



**Upper Tribunal
(Immigration and Asylum Chamber)**
UI-2022-005873

Appeal Number:
DC/50060/2021

THE IMMIGRATION ACTS

**Field House
On 13 April 2023**

**Decision & Reasons
Promulgated
On 14 July 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

Secretary of State for the Home Department

Appellant

and

**Anum Ali
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the appellant: Mr Clarke, Senior Home Office Presenting Officer
For the respondent: Ms Harvey, Counsel instructed by Turpin Miller

DECISION AND REASONS

1. This is an appeal against a decision dated 28 September 2022 of First-tier Tribunal Judge Brannan which allowed Ms Ali's appeal against a deprivation of citizenship decision dated 11 March 2021 made under Section 40(3) of the British Nationality Act 1981 (the BNA).
2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Ms Ali as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant is a citizen of India and was born on 30 June 1970. The appellant's name at birth was Nahid Sultana Jilani.
4. The appellant married Sayed Jilani in 1989. She and Mr Jilani came to the UK as visitors in 1999. They came with two of Mr Jilani's children from a previous relationship. The appellant and Mr Jilani had three more children in the UK. It is not necessary to refer to them further here as their circumstances are not material to the error of law decision that has to be made.
5. On 21 May 2002 the appellant made an asylum claim in a false identity. She claimed that she was a Pakistani national named Nahid Ali and that her date of birth was 2 October 1972. She claimed that was in fear of her Pakistani husband. The claim was refused on 16 July 2002. The appellant appealed. She was found credible and her appeal was allowed by Mr Jamieson in a decision issued on 3 June 2003. The appellant accepts that the claim was false.
6. The appellant was granted indefinite leave to remain (ILR) on the basis of the decision of Mr Jamieson. On 9 January 2004 she applied for a travel document in the false identity of Nahid Ali and was issued with a travel document in that identity on 23 January 2004.
7. On 14 July 2004 the appellant obtained a 10 year visit visa in her true identity.
8. On 6 December 2010 the appellant applied for British citizenship in the false identity of Nahid Ali. She was granted British citizenship in that identity on 2 February 2010.
9. On 19 August 2011 Mr Jilani, using the false identify of Zahid Ali, applied for leave to remain as the partner of the appellant, relying on her status as a British citizen in the identity of Nahid Ali. He was granted leave to remain on this basis on 14 October 2014.
10. Meanwhile, the Department of Work and Pensions (DWP) had become interested in the appellant and Mr Jilani. In 2012, their home was raided whilst the couple were abroad. Documents revealing the identity fraud were discovered.
11. On her return to the UK the appellant was charged with 9 offences of benefit fraud and 5 immigration offences. She pleaded not guilty. She maintained that she had acted at all times under duress because Mr Jilani had been violent towards her and forced her to act illegally. At a trial in March 2013, the jury failed to reach a verdict, there being an insufficient majority for either a guilty or a not guilty verdict. The appellant was acquitted.

12. The trial judge, Judge Worsley, made comments after the trial ended. Those comments were addressed by the respondent in the deprivation decision (see paragraph 41) and are set out in full in paragraph 48 of the decision of the First-tier Tribunal. Judge Worsley stated that if the appellant had been found guilty because the jury did not find that her defence of duress was made out, he would still have handed down a suspended sentence as in his view “if it was not duress it came as near to duress as can be the case when someone is guilty”. He also commented that in his view, having read psychology reports and seen the appellant in court, “she was essentially a broken woman and so has been punished by the trial process so far.” Judge Worsley suggested that his comments would probably bind a judge if there was re-trial. There was no re-trial.
13. On 15 May 2013 the appellant changed her name to Anjum Ali, the name she is using in these proceedings.
14. The respondent sent the appellant a decision on 4 March 2014 stating that the grant of citizenship was a nullity. Her case then became caught up in the cohort awaiting resolution from the case of R (Hysaj) v. Secretary of State for the Home Department [2017] UKSC 82.
15. On 3 February 2018 the respondent withdrew the nullity decision and indicated she intended to deprive the appellant of citizenship under Section 40(3) of the BNA. The appellant made representations arguing that she should not be deprived of British citizenship. On 11 March 2021 the respondent made a decision to deprive the appellant of British citizenship.
16. The appellant appealed the deprivation decision. The appeal came before Judge Brannan on 13 September 2022. Judge Brannan allowed the appeal. He found that the condition precedent specified in s.40(3) of the BNA was met, that is, the appellant’s citizenship had been obtained by means of fraud. He went on to find that the respondent had not acted reasonably when exercising her discretion to deprive the appellant of citizenship, however, and allowed the appeal on that basis.
17. The respondent appealed the decision of Judge Brannan and was granted permission to appeal by the Upper Tribunal on 10 January 2023.

