



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00010/2018

THE IMMIGRATION ACTS

Heard at Field House
On 22 October 2018

Decision & Reasons Promulgated
On 20 November 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RSD

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

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

For the Respondent: Ms C Fletcher, Counsel, instructed by WRJ Solicitors

DECISION AND REASONS

1. This is an appeal against the decision dated 24 June 2018 of First-tier Tribunal Judge Gurung-Thapa which allowed the appeal of RSD against the respondent's decision to deprive him of his British citizenship under Section 40(3) of the British Nationality Act 1981.
2. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the

respondent. Failure to comply with this direction could lead to contempt of court proceedings. I make this order to avoid serious harm arising for RSD's family members, in particular his minor child.

3. For the purposes of this decision I refer to RSD as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.
4. The background to this matter is that the appellant came to the UK from India in 1997 and claimed asylum. He was refused protection by the respondent but was successful in his appeal and on 17 August 2000 he was granted refugee status. The appellant lodged an application for naturalisation as a British citizen on 5 January 2004. This was successful and on 25 August 2004 he became a British citizen.
5. The police later informed the respondent that on 10 March 2011 the appellant was convicted of 23 counts of sexual abuse against a male child within the family. The Certificate of Conviction or Finding outlined that the offences were committed between 2003 and 2010. The appellant began grooming the child in question from the age of 7 and many acts of rape, both anal and oral, followed. The appellant was sentenced to fourteen years' imprisonment and placed on the sex offenders' register for life.
6. The respondent referred to Section 40(3) of the British Nationality Act 1981 (the BNA) which provides as follows:
 - "40(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."
7. The respondent noted that the conviction showed that the appellant's offending behaviour had commenced in 2003, that is, prior to the naturalisation application made in January 2004. The respondent also noted that where the applicant was asked to provide information concerning his good character in Section 3 of the naturalisation application form, that section had been left blank. The respondent found as follows in her decision depriving the applicant of British citizenship:
 - "10. ... Given the fact that you began your sexual offences in 2003, prior to lodging your naturalisation application, and continued to do so many years after you were granted British citizenship, you were clearly not of good character. It was only because you concealed your sexual assaults that led (sic) to your application succeeding.

...

12. The naturalisation application form and AN guidance notes (*Annex A and B refer*) explain that anything that would indicate that you were not of good character should have been disclosed. This would have afforded the caseworker with information directly relevant to the assessment of your character. Rather than tell the truth, you withheld your involvement in criminal activity. It is considered that this was a deliberate deception designed to deny the caseworker with information that would, if you had been truthful, resulted in refusal of your application on character grounds. The deception was therefore material to the decision to grant you citizenship as it resulted in you being assessed as being of good character, when you were not.
 13. For the reasons given above it is not accepted there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that you failed to provide information with the intention of obtaining a grant of citizenship in circumstances where your application would have been unsuccessful if you had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship.”
8. As a result of these matters on 15 February 2018, the respondent gave notice under Section 40(5) of the British Nationality Act 1981 that he had decided to make an order under Section 40(3). The appellant then exercised his right of appeal. The appellant’s evidence before the First-tier Tribunal was that Section 3 of the naturalisation application form had been left blank because of inadequate conduct of his legal advisers. The First-tier Tribunal records the appellant’s evidence on this matter as follows in paragraphs 27 to 32:
- “27. The appellant in examination-in-chief was asked if he completed his naturalisation application form and he replied it was his solicitor. He was not able to read or write English at that time. He was asked if his solicitor told him about the questions in the application form and he replied he does not think so. He was further asked if his solicitor had asked him certain questions if he would have been able to tell whether the questions were from the application form to which the appellant replied no.
 28. I asked the appellant how his solicitor obtained the answers contained in the application form and the appellant replied he gave the solicitor £500. I again asked the appellant where his solicitor obtained the answers contained in the application form to which the appellant replied the solicitor took £500 off him and he signed it. I asked the appellant if he asked the solicitor about the questions on the form and he replied he does not think so. It was put to the appellant that he has not mentioned in his witness statement that the previous solicitor did not ask him about the questions on the form to which the appellant replied if a person is upset in prison he does not know what he is doing. It was put to the appellant that he has made a full page witness statement and why he made no mention that his solicitor did not ask him the questions on the form to which the appellant replied when the witness statement was taken the solicitor did not ask him questions relating to that. When asked why he did not volunteer the information himself, the appellant replied sometimes some things don’t come in the mind.

