



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003538

First-tier Tribunal No: DC/500051/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

19th January 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Asim Murtati
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer
For the Respondent: Ms H. Foot, Counsel instructed by Oliver & Hassani

Heard at Field House on 4 October 2023

DECISION AND REASONS

1. The Respondent is a national of Kosovo born on the 11th May 1977. On the 12th May 2023 the First-tier Tribunal (Judge Barker) allowed, on human rights grounds, his appeal against a decision to deprive him of his British citizenship. The Secretary of State now has permission to appeal against that decision.
2. I apologise for the length of time that the parties have had to wait for this decision. The fault for the delay is entirely mine.

Background

3. The Respondent Mr Murtati arrived in the United Kingdom in November 1999. He claimed asylum and said that he was a Kosovan fleeing the civil war in that territory. The Secretary of State accepted that he was a national of the Federal Republic of Yugoslavia. Asylum was refused, but he was granted 'exceptional leave to remain' (ELR) on the 14th of June 2000. On the 12th of July 2005 he was granted indefinite leave to remain (ILR) as part of an amnesty exercise then in operation, referred to in the papers before me as the 'family concession policy'. He was naturalised as a British citizen on the 9th of November 2006.
4. In November 2007 the Albanian government issued extradition proceedings against the Respondent. It turned out that approximately one year before his arrival in the United Kingdom Mr Murtati had been convicted in Albania of armed robbery. He had been sentenced *in absentia* on the 3rd of November 1998 to eleven and a half years in prison. He was extradited to Albania on the 15th of January 2009, and was sent to prison to begin his sentence.
5. At the date that Mr Murtati was sent to prison in Albania he was a married man with three children. Sadly his wife was diagnosed with cancer not long after he was deported, and on the 7th October 2012 she died. In his absence the children were taken into the care of the local authority.
6. Following his release from prison in Albania in 2015 Mr Murtati came back to live in the United Kingdom and in September 2019 his children were returned to him.
7. The Secretary of State took a decision to deprive the Respondent of his British nationality on the 4th of August 2020. The legal basis for that decision was Section 40(3) of the British Nationality Act 1981 (as amended):
 - (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.
8. Mr Murtati appealed to the First-tier Tribunal. He accepted that he had lied on arrival in 1999. He was not a citizen of Yugoslavia as he had claimed, he was a citizen of Albania. He however submitted that the condition precedent in section 40(3) was not made out, because his British nationality had not flowed from that lie. When he was granted indefinite leave to remain in 2005 this had been on the basis of the family concession policy, upon which his claimed nationality had no bearing. He could not be said to have lied about his criminal convictions because he had been unaware of the trial in Albania. The first he knew about it was 2007 when the extradition proceedings were commenced. He further submitted that as the sole carer for his children it would be a disproportionate interference with his Article 8 family life to deprive him of his British nationality today.

9. At paragraph 33 of his decision Judge Barker sets out those matters said to be agreed between the parties. Materially for the purpose of this appeal these include:

“c. the Appellant’s deliberate deception in relation to his nationality alone, would not have led to a decision to deprive him of his British citizenship;

d. if the Respondent had been aware of the Appellant’s criminal conviction in Albania, this would have had a material affect on the decision to grant the Appellant British citizenship”;

10. These agreed matters receive further elaboration at paragraphs 38 and 39 of the decision:

38. It was agreed by Mr Hogg that the deception in relation to the Appellant’s nationality alone, would not have led to a decision to deprive him of his nationality, as it was not a factor that was material to the grant of citizenship, particularly as the Appellant was granted indefinite leave to remain under the family concession.

39. The real issue in this appeal is whether the Appellant deliberately and dishonestly failed to disclose his criminal conviction in Albania. It is accepted by Ms Foot that if I am satisfied of this then this false representation would have had a bearing on the Respondent’s decision to grant him British citizenship. In essence, the Appellant would not have met the good character requirements and his application would have been refused.

