



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

Appeal Number: DC/00003/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19 November 2018**

**Decision & Reasons Promulgated
On 28 November 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

AKINTUNDE ABIODUN OLATUNDE

Respondent

Representation:

For the Appellant: Ms J. Isherwood, Home Office Presenting Officer

For the Respondent: Mr. M. Sowerby of counsel, instructed by Quintessence Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Nigeria. On 30 July 2008 he was granted indefinite leave to remain as the husband of a British national. On 28 July 2009 the Respondent applied for naturalisation as a British citizen. He was issued with a certificate of naturalisation on 5 October 2009.

2. He has three children who are British citizens and a partner who has limited leave to remain in the United Kingdom, as the mother of three British citizen children.
3. On 13 June 2014 the Respondent was convicted on twenty counts of applying for and/or obtaining British passports or British driving licences in false identities and being in possession of a variety of documents in these false identities. Furthermore, on 24 October 2014, he was sentenced to a total of 42 months imprisonment for these offences, which took place between 10 November 1999 and 29 January 2014.
4. On 14 May 2015 the Respondent was referred to the Status Review Unit by the Criminal Casework Team and on 29 December 2017 the Appellant decided to deprive the Respondent of his British citizenship under section 40(3) of the British Nationality Act 1981.
5. The Appellant appealed against this decision on 17 January 2018 and his appeal was heard and allowed by First-tier Tribunal Judge Herbert in a decision promulgated on 22 August 2018. The Appellant appealed against this decision and on 2 October 2018 First-tier Tribunal Judge Davidge granted him permission to appeal.

ERROR OF LAW HEARING

6. The Home Office Presenting Officer and counsel for the Respondent both made oral submissions and I have taken these into account, where they were relevant, in my findings below.

ERROR OF LAW DECISION

7. Section 40(3) of the British Nationality Act 1981 states that:

“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 material fact”.

8. In paragraph 37 of his decision, First-tier Tribunal Judge Herbert stated that the first issue in the appeal was whether the Respondent had used fraud to obtain his naturalisation as a British citizen. More properly, the actions taken by the Respondent amounted to a “concealment of material facts”, including the fact that he had used a number of other identities and had obtained passports and driving licences to which he was not entitled.
9. In paragraph 41 and 42 of his decision, First-tier Tribunal Judge Herbert then considered whether the Respondent deliberately placed himself in breach of section 40(3) or whether it was an innocent mistake. Counsel for the Respondent submitted that the reasons given by the First-tier Tribunal Judge for finding that the Respondent had made an innocent mistake were cogent and compelling. He also relied on paragraph 58 of the decision, where the First-tier Tribunal Judge found that “taking a holistic view of the [Respondent’s] claim, it is more probable than not that [his omission] was not a deliberate act”.
10. However, the First-tier Tribunal Judge failed to take into account the fact that question 1.8 of the application form, which the Respondent completed when he applied to naturalise, stated that “if you are or ever have been known by any name or names apart from those mentioned above, please give details here”. The Respondent left the answer box blank. No explanation was put forward for this omission. At best, in paragraph 42 c) the First-Tier Tribunal Judge asserted that there was a general understanding that detailed forms such as this can lead to mistakes by all applicants, whether or not they are educated or adapted to life in the United Kingdom.

11. He also failed to take into account that there were no other mistakes on the form apart from the manner in which the Respondent subsequently answered the question about “good character” and both of the omissions assisted the Respondent to conceal factors which might hinder his ability to naturalise. In addition, in my view, the meaning of question 1.8 was clear and not open to misinterpretation.
12. First-tier Tribunal Judge Herbert concentrated on the failure by the Respondent to give an affirmative answer to question 3.12 on the application form, which stated that “have you engaged in any other activities which might indicate that you may not be considered a person of good character?”. In paragraph 42 of his decision, he noted that the question was somewhat unclear and could encompass a range of activity. However, he failed to take into account the fact that the Respondent subsequently pleaded guilty to twenty counts of applying for and/or obtaining passports and driving licences in false identities and being in possession of documents in false identities, which indicates that he understood that this amounted to criminal behaviour.
13. Furthermore, the First-tier Tribunal Judge also failed to take into account that, in his sentencing remarks, His Honour Judge Devaux DL noted that the Respondent used the same method when he applied for the various false passports. He gave the details of an individual who did exist but supplied his own photograph. In addition, he provided a variety of addresses throughout the country to which these passports were to be sent. The offences for which he was convicted also stretched from 10 November 1999 to 29 January 2014 which indicated that the Respondent consistently relied upon documents to which he was not entitled and did so throughout his time in the United Kingdom.
14. This evidence should also have been considered when, in paragraph 57 of his decision, the First-tier Tribunal Judge relied on the fact that the Respondent had applied for naturalisation in his true identity and that in 2009 he had not yet had any convictions.

