break in the chain of causation as applicable here. Notwithstanding his previous deception the appellant returned in his true identity and nationality and his wife's also. The Secretary of State had known all of this when the entry clearance application was made.
23. Mr Clarke argued that the wife's fraud was in issue and that conduct was caught by the subsection, but it was argued that it had to be the appellant's fraud and deception under the subsection. The entry clearance application and the application made after he came to the United Kingdom did not involve fraud, so the chain of causation was

broken. He had been granted indefinite leave to remain in his own identity and it was irrelevant whether his wife was Kosovan or Albanian, it was only relevant that she was settled in the United Kingdom at the time. So the indications that his wife was Kosovan, on her documents, were not relevant to the grants to the appellant as they were not dependent upon her country of origin or nationality. Ms Smith's skeleton argument at paragraphs 23 to 31 addressed this, and she relied on the points made there. She did not accept the point made by Mr Clarke distinguishing Sleiman, as set out at her paragraph 28. Putting forward the wife's false original nationality in the indefinite leave to remain application was not enough. The question was whether the appellant's fraud was material to the grant of citizenship and he had just said she was Kosovan and that was not material as he would in any event have been granted citizenship at that stage and therefore the condition precedent was not made out and the appeal should be allowed.

24. If the Tribunal disagreed, then in any event applying the flexible standard set out in Begum the Secretary of State should have exercised discretion differently. Reference was made to the terms of the deprivation policy at Chapter 55 and the length of time the appellant had been in the United Kingdom. Paragraphs 55.7.3 and 55.7.4 were applicable and were met. The case came under that policy. The issues as to whether the policy had been applied and whether this had been done rationally were matters for the Tribunal. In the circumstances of the case the Secretary of State should have exercised discretion in the appellant's favour.
25. With regard to Article 8 it was accepted that Hysaj was relevant to the assessment but the circumstances there were different for a number of reasons. Quite a serious offence had been committed by the appellant there and that was relevant to the proportionality assessment even though at the time he was not subject to deportation action as he was still a British citizen then. It had not been said there that a person could not succeed under Article 8 but it said that something more was needed on the facts of that case. The limbo period would have an adverse impact on the wife and the three children. Their best interests were to be taken into account. They were at school and college and this situation could be detrimental to them. The appellant worked as a haulier as set out in his most recent witness statement. If he had a period of limbo and that could be lengthy, as few cases were determined within the period set out by the Secretary of State, that would be detrimental. This was relevant to proportionality. The appellant had lived in the United Kingdom for over twenty years and had left the United Kingdom and made an entry clearance application from Albania in his true identity and nationality. He had no criminal convictions and had an excellent employment record. Also, the public interest in a deportation appeal was not a question of national security where section 40(3) governed the case. The decision was disproportionate and the appeal should be allowed.
26. I reserved my decision.

27. On 30th April 2021 I was sent by the appellant's representatives a copy of a letter, dated 28th April 2021, from the Home Office SRU Deprivation & Revocation Team to the appellant's wife. Relevant parts of that letter state:

"The Secretary of State was considering depriving you of your British citizenship on the grounds that it had been obtained as a result of fraud, false representation or concealment of material fact.

Your case was referred to us because it was considered that you had claimed asylum and been granted Indefinite Leave to Remain under a false identity. The full facts have now been considered in accordance with our policy.

I am now writing to inform you that the Secretary of State has decided not to deprive you of citizenship because your case does not fall within our policy. As a result you will remain a British citizen."

28. As a consequence, on 6th May 2021 I invited both sides to provide written representations as to the implications, if any, of this decision for the appellant's appeal. A response was received from the appellant's representatives on 20th May 2021. There has been no response from the respondent, despite being given a further opportunity to respond by an email dated 9th July 2021. I address this matter further below.
29. As noted above, there is essentially common ground between the representatives as to the legal principles applicable in this case. Following the decision of the Supreme Court in Begum, it is clear that the discretion set out in section 40(2), and I agree it must follow, in section 40(3) of the British Nationality Act 1981, is to be exercised by the Secretary of State and no-one else. Clearly, the context is different since this is not a conducive grounds appeal, but one where deprivation may be ordered as a consequence of fraud, false representation or concealment of a material fact. The statutory condition which must be satisfied before the discretion can be exercised in this case is that of fraud. That, it is again common ground, is a matter for the Tribunal but otherwise the challenge to the decision with regard to deprivation has to be on the basis that the Secretary of State made an unlawful decision in that it did not comply with public law principles requiring the decision to be rational. It is also relevant to take into account, as set out at paragraph 81 in Begum, the significance of the right interfered with, the degree of interference involved, and it would appear also, the subject matter, given what was said by Lord Sumption in Pham [2015] UKSC 19, concerning the extent to which even on a statutory appeal the court is competent to re-assess the balance which the decision-maker was called on to make given the subject matter. It is important to bear in mind is that the assessment must not place the Tribunal in the shoes of the decision-maker and it must not

regard itself as competent to consider the matter de novo or take the decision itself. There is flexibility to that extent.