11. The Tribunal then heard evidence about the conviction and Mr Murtati’s knowledge of it. It found him to be an impressive witness who gave a consistent account to the effect that he had not been aware of the conviction in Albania, and was therefore not acting dishonestly when in 2006 he told the Home Office that he had not been convicted of any offence. The Tribunal accepted country background evidence about the deficiencies in the Albanian criminal justice system, and the evidence that Mr Murtati had been unaware of any investigation into him prior to his departure from Albania. The condition precedent not having been established, the appeal was allowed.

The Challenge

12. The Secretary of state has permission to appeal on the following grounds:
- i) That the Tribunal erred in conducting its own merits assessment of whether the Respondent lied. As a matter of law the Tribunal's remit was restricted to considering whether the Secretary of State’s conclusion was flawed for irrationality or another public law error: Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7.
 - ii) In reaching its positive credibility assessment of the Respondent the Tribunal appears to have accepted his case that he was

wrongly accused and convicted of armed robbery. It was not open to the Tribunal to go behind the decision of the United Kingdom authorities to extradite the Respondent, or the conviction in Albania. That the Respondent continues to protest his innocence is a matter that should have been weighed in the balance against him when assessing whether or not he intended to deceive the Home Office.

- iii) The Tribunal has failed to give reasons for its conclusion that the Respondent's evidence about his knowledge at the relevant time was "compelling".

The Response

13. For the Respondent Ms Foot accepts that on the present state of authority, the Tribunal can be said to have erred in the manner alleged in ground (i). It did not limit itself to a *Begum* review. She submits, however, that this does not matter. It is not a material error because on a proper analysis the Secretary of State's decision was flawed for public law error; in particular the Secretary of State had failed to have regard to a decision of the High Court in the extradition proceedings which made it clear but the appellant had been unaware of the charges and conviction against him in Albania until those proceedings had been launched in 2007. The alleged fraud/false representation took place in 2006 when Mr Murtati applied to naturalise.

Ground 1: The Condition Precedent

14. As I note above, there is no dispute between the parties about what approach, on the present state of authority, Judge Barker should have taken to whether the Secretary of State had established that one or more of the condition precedents set out in s40(3) BNA 1981 existed¹. Following *Begum*, she was limited to considering whether the Secretary of State's conclusion was flawed for a public law error: see for instance *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC). It was not open to Judge Barker to conduct her own merits based review into whether or not Mr Murtati had committed fraud, made false representations or otherwise concealed a material fact.
15. The parties are further in agreement that this was in fact what she did. Having referred herself to paragraph 26 of *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483 Judge Barker proceeds to conduct her own assessment of whether Mr Murtati knowingly lied when he said he had no convictions. On the present state of the authorities that was an error of law. *KV* pre-dated *Begum* and the authorities that have ensued from the Tribunal.
16. The question arises whether or not that error was material. Ms Foot for Mr Murtati submits that in fact the Secretary of State's decision is flawed for a clear public law errors. That being the case, the same conclusion would have been reached even if the First-tier Tribunal had directed itself correctly: the substantive appeal must be allowed on the ground that the condition precedent has not been established.

¹ It is right to note that Ms Foot reserved her position about whether *Ciceri* was correct to extend the principle in *Begum* to s40(3) deprivation appeals. She was however content for the purpose of the error of law hearing to proceed on the basis that it did.