29. Having carefully gone through the naturalisation application form I find it reasonable to conclude that only the appellant would have been able to give the information contained in that form for example his parents' names and his wife's name (A2), time spent outside the UK (A4) and details about the referees (A5). I reject the appellant's claim that his previous solicitor did not put the questions to him.
 30. The appellant claims that he is stateless because he surrendered his Indian nationality following naturalisation as a British citizen [18]. I asked the appellant if he was able to retain his Indian nationality when he became a British citizen and he replied he was not allowed to keep two nationalities. It was put to him that the UK allows dual nationality to which the appellant replied when he applied for naturalisation his Indian passport was taken by people who gave him the nationality. The appellant then stated that he gave the passport to the solicitor when he applied for naturalisation. He never got his passport back. Paragraph 18 of the appellant's statement was read to him and was asked how he surrendered his Indian nationality. The appellant replied when he applied for British citizenship his passport was given to the solicitor and he never got his passport back. The appellant was asked if he or his representatives surrendered his Indian nationality to which the appellant replied when he applied for British citizenship he gave his passport to the solicitor and not to the Indian Embassy.
 31. The appellant confirmed that since the grant of British citizenship he has travelled to India at least 2/4 times.
 32. Given the appellant's overall credibility, I reject the appellant's claim that he has surrendered his Indian nationality. I find that there is no satisfactory evidence before me to suggest that the appellant would be stateless if he is deprived of his British nationality."
9. The First-tier Tribunal then went on to consider the respondent's guidance on the meaning of "false representation" and "concealment of any material fact" and "fraud" as used in s.40(3) of the BNA. At paragraphs 35 to 38 the judge found as follows:
- "35. Mr Jussab submitted that the reference made by the respondent to the AN guide at [11-12] of the refusal letter and said to be from December 2003 is incorrect because sections in the actual naturalisation application form does not correlate to the sections of the AN guidance form and gave an example that Section 3 relates to good character yet Section 3 of the guidance form deals with residence requirement. He stated that it cannot be accepted that the respondent has submitted the correct guidance form that existed at the time the appellant applied for naturalisation. I find that there is force in Mr Jussab's submission and I also take note of the fact that the application form for example the paragraph just before sub-section 3.10 refers to paragraphs 40-41 of the guide, yet there are no such paragraphs in the AN guidance form.
 36. Be that as it may, I find that the critical issue is whether or not the appellant intended to deceive the Secretary of State when he submitted his naturalisation application. I accept Mr Jussab's submission that the definitions given for false representation concealment of any material fact imply a requirement on the

appellant's part to intend to deceive the decision maker but on the basis of the evidence there was no such intention to deceive.

37. Furthermore, the appellant had completely failed to complete Section 3 which deals with good character (A3-A4). Not only did the appellant fail to complete sub-section 3.13 he also failed to complete sub-sections 3.10, 3.11 and 3.12. Given the fact that Section 3 on good character had been left completely blank, I find it reasonable to conclude that it was incumbent on the respondent to have returned the application form asking him to complete Section 3. There is no evidence before me to suggest that the respondent had taken this course of action and chose to grant the appellant British citizenship while the form had not been fully completed.
38. I therefore find that the respondent has failed to discharge the burden of proof pursuant to Section 40(3)."

10. The respondent applied for permission to appeal against the decision of the First-tier Tribunal setting out the following grounds:

"In this matter the Secretary of State gave notice of an intention to deprive the Appellant of British citizenship on 15/2/18. The Secretary of State invoked her discretion under s.40(3) on the basis that the Appellant, in a 2004 naturalisation application, had failed to answer question 3.13 'Have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?'. It was argued that the Appellant failed to disclose criminal activity that occurred prior to the date of the application on 5/1/04. The Appellant was convicted of 23 counts of sexual abuse against a male child within the family between 2000-2010. The Appellant was sentenced to fourteen years and placed on the sexual offenders' register for life.

At paragraph 26 the FTIJ finds the Appellant was not a witness of truth and wholly rejects A's assertion that he was unaware of the questions in the application form because his solicitor did not put the questions to him @ 29. The FTIJ makes further adverse credibility findings @ 32 in respect of the Appellant's surrender of Indian nationality.

It is submitted in light of the Tribunal's rejection of the Appellant's '*innocent explanation*' for failing to disclose criminal acts, the FTIJ finding @ 36 that there was no intention to deceive is inadequately reasoned and unsustainable. It is submitted that the reasoning @ 37 that the whole of the good character section was blank fails to engage with the finding at paragraph 29 that the solicitor put the questions in the form to the Appellant. There was no explanation as to why then Section 3 remained blank.