15. As a consequence, First-tier Tribunal Judge Herbert failed to take into account a number of factors which indicated on a balance of probability that the answers which the Respondent gave to questions 1.8 and 3.12 did not amount to an innocent mistake.

16. In the alternative, First-tier Tribunal Judge considered whether the decision to deprive the Respondent of his British citizenship amounted to a breach of his right to continue to enjoy a family life in the United Kingdom for the purposes of Article 8 of the European Convention on Human Rights. The second ground of appeal asserted that this also amounted to an error of law, as the decision under appeal was one of revocation not deportation. However, as the power provided by section 40 of the British Nationality Act 1981 is a discretionary one, the Appellant did have to consider whether he should exercise this power. In this context the circumstances of the Respondent's partner and children did amount to relevant considerations. In *Deliallisi (British citizen: deprivation appeal: Scope)* [2013] UKUT 00439(IAC) the Upper Tribunal held that:

“(1) An appeal under section 40A of the British Nationality Act 1981 against a decision to deprive a person of British citizenship requires the Tribunal to consider whether the Secretary of State's discretionary decision to deprive should be exercised differently. This will involve (but not be limited to) ECHR Article 8 issues, as well as the question whether deprivation would be a disproportionate interference with a person's EU rights.

(2) Although, unlike section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002, section 40A of the 1981 Act does not involve any statutory hypothesis that the appellant will be removed from the United Kingdom in consequence of the deprivation decision, the Tribunal is required to determine the reasonably foreseeable consequences of deprivation, which may, depending on the facts, include removal”.

17. Given the length of the Respondent's sentence it was reasonably foreseeable that, if he was deprived of his British citizenship, he would be liable to automatic deportation pursuant to section 32 of the UK Borders Act 2007.
18. Therefore, First-tier Tribunal Judge Herbert did not err in law merely because he considered Article 8 of the European Convention on Human Rights and reminded himself in paragraph 56 of his decision, that he needed to answer the questions set out in *R (ex parte Razgar) v Secretary of State for the Home Department* [2004] UKHL 27
19. But when considering whether the revocation would be proportionate he referred to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in paragraph 62 of his decision. This was inappropriate as the context in which he was considering Article 8 was one in which it was reasonably foreseeable that a decision would be made to deport the Respondent from the United Kingdom.
20. The First-tier Tribunal Judge did refer to a number of cases which addressed the impact of a child's best interests on a proportionality decision, including the recent case of *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 00088 (IAC) where the Upper Tribunal found that:

"A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part".

21. All three of the Respondent's children had been born here and two of them had been in the United Kingdom for over ten years and the other has been here for over seven years. Therefore, their private lives, including their attendance at school, was a relevant factor. However, First-tier Tribunal Judge did not undertake any assessment of the individual factors in the Respondent's children's lives or even refer to the, albeit limited, evidence about their lives which can be found in the witness statements by the Respondent and their mother. In addition, the First-tier Tribunal Judge elected not to hear any oral evidence from the witnesses and, therefore, their evidence was untested.
22. In addition, he did not remind himself that ultimately the question would be whether, if a decision was made to deport the Respondent, it would be unduly harsh for the children to accompany him to Nigeria or remain here with their mother.
23. In the recent case of *KO & Others v Secretary of State for the Home Department* [2018] UKSC 53 the Supreme Court confirmed that authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

24. In the decision under appeal, the First-tier Tribunal Judge went no further in paragraph 56 than taking judicial notice that children in one parent households tend to have a lower rate of educational attainment and a far higher rate of delinquency.
25. As a consequence, First-tier Tribunal Judge Herbert did make errors of law in his decision and his decision should be set aside.

DECISION

- (1) The appeal is allowed.
- (2) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Herbert or First-tier Tribunal Judge Davidge.

Nadine Finch

Signed

Dated: 20 November 2018

Upper Tribunal Judge Finch