



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004691

First-tier Tribunal Nos: DC/50080/2022
LD/00005/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

25th March 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE MCCARTHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IZMIR AGIA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms McKenzie, Senior Home Office Presenting Officer
For the Respondent: Mr Bazini, Counsel instructed by Duncan Lewis solicitors

Heard at Field House on 23 February 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience we will refer to the parties as they were designated in the First-tier Tribunal.

Introduction

2. The appellant entered the UK in September 1999 (aged 16) claiming to be a Kosovan born in September 1983. His asylum application was refused but he was granted exceptional leave until March 2004. In 2000 he applied for a travel document. In 2004 he applied for ILR. In 2005 he applied for citizenship. All of these applications were successful. When the appellant applied for ILR and citizenship he was an adult.

3. It subsequently came to light that the appellant lied in the aforementioned applications about his identity and age. The appellant is, in fact, as he now accepts, an Albanian citizen born in October 1982.
4. In the light of the appellant's use of a false identity the respondent made a decision ("the SSHD decision") to deprive the appellant of his citizenship. The appellant appealed to the First-tier Tribunal against the SSHD decision, where his appeal came before Judge of the First-tier Tribunal Burnett ("the judge"). In a decision dated 28 September 2023 ("the FTT decision") the judge allowed the appeal. The respondent is now appealing against the FTT decision.

Relevant Law

5. Section 40(3) of the British Nationality Act 1981 provides:

(3) The Secretary of State may by order deprive a person of 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."

6. In *Chimi (deprivation of appeals, scope and evidence Cameroon* [2023] UKUT 00115 (IAC) the Upper Tribunal provided a framework for deciding appeals where the respondent has made a decision to deprive a person of citizenship under section 40(3). This is set out in the headnote to *Chimi*, where a three stage analysis is set out. It states:

- "(a) Did the Secretary of State materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,
- (b) Did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,
- (c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed".

7. In *Kolicaj (Deprivation: procedure and discretion)* [2023] UKUT 00294 (IAC) the Upper Tribunal considered the second of the three stages identified in *Chimi*; the exercise of discretion by the respondent. Paragraph 3 of the headnote states:

"Where the Secretary of State determines that the condition precedent for exercising that power is made out, she must then exercise her discretion as to whether to deprive that person of their British citizenship in the light of all the circumstances of the case. It follows that even if the decision of the Secretary of State in relation to the condition precedent is free of public law error, the decision might nevertheless be unlawful where she fails to exercise her discretion, or where the exercise of that discretion is itself tainted by public law error".

The SSHD Decision

8. In the SSHD decision, the respondent set out the appellant's immigration history in detail, including the false information he gave when making the asylum application in 1999, his application for ILR in 2004 and his application for citizenship in 2005. The respondent recorded that the appellant admitted lying about his nationality in these applications but claimed he was a minor following his parents' instructions when he applied for asylum; that he suffers from schizophrenia which may have affected his behaviour when he gave false information in his applications; and that the length of time he had lived in the UK makes it unreasonable to revoke his citizenship.
9. The respondent's response to these points, in summary, was that:
 - (a) the appellant had not provided any evidence to show his medical condition affected his judgment when making the relevant applications;
 - (b) his length of residence is not a bar to depriving him of citizenship;
 - (c) at no point did the appellant provide the respondent with an opportunity to consider his true circumstances; and had the caseworker known that the appellant had not been entitled to ILR he would not have been granted citizenship;
 - (d) the appellant had ample opportunity to provide details of his genuine identity to the respondent;
 - (e) the appellant's claims to have taken instructions from his parents when applying, as a child, for asylum does not explain why he lied when applying for citizenship, at which time he was an adult; and all adults should be held legally responsible for what they say in their applications to the respondent; and
 - (f) the false information given by the appellant in all of his applications to the respondent was deliberate, which damages his good character such that, had the truth be known, he would have not satisfied the good character requirement in the citizenship application.
10. After concluding that the appellant committed fraud that was material to the grant of citizenship, the respondent considered Article 8 ECHR and decided that depriving him of citizenship was proportionate.

The FTT Decision

11. The judge set out, and stated that he was following, the three stage approach described in *Chimi*.
12. The judge addressed the first stage in *Chimi* briefly (in paragraph 28 - 29), stating that:

"the factual precedent that the appellant gave a false identity is not challenged by the appellant".
13. The judge did not make a finding in terms that the respondent's finding in respect of the condition precedent was lawful but this is implicit from reading the decision as a whole. After observing that it was not in dispute that the appellant used a false identity to obtain citizenship the judge proceeded to consider in detail the second stage in *Chimi* - the lawfulness the respondent's exercise of discretion. Had the judge not accepted that the respondent lawfully found the

condition precedent was satisfied, there would have been no need to move on the second of the three stages in *Chimi*.

14. The judge undertook a detailed consideration of the second stage in *Chimi* in paragraphs 30 - 42. The judge found that the respondent erred in the exercise of discretion primarily because (a) she failed to adequately (or at all) take into account that the appellant was a minor when he applied for asylum; and (b) she failed to make reasonable enquiries regarding, and did not adequately have regard to the significance of, the appellant's mental health problems at the time he applied for ILR and citizenship.
15. Having found that the respondent erred in the exercise of discretion there was no need for the judge to consider the third stage in *Chimi* (article 8 ECHR). However, the judge undertook this assessment and found that depriving the appellant of citizenship would be disproportionate.

