IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004223

First-tier Tribunal No: DC/50237/2022

Heard at Field House on 26 February 2024
Re-promulgated on 04 April 2024

THE IMMIGRATION ACTS

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

ABDUL REDA RKAIN
NO ANONYMITY ORDER MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Record, Counsel
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant applied for a passport as a British Overseas Citizen on 28 September 1998, as he was entitled to do. In doing so he supplied with his application the Lebanese passport that had been issued to him by the Lebanese authorities in Beirut in 1997, as part of the supporting evidence required to establish his identity. In due course a British Overseas Citizen passport was issued to him by the United Kingdon passport office.
2. On 25 January 2004 the Appellant applied to the Respondent for registration as a British citizen, pursuant to section 4B of the British Nationality Act. To qualify as such the Appellant had to hold no other citizenship beyond his British Overseas Citizenship, and so the application form required a declaration from the Appellant that this was indeed the case. The application form also required of him a declaration that the contents of his application were true, and warned him that to give false information knowingly, or indeed recklessly, was a criminal offence. The Appellant completed the application form to declare that he held no other

citizenship beyond that of his British Overseas Citizenship, and had never done so [Section 8].

3. Accordingly the Appellant made no reference to the Lebanese passport in the application for registration, and he denied that he held, or indeed had ever held, Lebanese citizenship. He subsequently provided in support of his application a letter from the Embassy of the Lebanon in Kinshasa dated 24 November 2004 attesting that he did not have the right to citizenship of the Lebanon. The application for registration as a British citizen was granted on 6 January 2005.

4. On 25 August 2022 the Respondent gave written notice to the Appellant that he had reason to believe that the Appellant had obtained fraudulently his British citizen status. As a result of a wider ranging investigation into abuse of the registration process by British Overseas Citizens, the Respondent had been alerted to the fact that the Appellant had submitted the Lebanese passport issued to him in 1997, in support of his 1998 application for a British Overseas Citizen passport. Thus, the Respondent was in possession of information that suggested the Appellant had held Lebanese citizenship in 1997, and that he may therefore have continued to hold another nationality when he had applied for registration as a British citizen in 2004, and if so, he had concealed both facts when doing so.

5. The Appellant was informed that the Respondent was considering depriving him of that British citizen status under s40(3) of the British Nationality Act 1981. In order to reach a decision on the matter the Respondent required the Appellant to provide documents, information and answers to fifteen questions that concerned *inter alia* his birth registration, the Lebanese civil registration records that related to him, and, details of the members of his immediate family. Question 6 raised a specific enquiry, as to why, given his circumstances, he claimed he was not entitled to Lebanese nationality at the date of application; "*Please explain why, according to the Lebanese Embassy of Kinshasa you were not entitled to Lebanese nationality*." Correspondingly, Question 7 focused upon whether, having been entitled to Lebanese nationality, he claimed that he no longer held it at the date of application; "*Please state whether you have ever renounced or lost Lebanese nationality*."

6. The Appellant responded on 20 September 2022 providing both documents, and answers. He declared that since his father was not born in Lebanon, he could not acquire Lebanese citizenship by descent. He claimed to have enclosed copies of all the passports he had ever held, but he omitted in making that response to provide a copy of, or make any reference to, the Lebanese passport issued to him in 1997, and which he had supplied in support of his application for a British Overseas Citizen passport. He declared that he had never renounced or lost Lebanese citizenship.

7. That response prompted the Respondent to raise further queries of him by email, concerning the length of his residence in the Lebanon, and, whether he had ever been issued with a Lebanese passport, but the Appellant chose to give no response to them. (Decision letter [14] – we also note that Ms Record accepted that no dispute had ever been raised by the Appellant over whether these emails were received by him, or left unanswered as alleged by the Respondent in his reasons for the decision under appeal.)

8. On 1 November 2022 the Respondent issued a written decision to the Appellant of his conclusion that the Appellant had obtained his British citizenship fraudulently, and, his decision that the Appellant should therefore be deprived of that citizenship, together with his reasons for those decisions.

9. The Appellant lodged an appeal against that decision under s40A of the 1981 Act, which was heard, and allowed, by First-tier Tribunal Judge Brannan in a decision promulgated on 14 July 2023.