17. Mr Terrell reminds me that the test for whether or not an error is material is not whether the Tribunal below might, could or should have reached the same conclusion, the error notwithstanding. An established error will, in circumstances such as these, only be immaterial where “it is clear that on the materials before the tribunal any rational tribunal must have come to the same conclusion”: Secretary of State for the Home Department v AJ Angola [2014] EWCA Civ 1636 [at 49].
18. I remind myself that the matter in issue here was not whether Mr Murtati had lied about his nationality when he arrived in the UK, or whether he maintained that lie over multiple applications. That is because it was expressly conceded before the First-tier Tribunal – perhaps surprisingly – that this deception would not, on its own, justify deprivation action because it had not materially contributed to Mr Murtati’s grant of citizenship. The PO who appeared before the First-tier Tribunal argued that the reason for the action was rather Mr Murtati’s statement that he had no criminal convictions, when we now know that he did. It is the Secretary of State’s case that he knowingly concealed that matter on a number of occasions which cumulatively and materially led to his naturalisation. The question that the Tribunal should have asked itself – and that I must now ask – is whether the Secretary of State materially erred in law when he reached that conclusion: Chimi: (deprivation appeals: scope and evidence) Cameroon [2023] UKUT 00115 (IAC).
19. Ms Foot’s case before this Tribunal is that the Secretary of State did materially err in law in failing to have regard to material facts, in particular the recorded judgment of the High Court in the extradition proceedings: Murtati v the Government of the Republic of Albania [2008] EWHC 2856 (Admin). It was clear from that judgment, she submits, that Mr Murtati had been unaware of the case against him in Albania until the proceedings were filed with the UK government.
20. The appeal in the extradition proceedings came before Mr Justice Pill and Mr Justice Pitchford on the 25th November 2008. Ms Foot relies in particular on this passage from their short judgment:

“9. At the trial, the court appeared to have regard to the evidence of a co-defendant. It cannot be assumed, it is submitted, that the co-defendant and other potential witnesses would now be available. Given the lapse of time, it will be difficult to challenge identification evidence. It will be difficult now to obtain evidence that the appellant was in Macedonia at the time the offence was committed, which is his proposed defence. The appellant relies on the absence of a specific finding by the District Judge that the appellant was a fugitive and the burden of proof is on the respondent. **The District Judge was not satisfied that the appellant had been aware of the proceedings and trial.**

10. For the respondent, Miss Barnes submits that, while the judge did not expressly state that the appellant was a fugitive, her factual findings amount to such a finding, **even though the appellant had not been aware of the court proceedings.** He left the Balkans “shortly after the commission of these offences” and he adopted another identity in the United Kingdom. The Deputy Senior District Judge stated that “He can hardly be described as having lived openly”. There was also evidence from

which the District Judge could and did infer that, in recent years, the appellant had been in contact with his family”.

21. Although Ms Foot acknowledges that the judgment of the High Court does not appear to have been before the Secretary of State when she made her decision, she submits that he must have been aware, or ought to have been aware of it. Although he was not a party to those proceedings, it had been the Secretary of State who had ordered the extradition, at the request of the Albanian authorities, and the High Court judgment is a matter of public record. In Begum public law terms, the Secretary of State failed to take into account material considerations, namely the fact that Mr Murtati’s assertion of ignorance had been accepted by the District Judge in Westminster Magistrates’ Court, and by the parties in the proceedings in the High Court. In the alternative Ms Foot submits that the Secretary of State failed in her *Tameside* duty to undertake sufficient enquiries relating to the Appellant’s extradition prior to making her decision to deprive: see Chimi (deprivation appeals: scope and evidence) Cameroon [2023] UKUT 00115 (IAC) at [56], Shyti v Secretary of State for the Home Department [2023] EWCA Civ 770 at [88]-[94].
22. For the Secretary of State Mr Terrell underlines that the High Court judgment was not provided to the Home Office in response to the notification decision. He submits that it was not so obviously relevant that the Secretary of State should have sought it out and taken it into account. Moreover, he submits that it is not clear from the judgment that the sentences highlighted by Ms Foot amount to findings of fact in his favour. Elsewhere the judgment references an appeal against the conviction launched by Mr Murtati’s brother in 1999 and the fact that Mr Murtati had retained contact with his family, matters which taken together strongly suggest that he did likely know about the case against him in Albania.
23. It can be said with some certainty that the Secretary of State did not have regard to the High Court’s extradition judgment in reaching his decision to deprive Mr Murtati of his British citizenship. Mr Terrell points out that it was not brought to his attention by Mr Murtati, but I am satisfied that it is nevertheless admissible in these proceedings for the following reasons. It was clearly in existence at the time, and I accept Ms Foot’s submission that the extradition litigation was, I paraphrase, the obvious place for the Secretary of State to look when considering the alleged deception. The proceedings which ended up in the High Court had indeed been instigated by the Secretary of State, and it was a matter in which he plainly retained an interest. I further regard it as admissible on the ground that it goes directly to the error of law pleaded by Mr Murtati, that the Secretary of State failed to have regard to material matters when he concluded that the condition precedent, here (deliberately) false representations had been made: see Chimi [at 61].
24. Turning to the substance of the High Court’s decision, I agree with Mr Terrell that the sentences which Ms Foot highlights do not amount to reasoned findings of fact made by the judges on appeal. What they do serve to demonstrate, however, was that Mr Murtati’s knowledge had been a material issue in the proceedings below, and that the Deputy Senior Magistrate Wickham had concluded, after reviewing the evidence before her, that he had not in fact known about the criminal proceedings until his extradition had been sought. It may be that had the Secretary of State obtained a copy of that decision of Westminster Magistrates, he would have found good reason to depart from it, but that is not what happened here. The Magistrates’ conclusions, which went directly to the