The Respondent’s Grounds

18. The respondent put forward two main grounds of challenge to the decision of Judge Brannan. The respondent’s first ground maintained that the First-tier Tribunal erred in accepting that the condition precedent under s.40(3) was met but also that the respondent erred in finding that the applicant did not meet the good character requirements required for a grant of citizenship. The respondent also maintained as part of her first ground that the First-tier Tribunal erred in finding that the respondent had reached an unreasonable conclusion concerning the appellant having acted under duress.

19. The respondent's second ground maintained that the decision did not conduct a lawful assessment under Article 8 ECHR.

Discussion

20. 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.

21. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently summarised by the Court of Appeal in Volpi v Volpi [\[2022\] EWCA Civ 464](#):

"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."

22. In light of this guidance and the correct legal self-directions set out in the decision of Judge Brannan, I was cautious when deciding whether the decision of the First-tier Tribunal showed an error on a point of law. I did conclude that there was material error, however.

The s.40(3) Condition Precedent

23. As set out by Judge Brannan in paragraph 42 of his decision, the correct legal approach to the assessment of whether the condition precedent set out in s.40(3) of the BNA is met is provided in paragraph 1 of the head note of Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC):

“(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

24. The first task for the First-tier Tribunal was, therefore, to decide whether the respondent had made findings on the condition precedent being met which “are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.”
25. Before the First-tier Tribunal the appellant conceded that she had used fraud to obtain citizenship. She accepted that this meant that the condition precedent of having obtained citizenship by fraud, as required by s.40(3) of the BNA was met. This concession was made in paragraph 6c and 18 of the appellant’s skeleton argument dated 3 April 2022 and maintained at the hearing. Judge Brannan stated in paragraph 44 of the decision:

“It is clear and agreed that the condition precedent in section 40(3) of the BNA is met.”

Put another way, the First-tier Tribunal was accepting here that the respondent had taken a rational and lawful approach when finding that the

appellant's use of fraud had been material to her being granted citizenship.

26. The respondent's position was not merely that the appellant had used a false identity when applying for citizenship and had done so in previous applications, however. The respondent's position on the use of fraud and why this was material to the grant of citizenship was set out in paragraphs 20 to 25 of the decision to deprive the appellant of citizenship. The respondent's case was that the fraud practised by the applicant was her failure to make truthful declarations when asked about whether she met the good character requirements. If the appellant had been truthful, she would not have been found to have met the good character requirements and her fraudulent declarations as to her good character were therefore material to the grant of citizenship.
27. When finding that the condition precedent required in s.40(3) was met, the First-tier Tribunal was therefore accepting, using the wording in Ciceri, that the respondent's position in paragraphs 20 to 25 of the deprivation decision was supported by evidence and was a view that could reasonably be held. The appellant would not have been found to have met the good character requirements had she not used fraud in her citizenship application.
28. Having decided that the condition precedent was met, the First-tier Tribunal indicated in paragraph 44 that the next issue to be decided was whether the respondent's exercise of her discretion to deprive the appellant of citizenship was reasonable. This is the assessment set out in paragraph (6) of the headnote of Ciceri:

“(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).”
29. The First-tier Tribunal went on in paragraphs 45 to 64 to find that the respondent took an unreasonable approach to whether the appellant had been under duress when using a false identity in her various dealings with the respondent and when committing benefit fraud. In paragraph 62 the First-tier Tribunal found that not only had the respondent reached an unreasonable view on duress but indicated that “I find, on the balance of probabilities, that she did in fact suffer terribly at the hands of Zahid Ali who effectively controlled her life in the UK” and that “she was effectively acting under duress and was a broken woman after her ordeal.” Further consideration of whether those findings were open to the First-tier Tribunal is below.

30. Having made these findings on duress, the First-tier Tribunal, returned in paragraphs 69 to 71 of the decision to the question of whether of whether the respondent was entitled to find that the appellant would not have met the good character requirements when she applied for citizenship. Paragraphs 69 to 71 of the decision state:

“69. Second, the Respondent relies on the good character requirement in her decision at paragraphs 21 to 25 of her decision, concluding: 25. It is evident that you would have been refused British citizenship under S 2.1, S 9.1 and S 9.5.1 had the Nationality caseworker been aware that you had presented a false identity and a false set of circumstances to the Home Office and had continued to repeatedly advance the same false representations throughout the duration of your immigration history to that point. However, your deception resulted in the Nationality caseworker making the decision to grant you British citizenship. Therefore, on 2 February 2011, you were issued with a certificate of naturalisation in the identity of Nahid Ali, date of birth 2 October 1972, place of birth Lahore, Pakistan (Annex DD, page 1) and you can be seen with the Mayor of Camden accepting same in your photograph (Annex DD, page 2).

