



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

Appeal Number:
UI-2022-005673, [DC/50060/2020]
UI-2022-005674, [DC/50305/2021]
IA/02354/2021 & LD/00075/2022

THE IMMIGRATION ACTS

**Heard at Field House
On 15 May 2023**

**Decision & Reasons Promulgated
On 21 May 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

**HAMIT KULICI
(AKA HAMIT ABAZI)**

**GOFFILE KULICI
(AKA GOFFILE ABAZI)**

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms Patyna, Counsel instructed by A J Jones Solicitors

DECISION AND REASONS

1. This is an appeal against the decision issued on 28 September 2022 of First-tier Tribunal Wilding which allowed the appeals of Mr and Mrs Kulici against a decisions made under Section 40(3) of the British Nationality Act 1981 (BNA 1981).
2. Permission to appeal was granted by the Upper Tribunal on 15 December 2022.

Background

3. The appellants are citizen of Albania. The first appellant was born on 5 May 1959 and the second appellant was born on 25 April 1959. They are married. For the purposes of this decision I refer to Mr Kulici as the appellant and to Mrs Kulici as the second appellant.
4. It is common ground that the appellants came to the UK in in November 1999. The appellant claimed asylum in a false identity, claiming to be Hatim Abazi, a Kosovan national. His wife and three children were included in the application as his dependents, also with false identities as Kosovan nationals. The asylum claim was refused but the appellant won his appeal on 5 June 2000, the judge accepting that the family were Kosovan.
5. The appellants applied for British citizenship on 15 November 2005 relying on the false Kosovan identities. They were granted British citizenship on 13 February 2008.
6. On 25 November 2020 the respondent made a decision under s.40(3) of the BNA 1981 to deprive the appellant of British citizenship. On 3 December 2021, the respondent made a decision to deprive the second of British citizenship.
7. The appellants appealed those decisions and their appeals were heard by Judge Wilding on 30 June 2022. Judge Wilding allowed the appeals, finding that deprivation amounted to a disproportionate interference with the appellants' Article 8 rights.

Decision of the First-tier Tribunal

8. Judge Wilding directed himself at a number of points in the decision to the legal principles to be applied when considering whether the decisions to deprive were correctly made, taken from the cases of Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC) and Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC). He referred to the Article 8 assessment being one of 'reasonably foreseeable consequences of deprivation on [] family and private life' in paragraph 15, reminded himself in paragraph 16 that he was not making a 'proportionality assessment as to impact of removal, but was 'concerned with the impact of the removal of their nationality'. In paragraph 23 he recognised that this was a more limited consideration. He set out paragraphs 109 and 110 of Hysaj in paragraph 18, those passages identifying that "without more" the impact of deprivation on day to day life

“cannot possibly tip the proportionality balance” in favour of finding deprivation of citizenship obtained by fraud. In paragraph 22 Judge Wilding identified the “considerable public interest in the deprivation of nationality where it was obtained by fraud and set out that he took this principle as his starting point.

9. In paragraphs 10 to 14 Judge Wilding considered whether the respondent had acted reasonably in concluding that the appellants had obtained citizenship by using fraud as required by s.40(3) of the BNA 1981. He found that this condition was met.

10. Judge Wilding went on in paragraphs to 15 to 27 to assess the appellants’ Article 8 claim. He found the appellants and their sons to be credible; paragraph 17. He found that the appellants would find it very difficult to survive in the limbo period whilst an application for leave to remain was being considered. The couple relied on the income of the appellant for their expenses other than the mortgage; see paragraph 16. Their sons could continue to pay their mortgage but the couple’s other expense could not be met; see paragraph 19. They would face particular hardship because of their age and having no other source of income, their family having already provided as much as they could; see paragraph 25. The limbo period would be extensive, much longer than that identified in Hysaj; see paragraph 21. The judge placed “considerable weight” on the length of the limbo period that the appellants would be in whilst they waited for a decision regularising their status; see paragraph 24.