10. The Judge recognised that it was not in dispute that the Appellant had provided a Lebanese passport in support of his September 1998 application for a British Overseas Citizen passport, and that he had at best made no reference to its existence in the course of his registration application of 25 January 2004. The Judge was not persuaded that it was irrational for the Respondent to have concluded that the Appellant held Lebanese citizenship in 1998, and that he continued to hold it in January 2004, at the date that he had applied for registration as a British citizen. Nevertheless, the Judge's reasoning appears to have led him to the conclusion that the process followed by the Respondent in making his enquiries prior to reaching his decision to deprive was so unfair that it necessarily, and of itself, rendered the decision of 1 November 2022 an unlawful one.
11. The Respondent sought permission to appeal that decision to the Upper Tribunal and a limited grant of permission was given on 26 September 2023. Before us, there was no dispute that the scope of the permitted challenge by the Respondent is the alleged failure of the Judge to properly take into account the full content of the Respondent's notice of 25 August 2022, and thus the range and focus of the enquiries that were raised of the Appellant. In short, the Respondent argues that whatever common law fairness did require of the Respondent in the circumstances of this case, the process that was adopted met that required standard. Moreover, as the Judge should have identified, in reality it was the Appellant who had failed to properly engage with the opportunity that had been offered to him, to explain himself.

Due process in the course of the decision making

12. It is not suggested that this is one of those cases concerning the threat to society arising either on national security grounds, or, through involvement in serious organised crime, that could have lead the Respondent to consider the use of his powers under s40(2). Accordingly, there was no prospect of the Appellant being able to take advantage of a forewarning of the Respondent's concerns in order to be able to frustrate the process of deprivation of citizenship, by taking steps to rid themselves of any alternative citizenship they held. It is clear that on many occasions when the Respondent is considering his powers under s40(2) that will be a matter that will require his consideration. Recent examples arising in both the national security setting, and the serious organised crime setting, can be found in both Begum v SSHD [2024] EWCA Civ 152, and, Kolicaj (Deprivation: procedure and discretion) Albania [2023] UKUT 294.
13. We turn then to those occasions when the Respondent is considering the use of his powers under s 40(3) as a result of a suspicion that there was a resort to deceit in the course of the application for naturalisation, or for registration, as this was. We anticipate that there will be many cases referred to the Respondent's Status Review Unit for investigation, and, to allow for a proper consideration of the exercise of the discretion, in which the individual has an explanation to offer for their conduct, or, matters that they should draw to the Respondent's attention as potentially weighing against the exercise of his discretion in favour of the deprivation of their British citizenship. Some may be able to establish unequivocally that their impugned conduct was innocent. Some may be able to persuade the Respondent that even if it was not, their own circumstances, or, those of their immediate family members, are such that either they should be allowed to retain their British citizenship, or, perhaps more commonly, that even if they should not, they should nonetheless be granted a period of discretionary leave to remain in the United Kingdom. A process that provides for this exchange of suspicion, and explanation, prior to decision making strikes us as one plainly

required by fairness, pragmatism, and good governance, even if it is not one that is expressly provided for by the British Nationality Act 1981.

14. It is clear that s40 and s40A of the British Nationality Act 1981 do not provide a statutory mechanism for such a process. The statutory mechanism is limited to the requirements of s40(5), which require that written notice be given of a decision to deprive before the Deprivation Order itself is made, in order to alert the individual to their right of appeal. Even so, we note that lodging of such an appeal is "non-suspensive" in the sense that initiating such an appeal is no fetter to the Respondent's ability to proceed to make the Deprivation Order.

15. Nevertheless, as rehearsed in R (Balajigari) v SSHD [2019] EWCA Civ 673 the absence of a statutory mechanism does not mean that there is never any obligation upon the Respondent to offer an individual the opportunity to explain their conduct, once suspicion of deceit has arisen. The common law requirement of procedural fairness may not mean that such a process needs to be adopted in the circumstances that give rise to consideration of the exercise of the discretion arising under s40(2), but it is difficult to see why generally it would not do so in those giving rise to the exercise of the discretion arising under s40(3). Obviously, part of the content of the common law duty is the need to provide the individual with an indication of the nature of the issues which the Respondent is concerned about. It may well be, although it will depend upon the nature of the case, that as here the Respondent will set out a list of questions which will assist in the individual understanding the nature of the concerns so that there is an appropriate opportunity to respond to them. Having invited a response the Respondent is, of course, then obliged to consider the response (or lack of one) that the individual has offered, before reaching his conclusion either that the individual has been dishonest, or, that the discretion should be exercised in favour of deprivation.

Error of law?

16. In this appeal the Judge was persuaded that the enquiries raised by the Respondent were inadequate, and that the inadequacy led to an unfair decision making process. The cornerstone of the Judge's conclusion in this respect is to be found in paragraph 21 of his decision, in which he directs himself that the Respondent "*made no reference to this passport at all prior to reaching her decision*" and "*the Appellant had no way of knowing that the Respondent was referring to [the Lebanese passport] when she invited him to make his representations*".

17. With the greatest respect to the Judge, this conclusion is simply unsustainable, in the face of his acceptance that a Lebanese passport was supplied in support of the 1998 application, the full text of the letter of 25 August 2022, and, the subsequent emails of enquiry. It follows that the Judge's decision that the Respondent gave the Appellant no opportunity to explain himself, and thus followed a decision making process that was so procedurally unfair to the Appellant as to render the decision under appeal an unlawful one, simply falls away.