30. Of clear importance is the chronology in this case. I set that out in summary in the error of law decision but it will be helpful, I think, to revisit it now.
31. The appellant entered the United Kingdom on 10th February 1999 under a false name and claiming a different nationality, i.e. Kosovan. He made a second application for asylum in his true name but again claiming to be Kosovan. He was accompanied by the lady who is now his wife but who was claimed at the time to be his sister and it was claimed by him on their behalf that they were Kosovan refugees. It appears from the chronology that on 2nd November 1999 she had claimed asylum in a different identity claiming to be a Kosovan refugee. Her claim was refused as was the appellant's.
32. Subsequently she was granted indefinite leave to remain under the family ILR exercise, on 13th February 2004. She had claimed to be a Kosovan refugee.
33. It is relevant at this point to note the terms of the policy provided by Mr Clarke, for which I am grateful, given the difficulties that had been experienced previously in obtaining a copy. It is the APU Notice 4/2003 setting out the terms of the one-off exercise to allow families who have been in the United Kingdom for three years or more to stay. The relevant criteria of the initial claim for asylum are that it must have been made before 2nd October 2000 and that families are eligible for the concession in certain circumstances. It is relevant to note that under the list of exclusions is included the provision that the concession will not apply to a family where the principal applicant or any of the dependants have made or attempted to make an application for asylum in the UK in more than one identity.
34. The appellant's wife was granted British citizenship on 16th June 2005. On 6th March 2006 the appellant withdrew his asylum claim after confirming his real identity and left the United Kingdom on 28th March applied for entry clearance to join his spouse in the United Kingdom and was granted a two year visa. He applied in his own name and using her correct name and their Albanian nationalities. He subsequently applied for and was granted indefinite leave to remain, though it is noted by the respondent that in his application he had ticked "no" when asked if he had engaged in activities which would indicate he was not of good character. He was granted indefinite leave to remain on 4th April 2008 and on 26th May 2009 he applied for British citizenship, in which application he claimed that his wife was Kosovan. He signed a declaration of truth. He was granted British citizenship on 27th August 2009.

35. In the refusal letter the respondent said that had she known that the appellant's wife was providing false information she would not have been awarded indefinite leave to remain under the family ILR exercise and the appellant would not have been eligible to join her and it was also argued that she would have been refused ILR as she would not have met the character and conduct requirement and without her settled status which she was granted through her false representations he would not have been entitled to return on a visit visa as the spouse of a settled person.
36. With regard to character and conduct the respondent referred to the caseworker instructions in force at the time of the appellant's application for naturalisation which confirmed that they would not normally consider applicants to be of good character if there was evidence that they practise deception.
37. The Chapter 18 character and conduct guidance confirms at paragraph 9.1 as follows:
- "9.1 Caseworkers should count heavily against an applicant any attempt to lie or 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 in any matter must raise doubt about an applicant's truthfulness in other matters."
38. It is necessary at this point to consider the relevance of the letter of 28th April 2021 to the appellant's wife, to which I have referred above. It was argued in Ms Smith's response to the invitation to make representations in light of this, that it is difficult to reconcile with it the insistence in submissions that the appellant was complicit in his wife's fraud and that by giving her false particulars and nationality as Kosovan in the entry clearance application and subsequent Indefinite Leave to Remain application it was material to the grant of citizenship. Ms Smith highlights the following from the current Nationality Instructions, Chapter 55 Deprivation and Nullity of British Citizenship:
- "55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.
- 55.7.4 For example, where a person acquires ILR under a concession (e.g. the family ILR concession) the fact that we could show the person had previously lied about their asylum claim may be irrelevant."
- (Emphasis added).
39. Ms Smith goes on to argue that in these circumstances where his wife is deemed to retain her citizenship notwithstanding that her deception in her

asylum claim is now known to the respondent, it is clear that any deception by the appellant, who returned to Albania after his own false asylum claims thereby breaking the chain of causation, in putting forward her false particulars and nationality in the entry clearance and ILR applications is not material and does not justify deprivation. Neither can it be caught by the good character requirement, given the respondent's position in relation to the wife's own deception in her asylum claim.

40. It is common ground, as held in Sleiman, that the impugned behaviour must be directly material to the decision to grant citizenship to justify the deprivation of citizenship.

41. The argument is made by Ms Smith that the appellant's wife's grant of indefinite leave to remain was not acquired by the false details which she provided. Her asylum claim was refused and she was granted ILR under the family ILR exercise. Reference is made to the respondent's guidance at paragraph 55.7.4:

“For example, where a person acquires ILR under a concession (e.g. the family ILR concession) the fact that we could show the person had previously lied about their asylum claim may be irrelevant.”

42. I agree with the argument made on behalf of the appellant. Though the grant of ILR under the family ILR concession was made to the appellant's wife at a time when she was still claiming to be Kosovan, the terms of the letter to her of 28th April 2021 made it clear that her case does not “fall within our policy”, and hence she was not deprived of British citizenship. I can see no material difference between the facts of her case and those of the appellant, and the respondent has failed to respond to two opportunities to clarify her position on the point. The points set out at paragraph 35 above about the wife's case essentially fall away as reasons to refuse the appellant's claim, in light of the letter of 28th April 2021. The chain of causation is broken. The deprivation decision is irrational. As a consequence the challenge to the decision to deprive the appellant of British citizenship is made out, and the appeal is allowed on that basis.

43. In light of the fact that I have found that the appeal against the deprivation decision succeeds, it must follow that the Article 8 appeal succeeds also. The appellant has been a British citizen since 2009, and has been resident in the United Kingdom for two decades. He has a British wife and two British children.

44. This appeal is allowed.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 13th October 2021

Upper Tribunal Judge Allen