11. The grounds maintained:

Ground 1 - The judge made mistakes of fact about the appellants’ finances if subjected a period of limbo whilst waiting to regularise their status

Ground 2 - The judge failed to take into account when considering what weight to place on the appellant’s evidence that the appellant had acted dishonestly over many years in maintaining his false identity

Ground 3 - It was a mistake of fact to find that the appellants’ children and other family would not provide adequate support if the couple were subjected to a period of limbo

Ground 4 - It was not open to the First-tier Tribunal to place weight on evidence in an unreported decision as to it now taking up to 300 days for the respondent to make a decision on whether to grant limited leave to the appellants

Ground 5 - The judge erred in placing weight on the respondent’s decision not to proceed with deprivation proceedings against the appellant’s brother.

12. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. There is a need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in *AE (Iraq)*. Warby LJ recalled the judgment of Floyd LJ in *UT (Sri Lanka) v Secretary of State for the Home Department* [\[2019\] EWCA Civ 1095](#) at [19]:

"... although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter.

13. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in *Volpi v Volpi* [\[2022\] EWCA Civ 464](#) in these terms, per Lewison LJ:

"2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment

to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

14. In light of this guidance and numerous correct legal self-directions set out in the decision of Judge Wilding, I was cautious when deciding whether the decision of the First-tier Tribunal showed an error on a point of law.
15. I did conclude that there was material error, however. It is not disputed that the evidence before the First-tier Tribunal was that the appellants' sons paid the mortgage on the appellants' home; see paragraphs 16 and 25. The judge, however, in paragraph 19, refers to the mortgage being paid for "to some degree" by the sons. That was not correct. He also states in paragraph 25 that it was unclear how the couple would "cover their mortgage" during the limbo period. Given that the appellants' financial circumstances, including not being able to pay the mortgage on their home, were factors at the core of the decision on proportionality, this appeared to me to be a mistake of significance. Ground 1 has merit.
16. Further, Judge Wilding indicated in paragraph 20 of the decision that it was "a relevant consideration" that the respondent had decided not to take deprivation action against the appellant's brother. The judge indicates in paragraph 26 that he placed "limited weight" on this factor. At the same time, he accepts that he did not know why no action was taken against the brother. Where that was so, it did not appear to me that it was open to the judge to place any weight on the circumstances of the appellant's brother. He could not know whether it was relevant or capable of adding any weight at all to the appellants' case. Ground 5 has merit.
17. In addition, paragraphs 21, 24 and 25 of the decision show that the length of time that the appellant's would find themselves in limbo added "considerable weight" to their case and made "a significant difference". The case of Muslija (deprivation: reasonably foreseeable consequences) Albania [2022] UKUT 00337 (IAC) sets out in paragraph 4 of the head note:

"Exposure to the "limbo period", without more, cannot possibly tip the proportionality balance in favour of an individual retaining fraudulently obtained citizenship. That means there are limits to the utility of an assessment of the length of the limbo period; in the absence of some other factor (c.f. "without more"), the mere fact of exposure to even a potentially lengthy period of limbo is a factor unlikely to be of dispositive relevance."
18. The length of the limbo period, in the decision of Judge Wilding, was clearly a factor that contributed to his conclusion that here, there was "more" than mere exposure to the hostile environment identified in Hysaj as being very unlikely to show an Article 8 breach. This conclusion was made without consideration of the guidance in Muslija that an extended period of limbo "is a factor unlikely to be of dispositive relevance." Ground 4 had merit.

19. In my judgment, the combination of these factors showed that the decision of the First-tier Tribunal that the appellants' Article 8 rights were breached by the decision to deprive them of citizenship showed a material error on a point of law. The weight on the public interest side of the balance is unarguably high in these cases and, had the errors identified above not occurred, the outcome of the appeal might have been different.
20. For completeness, I can indicate that it appeared to me that the judge was entitled to find the consistent evidence of the appellants and their witnesses credible given that he heard oral evidence which was subjected to cross-examination. Further, the evidence before the First-tier Tribunal was that the sons could continue to support their parents but could not provide more. I therefore did not find that Grounds 2 or 3 had merit.
21. For the reasons set out above, I found that the decision of the First-tier Tribunal disclosed an error on a point of law and set the decision aside to be remade. The parties were in agreement that where findings of fact as to the appellant's financial circumstances if they are deprived of citizenship had to be remade, it was appropriate for the appeal to be remitted to the First-tier Tribunal.

Notice of Decision

22. The decision of the First-tier Tribunal discloses an error on a point of law.
23. The appeal will be remade in the First-tier Tribunal.

Signed S Pitt
Upper Tribunal Judge Pitt

Dated: 19 May 2023