Remaking the decision

18. We invited Ms Record to make submissions on why, if this was our conclusion, we should not simply remake the decision ourselves on the papers before us. Moreover, to offer any submissions that she would wish us to take into account on the Appellant's behalf. The only reason offered as to why we should not immediately remake the decision was the absence of the Appellant, and his potential desire to be present. We noted that he had without explanation failed to attend the hearing before us, and that there had been no application for an

adjournment of it for even an hour or two to allow his attendance. We also note that no application had ever been made for him to offer evidence at any rehearing of the appeal. In the circumstances we were satisfied that we could and should proceed to remake the decision without more.

Irrationality

19. As initially presented to the Judge, the challenge to the Respondent's decision of 1 November 2022 was one of irrationality. That carried the heavy burden of demonstrating that no rational Secretary of State could have reached that conclusion that he did, on the evidence that was then before him. The Judge, correctly in our view, dismissed that argument.
20. The Judge's rationale was that the Respondent was entitled to rely upon the evidence available to him that Lebanese citizenship was from time to time bestowed upon individuals who were not otherwise entitled to it as a matter of discretion. That alone would be a complete answer to an irrationality challenge.
21. In this case, however, it did not stand alone.
22. We note that it was the Appellant who, in 1998, had produced to the United Kingdon Passport Office the Lebanese passport that was issued to him in 1997. It was not suggested by him in response to the Respondent's enquiries in 2022 that this passport was a forgery, or one whose issue he had obtained through corruption. In consequence the Respondent had no real alternative but to consider the Appellant as one who had been recognised by the Lebanese authorities as a citizen of the Lebanon at the date of issue in 1997. Moreover, the Appellant had to be regarded as having held himself out as being a citizen of the Lebanon in 1998 when he tendered that passport in support of his application for a British Overseas Citizen passport. In practical terms the burden has always been upon him to show that notwithstanding the issue of this passport, and his use of it, the reality was otherwise; Hussein (status of passports: foreign law) Tanzania [2020] UKUT 250. As the Vice President observed therein; "*It is simply not open to an individual to opt out of that system by denouncing his own passport; and it is not open to any State to ignore the contents of a passport simply on the basis of a claim by its holder that the passport does not mean what it says*". Whilst this was a decision made in the context of a Refugee Convention claim, we consider these observations have more general application.
23. The Appellant has asserted that the issue of the passport was only ever intended by the Lebanese authorities to provide him with a travel document, and never a recognition by them of Lebanese citizenship, but Ms Record did not suggest that he had provided expert evidence to support this assertion in response to the Respondent's enquiries, which demonstrated that this was the reality.
24. Accordingly, the irrationality challenge to the Respondent's decision that the statutory pre-condition of s40(3) was met, never held merit.

Due process

25. What fairness requires by way of enquiries of an individual suspected of deceit in the context of s40(3), and whether the Respondent is obliged to pursue a train of enquiry, and if so how far he is then obliged to do so, will necessarily vary from case to case. In this case we are satisfied that the Appellant was given an opportunity to explain himself, and that his response did not require the Respondent to pursue any further investigations of third parties. We are not persuaded that in the circumstances of this case common law fairness required the Respondent to go any further than that. He had available to him a genuine Lebanese passport issued to the Appellant in 1997, and a Lebanese birth certificate. He also held apparently reliable evidence that Lebanese citizenship

was granted from time to time on a discretionary basis to those who did not otherwise qualify for it. He was entitled to proceed to make a decision using his s40(3) powers, based upon that information, as to whether the statutory condition was made out, or not.

26. The decision reached by the Respondent was that in denying he either now held, or had ever held, any other citizenship than British Overseas Citizenship, when answering the questions raised in section 8 of the application for registration as a British citizen, the Appellant acted dishonestly. There is no suggestion that the Respondent failed to follow the approach to dishonesty required by the Supreme Court in Ivey v Genting Casinos (UK) t/a Crockfords [2017] UKSC 67. Once the facts have been established, the question of whether the individual's conduct was honest or not is to be determined by applying the objective standards of ordinary decent people: there is no requirement that the individual in question must appreciate that by those standards, what he has done is dishonest.

The exercise of discretion

27. The opportunity to register as a British citizen that is afforded to British Overseas Citizens is one that is only open to those who hold no other citizenship, and are not entitled to do so; section 4B of the British Nationality Act 1981. If, in January 2004, the Appellant was a Lebanese citizen, or was entitled to Lebanese citizenship, then the Respondent had no power under s4B to register him as a British citizen. His application should have been rejected, and perhaps he should have been invited to pursue naturalisation instead, if, and when, he qualified to do so.