very issue to be decided in respect of the condition precedent, were not taken into account at all. I am satisfied that this did amount to a failure to take material evidence into account.

25. I am further satisfied that there is another obvious public law error in the decision of the 4th August 2020: error of fact.

26. In that letter the decision maker records that on the 17th November 1999 Mr Murtati completed a 'statement of evidence form' (SEF) in which he was asked "have you any outstanding charges against you" to which he replied "no" [at Q3 SEF]. On the 13th July 2003 Mr Murtati applied for further leave to remain. On that form he was asked "Have you received a prison sentence in the UK or elsewhere", to which he ticked "no". Then on the 1st August 2006 Mr Murtati made his application to naturalise as a British citizen. Under the general heading of 'good character requirements' he was asked "Do you have any criminal convictions in the UK or any other country?" to which he ticked "no" [at section 4.6]. He was also asked "Have you ever been charged or indicted with a criminal offence?" to which he again ticked "no" [4.7]. The letter goes on:

"16. Your legal representatives state that you were fully aware of the charges against you in Albania and that you were trialled in absence (Annex L, page 7, para 6). In all your applications to the Home Office you falsely signed declarations knowing that you had armed robbery charges/conviction against you...."

27. The letter concludes that it is highly likely that Mr Murtati would have been refused on character grounds had the conviction been declared; the deception was therefore material to the gaining of that status.

28. I summarise the contents of that letter to illustrate that the only evidence that is taken into account in determining whether false representations have knowingly been made are a) the fact that Mr Murtati consistently denied having any convictions or charges against him between 1999 and 2006 and b) his representatives' admission that he had been "fully aware" of the charges. The difficulty is that Mr Murtati's legal representatives did not say that he was fully aware of the charges against him. In fact the letter at annex L of the Home Office bundle, from Oliver and Hasani and dated the 26th October 2018, says precisely the opposite:

"Our client instructed that on 15 January 2009 he was deported to Albania. He states that he was fully **unaware** of the charges against him and that he was trialled in absence".

(emphasis added).

29. The decision maker makes specific reference to this passage, and obviously misreads it. I am satisfied that this was a public law error such that the original decision is vitiated. I am satisfied that whilst Judge Barker did undertake the wrong exercise, I am quite satisfied that had she undertaken the correct one, her decision to allow the appeal would have been the same.

Grounds 2 & 3

30. Both of these grounds are concerned with alleged errors made by Judge Barker in the course of her substantive findings of fact, in the context of her own evaluation of s 40(3). That was an assessment which she should never have undertaken, and to that extent those parts of her judgment are set aside. The decision in the appeal nevertheless stands for the reasons I have set out above.

Decision

31. The Secretary of State's appeal is dismissed.
32. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
10th January 2024