70. She provides this guidance beginning at page 778 of the stitched bundle. The good character requirement appears in schedule 1 of the BNA 1981. It is a mandatory requirement, in that the Respondent cannot waive it. There is no statutory guidance of what constitutes good character, but I was directed to R (on the application of SK) v Secretary of State for the Home Department [2012] EWCA Civ 16, where LJ Stanley Burton at paragraph 30 summarised the Respondent’s role when considering good character as follows: In relation to naturalisation, on the other hand, the test is whether the Secretary of State is satisfied that the applicant is of good character. It is for the applicant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation.

71. If someone is not morally culpable for an action, it is hard to see how one can reasonable (sic) conclude their performance of the action shows anything about the goodness of their character. It might show their strength of character in that they could not resist. That is not a factor that Parliament has written in to the BNA.”

31. In these paragraphs the First-tier Tribunal appears to conclude, contrary to the earlier finding in paragraph 44 on the condition precedent, that the respondent would not have been entitled to find that the appellant was not of good character even if her fraud had been known when the citizenship decision was made. The decision therefore states both that it was reasonable for the respondent to find that the condition precedent was met and that it was not reasonable for her to do so.
32. It was argued for the appellant that the concession that she had made before the First-tier Tribunal concerned only the use of fraud and that she had not made a concession regarding her good character. As in paragraphs 26 and 27 above, however, the respondent’s position on the

condition precedent was not merely that the appellant had used fraud but that this was material to the grant of citizenship and the condition precedent being met as she could not have met the good character requirement had her fraud been known. Further, neither the decision of the First-tier Tribunal nor the skeleton argument for the appellant that was before the First-tier Tribunal set out that there was this distinction in the concession between the use of fraud and the appellant being found to be of good character. Even if that had been a submission before the First-tier Tribunal, nothing here shows what the First-tier Tribunal made of it when considering whether the condition precedent was met, when assessing duress and when considering the lawfulness of the respondent's exercise of her discretion.

33. In my judgment the decision of the First-tier Tribunal could not stand given this contradiction and confusion that arises from it as to whether the condition precedent was met as this a core element of the assessment on whether the respondent was entitled to deprive the appellant of citizenship. As this primary assessment is not sustainable it was my conclusion that the decision of the First-tier Tribunal had to be set aside to be remade.

Duress

34. Further, the respondent also maintained in her first ground that the First-tier Tribunal erred in concluding that the respondent's exercise of her discretion on whether to deprive the appellant of citizenship was unlawful because the respondent's approach to the issue of duress was not reasonable.
35. As before, the Upper Tribunal must be cautious in substituting its own view for that of the specialist First-tier Tribunal. As before, the First-tier Tribunal set out the relevant guidance from case law. It appeared obvious to me from the detailed discussion in the decision that First-tier Tribunal was anxious to make a lawful and fair decision in this difficult arena of deprivation of citizenship. I am not able to conclude that the findings on the role of duress in the respondent's exercise of her discretion are lawful, however.
36. In paragraphs 45 to 63 of the decision the First-tier Tribunal considered the respondent's position on whether the appellant had acted under duress. Judge Brannan found that the respondent was not entitled to find that the appellant had not acted under duress "or something very close to it" when exercising her discretion to deprive; see paragraph 61. Further, the First-tier Tribunal's own view on the merits was that the appellant had been under duress; see paragraph 62. As set out above, in paragraphs 69 to 71 the First-tier Tribunal found that the respondent was not entitled to conclude that the appellant lacked good character or that she should be deprived of citizenship because she had been acting under duress. The First-tier Tribunal also found in paragraphs 78 to 82 that the respondent's position on statelessness was also in error. The judge considered that as

the respondent had been wrong on the question of duress, the appellant had not been “able to properly answer the case against her” regarding statelessness and the respondent “has not properly assessed the statelessness claim.”

37. In my judgment, however, that the First-tier Tribunal erred in law in finding that the respondent’s conclusion on duress was not reasonably open to her.
38. The test of reasonableness in public law is a stringent one. The test set out in Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 All ER 680 is that a decision is unreasonable if no reasonable person acting reasonably could have made it. That is a high test and is stricter than merely showing that the decision was unreasonable.
39. When considering the respondent’s position that the appellant had not been under duress when she claimed when using a false identity or when making false welfare benefit claims, the First-tier Tribunal placed significant weight of the comments of the judge at the appellant’s trial for benefit fraud. The comments of the trial judge are set out in paragraph 48 of the First-tier Tribunal decision. The trial judge concluded:

“I can also say that if I had been sentencing following conviction, even if it had been convictions on all or a majority of the counts I would have suspended the sentence because if she were guilty, that is not acting under duress, my judgment at the end of the trial was that if it was not duress it came as near to duress as can be the case when someone is guilty because the pressure doesn’t go so far as duress.”

