



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001429
First-tier Tribunal No:
DC/50284/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 June 2023

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

SHUKRI HIMALLARI
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Badar, counsel instructed by Oliver and Hasani Solicitors
For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 19 June 2023

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Khawar promulgated on 6 January 2023. For ease of reference the parties will be referred to as they were before the First-tier Tribunal.
2. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 5 May 2023.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant is a national of Albania now aged forty-two. He entered the United Kingdom unlawfully during December 2000 and applied for asylum in a different identity, claiming that he was Shukri Duraku, aged sixteen, and that he was born in Gjakove, Kosovo. The appellant was refused asylum but granted Exceptional Leave to Remain as he was believed to be a minor. The appellant was subsequently granted indefinite leave to remain in the Duraku identity on 26 July 2010. He was granted British citizenship on 24 August 2011 and on the same day the appellant officially changed his name to Shukri Himallari and successfully applied for a British passport in that name, while maintaining that he had been born in Gjakove, Kosovo. The appellant subsequently applied to amend his details on his certificate of naturalisation which included mention that he had been born during 1984 in Albania and this caught the attention of the Status Review Unit as of 15 February 2021.
5. After giving the appellant the opportunity to make representations, the respondent decided to deprive the appellant of his British citizenship on 5 November 2021. The respondent considered that the appellant's deception led directly and materially to the grants of settlement and citizenship and concluded that deprivation was both reasonable and proportionate. In terms of Article 8 ECHR, the respondent stated that it was not necessary to take into account the impact that the appellant's removal would have on him and his family members at this stage. The decision letter clarified that consideration would be given to whether a limited form of leave was to be given once the appellant had been deprived of citizenship.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the appeal was allowed on the basis that the decision under challenge was made without applying the respondent's policy, as set out in Chapter 55 - Deprivation of Citizenship, paragraph 55.7.11.6:

... the case worker should consider the impact of deprivation on the individuals rights under the European Convention on Human Rights (ECHR). In particular you should consider whether deprivation would interfere with the persons private and family life and, if so, whether such action would nevertheless be proportionate. In some cases, it might be appropriate to remove citizenship but allow the person to remain in the UK. In such cases you should consider granting leave in accordance with guidance on family and private life.
7. The judge found that the said policy suggested a consideration of deprivation of citizenship and leave to remain being considered in tandem. He further found that the reference to a limbo period of 12 weeks in the decision letter was erroneous, based on the Secretary of State's response to a Freedom of Information (FOI) request in an unrelated case.

The grounds of appeal

8. There are three grounds of appeal. Firstly, the judge's acceptance of the appellant's submissions regarding Chapter 55 was perverse or inadequately reasoned as it failed to engage with the policy, or the decision letter and the judge misunderstood the policy.
9. Secondly, there was procedural unfairness in the judge relying on a FOI response addressing the length of the limbo period and the judge failed to explain why this document was probative of the issue.
10. Thirdly, the judge failed to identify a rare or exceptional factor which could outweigh the public interest, applying *Laci* [2021] Civ 769 and *Muslija* [2022] UKUT 00337. In addition, the judge's Article 8 assessment contained inadequate reasoning, failed to have regard to the public interest and took into account irrelevant considerations.
11. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The deception used by the Appellant started when he was an adult claiming to be a minor and from Kosovo, not Albania, and one he continued for a considerable period of time. It is arguable that the Judge did not engage with the public interest compared to the extent of the Appellant's deception and the actual guidance that applies. The Home Office letter at paragraph 24 was relied on without giving the Respondent the opportunity to comment or make submissions. It is arguable that the Judge embarked on a proleptic exercise taking into account features that did not apply and in a manner that was procedurally unfair.

12. The appellant filed a joint skeleton argument and rule 24 response dated 19 May 2023 in which the appeal was opposed on all grounds, albeit it is conceded that the FOI response was not provided by any party at the hearing.

The error of law hearing

13. When this matter came before us, we heard succinct submissions from the representatives. Mr Basra had nothing of substance to add to the grounds. Mr Badar made a valiant attempt to persuade us that the errors identified in the grounds were immaterial. In summary, he argued that the appeal was not allowed on the basis of the policy issue, the FOI response was a document the respondent ought to have produced and the judge was persuaded by Mr Badar's skeleton argument as to the relevance of *Balajigari*. As for the presence of rare or exceptional features, they could be found at [26-28] of the decision, albeit the judge did not identify them as such.
14. At the end of the hearing, we announced that we were satisfied that all grounds were made out, consequently the decision of the First-tier tribunal contained material errors of law and was set aside. Mr Badar urged us to remit the matter to the First-tier Tribunal for a de novo hearing rather than retain it in the Upper Tribunal as he understood that there was further evidence to be adduced given the previous hearing took place approximately a year ago.

Decision on error of law

15. As indicated above, we found that all grounds were made out. Regarding the first ground, the First-tier Tribunal judge was persuaded by Mr Badar that the respondent's decision was contrary to her policy as set out in Chapter 55 and

that consideration ought to have been given to granting the appellant leave at the same time as the decision to deprive him of citizenship was being undertaken. There is no requirement in the policy for a grant of leave to be considered at that stage in every case and indeed, Mr Badar did not draw our attention to any such provision. On the contrary, the policy indicates that caseworkers have a discretion to grant leave in appropriate circumstances.

16. Accordingly, the judge erred at [22] in finding that it was clear that the policy suggested that the deprivation decision and consideration of granting leave 'should be considered in tandem' and 'not at some later date.' If the judge was of the view that the respondent wrongly exercised her discretion to grant the appellant leave at the same time as deciding to deprive him of citizenship, the judge ought to have applied the correct legal test, that of *Wednesbury* unreasonableness. There is no indication that he did so.
17. The judge further erred both in considering evidence which had not been adduced by either party and without giving them an opportunity to make submissions. This was obviously procedurally unfair. We do not accept Mr Badar's submission that this error was immaterial. It was plainly material to the judge's assessment of whether the appellant and his family would experience a breach of their article 8 rights in the limbo period. The respondent's case was that the delay between deprivation of citizenship and the determination of the appellant's future human rights submissions was a period of 12 weeks. Based on the FOI response, the judge concluded that the limbo period was 'considerably greater' at an average of 257 days. The respondent was prevented from making submissions on this document and as can be seen from the grounds before us, the Secretary of State made a number of substantial points regarding the data referred to in the FOI response.
18. Lastly, in allowing the appeal, the judge fails to identify any features of the case as being rare or exceptional to the extent that they outweigh the public interest, applying *Laci*. The appellant's article 8 submissions came down to him not being able to support his family during the limbo period and the judge's reasons did not come close to satisfying the *Laci* test. Furthermore, we note that in *Muslija*, the Upper Tribunal found that an 'overly anticipatory analysis of the reasonably foreseeable consequences of deprivation will be founded on speculation.'
19. We canvassed the views of the parties as to the venue of any remaking should the panel detect a material error of law and have taken them into account. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), the panel carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. We took into consideration the history of this case, the nature and extent of the findings to be made as well as our conclusion that, in relation to the second ground, the Secretary of State was deprived of a fair hearing and of the opportunity for her case to be put. We consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and we therefore remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal (Taylor House) to be reheard by any judge except First-tier Tribunal Judge Khawar.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 June 2023