Grounds of Appeal

16. The respondent advanced six grounds of appeal. They are lengthy and we are grateful to Ms McKenzie for her succinct summary of them. In short:
 - (a) Ground 1 submits that if (which is not accepted) the respondent made a public law error, the judge failed to explain how this is material.
 - (b) Ground 2 submits that the judge failed to have regard to the findings in the SSHD decision in respect of the character and conduct of the appellant. It is also stated that the judge failed to take into consideration that the fraud (in applying for ILR and citizenship) was made when the appellant was an adult. It is stated that the judge's "singular focus" on whether the appellant was a child when he entered the UK and claimed asylum is irrational.
 - (c) Ground 3 submits that the respondent did not fail in any Tameside duty to make reasonable enquiries because reasonable enquiries were made in respect of the appellant's health.
 - (d) Ground 4 concerns a medical report that postdates the SSHD decision and is referred to by the judge in the Article 8 assessment. This ground submit that the reliability of the report is questionable in the light of the author referring to a hospital admission in 2003 that is not corroborated by medical records.
 - (e) Ground 5 submits that the judge failed to reconcile the tension between the appellant admitting dishonesty and his claim that he did not have the required mens rea for dishonesty.
 - (f) Ground 6 submits that the Article 8 assessment is deficient because the judge approached the proportionality assessment from the starting point that the decision under appeal was unlawful.

Submissions

17. Both Ms McKenzie and Mr Bazini made clear and succinct submissions, for which we are grateful. Ms McKenzie's submissions closely followed the grounds of appeal and it is not necessary to set out anything further beyond that which we have summarised above.
18. Mr Bazini's primary argument was that irrespective of the judge's findings and the issues raised in the grounds, the appeal was bound to be allowed because

there is a fundamental flaw in the SSHD decision. The flaw is that, after deciding that the condition precedent in s40(3) was met, the respondent failed to consider the exercise of discretion and proceeded straight to Article 8; i.e. the second of the three stages in *Chimi* was omitted. Mr Bazini noted that the absence of an exercise of discretion was raised in the First-tier Tribunal and the respondent's only answer to this, as recorded in paragraph 15 of the FTT decision, was that "it was implicit in the [SSHD] decision that the exercise of discretion had been considered".

19. With respect to the respondent's six grounds of appeal, Mr Bazini argued that the respondent had failed to identify an error by the judge, who was entitled to consider what ought to have, but had not, been considered by the respondent in the exercise of discretion.

Analysis

20. It is clear from *Chimi* and *Kolicaj* that when the condition precedent in s40(3) is found to be satisfied the respondent must proceed to exercise discretion.
21. We have scrutinised the SSHD decision and, as in the case of *Kolicaj*, there does not appear to be anything within it showing that (or how) the respondent exercised discretion, or even that she was aware that she was required to exercise discretion.
22. The SSHD decision is lengthy and detailed. It runs to 61 paragraphs. However, as Mr Bazini observed, the word discretion is not mentioned even once. Ms McKenzie argued that it could be inferred from paragraphs 3-6 of the SSHD decision that discretion had been exercised. However, paragraphs 4-6 merely set out relevant law. Paragraph 3 states:

"Following our investigations, and on the basis of the evidence presented, the Secretary of State has decided that you did in fact obtain your British citizenship fraudulently. The Secretary of State has decided that you should therefore be deprived of your British citizenship for the reasons outlined below".
23. Far from supporting Ms McKenzie's position, this paragraph reinforces our view that discretion was not exercised, because it appears to state that it necessarily followed from the respondent deciding that the appellant had engaged in fraud that he should be deprived of his citizenship. There is nothing in this paragraph indicating that the decision-maker was aware that the respondent had - and was required to exercise - a discretion.
24. A further argument advanced by Ms McKenzie was that even if the respondent erroneously failed to exercise discretion this would be immaterial. We do not find this submission persuasive. The appellant was a child when he applied for asylum and there was evidence before the respondent of having health problems in 2005 (when he applied for citizenship). It cannot be said that, had discretion been exercised with these considerations in mind, it is inevitable that the discretion would not have been exercised in the appellant's favour. Moreover, the appellant is entitled to know that - and how - discretion was exercised. This cannot be discerned from the SSHD decision.
25. We therefore agree with Mr Bazini that there could only be one outcome of the appellant's appeal to the First-tier Tribunal, which was for it to be allowed. In these circumstances, any error identified in the grounds would be immaterial.

26. In the light of the SSHD decision being undermined by a material public law error because of a failure to exercise discretion, it is not strictly necessary to consider the respondent's six grounds of appeal. However, for completeness, we will briefly explain why we do not find them persuasive.
27. Ground 1 argues that any public law errors in the SSHD decision are immaterial. This submission has no merit for the reasons given above, were we find that it is not inevitable that, had discretion been exercised, the same outcome would have been reached. Grounds 2-5, essentially, are arguing that it was perverse for the judge to find (and inadequate reasons were given for finding) that the condition precedent was not satisfied given that the appellant lied as an adult about his nationality when applying for ILR citizenship. However, the judge accepted that the condition precedent was met and the respondent, in these grounds, is therefore challenging an aspect of the decision that was decided in her favour. To the extent grounds 2-5 can be interpreted as challenging the judge's consideration of the respondent's exercise of discretion, they are without merit because they fail to address the fundamental issue of whether discretion was exercised at all in the SSHD decision. Ground 6 argues that the article 8 assessment was flawed because the starting point was that the SSHD decision was unlawful. We find this ground unpersuasive because, for the reasons we have given, the failure by the respondent to exercise discretion means that the SSHD decision was unlawful.

Notice of Decision

28. The decision of the First-tier Tribunal did not involve the making of a material error of law and therefore stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19.3.2024