In sentencing I would have also been mindful of the jury question and my direction on it that they should find her guilty on for example count 1 which covered 8 years if at any one time during that 8 years they were sure that she had taken some money not at that particular time under duress. In other words were she guilty it would not have been throughout the period and would not be guilty of the whole sum of £250k. I would have to be sure of what period she was guilty.

Seemed to me both from the psychological reports and from her in Court that she was essentially a broken woman now and so has been punished by the trial process so far.

Having gone so far as to say that I would have suspended the sentence it probably binds me and any other Judge in the future, particularly given that sentences can now be suspended for up to 2 years.”

40. The respondent’s deprivation decision took these comments into account; see paragraph 41. She did not find that she was bound by them or that they should lead her to find that the appellant acted under duress such that she should not be deprived of nationality. She noted that the jury had not found to the requisite majority that she was not guilty or accepted her

defence of duress; see paragraph 41 and 60. The respondent also considered that the fact that Mr Jamieson had accepted the appellant's account in her asylum appeal in 2003 as credible showed that she was capable of presenting as a credible person when she was giving false evidence; see paragraphs 17, 39, 41 and 58. The respondent questioned why there had been no contemporaneous reports of the serious abuse alleged by the appellant against her ex-husband; see paragraphs 40 and 63. The evidence of her step-children and children stating that she had been abused was contradicted by other statements they had made in other legal proceedings; paragraph 63 of the deprivation decision. The respondent took into account the psychology report prepared for the criminal court proceedings in 2012 but set out why she did not find it attracted weight; see paragraphs 38 to 40 of the deprivation decision. The respondent set out a number of reasons for not finding that the appellant had acted under duress, therefore.

41. The view of the First-tier Tribunal, however, set out in paragraph 59, gave primacy to the comments of the trial judge:

“59. I therefore find that no reasonable decision-maker could disregard the comments of Judge Worsley as the Respondent has. Rather, he made a judicial comments which carry significant weight. The Respondent has described no reason to depart from these except her mistaken understanding of the similarity of the proceedings before the two judges.

42. The comments of the trial judge are not formal remarks, however, and it is unclear how they could have bound a judge in any future trial in which the evidence would be heard again or how they could bind a decision-maker in any other proceedings given that they were obiter. As pointed out by the respondent, the acquittal by the jury indicated that there was no legal majority in favour of accepting the appellant's claim to have been under duress. The jury had the same evidence before it as the trial judge. These factors alone indicate that the respondent did not have to find that the comments of the trial judge attracted the “significant weight” given to them by the First-tier Tribunal.
43. Further, as set out above, the respondent did not “disregard” the comments of the trial judge. They were taken into account alongside the other material evidence on whether the appellant had been subject to duress. The respondent did not provide “no reasons” for placing less weight on the comments of the trial judge other than the different jurisdictions in which the appellant's evidence had been assessed. The respondent relied on a number of other factors when deciding that the comments of Judge Worsley did not carry the weight asserted by the appellant. The respondent assessed the comments of Judge Worsley together with the other material evidence which is what she was required to do. For these reasons, in my judgment, the assessment provided by the First-tier Tribunal on whether the respondent acted unreasonably when finding that the appellant had not acted under duress are not sufficient.

44. It was my conclusion that the First-tier Tribunal's decision that the respondent acted unreasonably in finding that the appellant was not subject to duress contained errors of law such that it had to be set aside. The finding of the First-tier Tribunal on the question of duress underpins the ultimate finding that the respondent exercised her discretion to deprive unreasonably. That conclusion must, therefore, also be set aside. This error and that identified above concerning the condition precedent mean that the core assessment required here must be set aside to be remade.
45. It is not necessary to address the respondent's second ground concerning the absence of an Article 8 ECHR assessment where the findings on condition precedent and the lawful exercise of discretion have been set aside.
46. It was my conclusion that the decision of the First-tier Tribunal disclosed material errors of law such that the decision had to be remade afresh. Where that is so it is appropriate for the remaking of the appeal to be made in the First-tier Tribunal. I noted the submission for the appellant that it would be hard for her to have to give evidence again. Given that all issues must be redecided, however, including the weight to be given to the evidence of the appellant and the other witnesses and given that First-tier Tribunal judges are well able to assess how to deal with an appellant's evidence and whether the vulnerable witness guidance should be applied, it remained my view that the correct disposal was for the remaking to take place in the First-tier Tribunal.

Notice of Decision

47. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade afresh in the First-tier Tribunal.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 18 June 2023