28. No doubt that is why no public law challenge is offered by the Appellant to the Respondent's decision to exercise his discretion in favour of deprivation of the British citizenship status, once he had concluded that the statutory condition to s40(3) had been made out. The Court of Appeal has been clear: deprivation of citizenship status will be the ordinary consequence of the statutory condition to s40(3) being made out: Laci v SSHD [2021] EWCA Civ 769.

29. This is not one of those cases (of which Kolicaj (Deprivation: procedure and discretion) Albania [2023] UKUT 294 is an example) in which the Respondent was either entirely unaware of his discretion, or, made no attempt to demonstrate why he had exercised it in favour of deprivation. The letter of 1 November 2022 giving his reasons for the decision to deprive did expressly recognise the existence of that discretion. True it is that the Respondent went on to deal somewhat brusquely with his reasons for exercising the discretion in favour of deprivation, but having already set out fully in that same letter the circumstances in which he was considering the deprivation of the Appellant's citizenship status, he was in our judgement perfectly entitled to say quite simply, as he did, that he had taken into account the contents of the Appellant's letter of 20 September 2022, but concluded nevertheless that deprivation would both reasonable and proportionate. In reality, the letter of 20 September 2020 raised no material of any significance beyond the matters that the respondent had already addressed in the letter of the 1 November 2022.

30. In our judgement, to require the Respondent to do more in circumstances such as these would be to set the expectation of explanation from him far too high. The Appellant does not suggest that any material consideration had been left out of account earlier in that letter, and to rehearse again what had already been set out in the course of reaching the conclusion that the statutory condition was made out, would have been otiose in the circumstances of this case. Further, in this case there was no need for the Respondent to give reasons for his reasons. However, this is no doubt another acutely fact sensitive issue, and it may be that

in a different s40(3) case an individual will be able to point to matters of significance that had been offered in mitigation of the ordinary consequences of their conduct, that were material to the exercise of the discretion, and which are entirely omitted from the letter offering the Respondent's reasons. We do not however see any purpose in requiring the Respondent to simply repeat what he had already set out, since the sensible reader can readily discern that those matters were in his mind when he turned to the exercise of his discretion.

Article 8

31. The Respondent gave an assurance in the course of the decision under appeal [32] that within four weeks of the making of a Deprivation Order (which has not yet occurred) a decision would follow upon whether the Appellant would be granted a period of leave to remain, or, be removed from the United Kingdom. It is not suggested that there is, in the context of this appeal, any basis upon which we could go behind that assurance.
32. The Appellant has not sought to identify precisely how the deprivation of his British citizen status would affect him during the four week period in question. As a citizen of the Lebanon who is said to divide his life between the United Kingdom, Belgium and Angola it is not for us to infer on his behalf what, if any, consequences there would be for him during that period. He does not suggest there would be consequences for any other individual. He has therefore entirely failed to identify how he would argue that his Article 8(1) rights are engaged during this period by the decision under appeal, and Ms Record did not indicate how that might be the case. Our consideration is limited to that period, since to go further and to anticipate the making of a decision to remove, which if it were ever made, would carry its own appeal rights; Aziz v SSHD [2018] EWCA Civ 1884. It is not open to us to consider the consequences of something that has not yet happened, and may indeed, never happen.
33. The Court of Appeal observed in Laci v SSHD [2021] EWCA Civ 769 @ [37 & 73] that it would only be in the most compelling circumstances that it would be right for the benefits of British citizenship to be retained notwithstanding the individual's resort to dishonesty in the course of acquiring it. The inherent public interest in maintaining the integrity of British nationality laws in the face of attempts to subvert it through dishonest conduct, and also to maintain public confidence in the naturalisation process itself, must be a very strong one.
34. We have noted that the Appellant's skeleton argument before the First-tier Judge did not seek to rely upon Article 8 – we do so only for completeness. Accordingly, although Article 8 was raised in the grounds of appeal, in the circumstances of this appeal it is simply not possible to conclude that the effect upon the Appellant's private life, of the deprivation of his British citizen status, would be disproportionate to the clear public interest in that outcome.

Conclusions

35. In the circumstances we are satisfied that the Judge fell into material error of law, and that his decision must be set aside and remade.
36. We are not satisfied that the Appellant has made out a public law challenge to the decision under appeal. It was therefore a lawful one. It was also a lawful one pursuant to section 6 of the Human Rights act 1998.
37. Accordingly, we remake the decision on the appeal so as to dismiss the appeal.

Notice of Decision

The decision promulgated on 14 July 2023 did involve the making of an error of law in the approach taken by the Judge to the evidence relied upon by the Appellant

sufficient to require the decision upon the appeal to be set aside and remade. We remake that decision so that the appeal is dismissed.

JM Holmes
Deputy Judge of the Upper Tribunal Immigration and Asylum Chamber
1 March 2024