It is submitted in light of these findings and the rejected case advanced by the Appellant, the FTIJ's finding that there was no evidence of intention to deceive was perverse; no rebuttal explanation for the failure to answer question 3.13 was accepted by the Tribunal."

11. In my judgment, it is correct, as argued in the grounds of appeal, that the decision of the First-tier Tribunal is irrational. The threshold for such a finding is high but made out here. The finding in paragraphs 26 to 29 that the appellant was untruthful as to

why Section 3 of the form on his good character was not completed is irreconcilable with the finding in paragraph 36 that there was no intention to deceive the decision maker. It is undisputed that the offending behaviour began in 2003. It is unarguable that this was behaviour that was highly relevant to the good character assessment and there is no credible explanation for the appellant failing to declare it. There was no obligation on the respondent to revert to the appellant or his legal advisors in 2004 asking for him to complete Section 3 as suggested in paragraph 37 of the First-Tier Tribunal's decision.

12. For these reasons I am satisfied that the decision of the First-Tier Tribunal on whether the appellant used fraud or concealed a material fact and therefore whether s.40(3) of the BNA was made out can be properly characterised as irrational, notwithstanding the elevated threshold for such a finding. Having reached that conclusion, I must set aside the decision to be re-made.
13. The appellant's argument on why he cannot be found to come within s.40(3) is as follows. When he completed the form in 2004 it was not his view that he had committed a criminal offence and therefore he could not reasonably have been expected to be aware of the need to declare his conduct. He could only have been expected to declare what had happened after he was convicted in 2011. Until then he had never considered himself to have been committing an offence or to be guilty. He therefore did not have the requisite intention to use fraud or conceal a material fact.
14. I do not accept that argument. The naturalisation application form is contained in the respondent's bundle. On pages A3-A4 the requirements of Section 3 on good character are set out. It states:

"In this section you need to give information which will help the Home Secretary to decide whether he can be satisfied that you are of good character. Checks will be made with the police and your referees will also be asked later on in this form to confirm that you are of good character."
15. On A4 of the respondent's bundle the form shows that the appellant was asked to answer the following question:

"3.13 Have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?"
16. In the box above paragraph 3.13 the appellant was advised as follows:

"You must disclose details of any activities which might be relevant to the question of whether you are a person of good character (see paras. 40-41 in the Guide). You must answer 'YES' or 'NO' to the following questions. If you answer 'YES', you must give full details on a separate sheet of paper."
17. The reference to the relevant paragraphs of the guide appear to be incorrect but the appellant can be expected to have referred to the full guidance which, as shown on page B9 of the respondent's bundle, advised as follows:

“You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so.”

18. For the respondent, Mr Clarke referred to the definition of whether someone has acted dishonestly in the case of **Ivey v Genting Casinos (UK) Limited [2017] UKSC 67**. At [74] the Supreme Court say this:


“When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

19. The appellant’s explanation for failing to answer any of the questions in the application form on good character has not been found credible. The application form, even without the guidance document, made it entirely clear to the appellant that the question of good character did not relate only to formal criminal convictions. That alone undermines his claim that he did not include his behaviour on the basis that he was not aware in 2004 that it was criminal. It is, in any event, not credible against any standard that he had a genuine belief that that grooming and sexually assaulting a child were not matters relevant to the good character declarations he was required to make in the naturalisation application. The only rational conclusion on the evidence here is that he deliberately failed to complete the good character sections of the form when he could only but have known that this aspect of his behaviour was material.
20. The appellant’s case therefore fails on the first limb of the test set down by the Supreme Court in **Ivey**. It is not accepted that he had a genuine belief in 2004 that he was not required to declare that he was grooming a child. On the contrary, my view of the evidence is that he concealed his behaviour, knowing that it would lead to a refusal of naturalisation and, very likely, to criminal proceedings.
21. It is therefore my conclusion that the appellant obtained naturalisation in 2004 by deliberately concealing material facts. The respondent therefore acted correctly in depriving him of British nationality, relying on s.40(3) of the BNA. I re-make the appeal as refused.

22. For completeness sake, I should point out that it has already been conceded for the appellant that Article 8 ECHR is not engaged here; see paragraph 41 of the decision of the First-tier Tribunal.

Notice of Decision

23. The decision of the First-tier Tribunal discloses error on a point of law and is set aside.
24. I remake the appeal as refused.

Signed 
Upper Tribunal Judge Pitt

Date: 8 November 2018