IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000601

First-tier Tribunal No: DC/50030/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10 July 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Appellant

and

Iltaz Ali Khan
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr M. Saleem, Malik and Malik Solicitors

Heard at Field House on 5 May 2023

DECISION AND REASONS

1. The issue at the heart of this appeal is whether a panel of the First-tier Tribunal made a mistake of fact when concluding that, at the time the Secretary of State considered an application for naturalisation as a British citizen from an applicant purporting to be a citizen of Afghanistan, she had before her evidence that he was, in fact, a citizen of Pakistan, with a history of entry clearance applications in his Pakistani identity?

2. By a decision dated 26 January 2023, First-tier Tribunal Judges LK Gibbs and D Hyland ("the judges") allowed an appeal brought by Iltaz Ali Khan, a naturalised British citizen of Pakistani origin, against a decision of the Secretary of State dated 1 February 2022 to make an order depriving Mr Khan of his British

citizenship. The Secretary of State now appeals against the decision of the First-tier Tribunal with the permission of First-tier Tribunal Judge Gumsley.

3. For ease of reference, I will refer to the appellant before the First-tier Tribunal as "the appellant" in this decision.

Factual background

4. The appellant is a citizen of Pakistan. In early 2001, he arrived in the UK with entry clearance issued to him in his Pakistani identity, Iltaz Ali Khan. On 8 January 2001, he claimed asylum as Aqeel Jan, falsely claiming to be a citizen of Afghanistan who feared the Taliban. The claim was refused and Mr Jan's appeal to the Immigration Adjudicator was dismissed by a determination promulgated on 27 July 2001.

5. The appellant then left the country and applied, as Mr Khan, for entry clearance on multiple occasions, each time unsuccessfully. He appears to have re-entered the country at some point, having been issued a driving licence in his false Afghan identity in November 2008.

6. In 2009, the appellant's solicitors, Malik and Malik, applied for indefinite leave to remain on behalf of Mr Jan, on the basis of the length of his residence. The application falsely claimed that Mr Jan had been in the United Kingdom ever since his asylum claim was refused. The application for indefinite leave to remain was ultimately successful, and the appellant (as Mr Jan) was granted indefinite leave to remain on an exceptional basis outside the rules on 25 October 2010. Mr Jan applied for naturalisation as a British citizen on 18 January 2011. Mr Jan became a British citizen on 1 April 2011.

7. On 28 July 2014, the Home Office received a "referral" suggesting that Mr Jan was not, and never had been, a former Afghan asylum seeker in fear of the Taliban. He was, in fact, Mr Khan, a citizen of Pakistan. In October 2021, the Secretary of State informed the appellant of her concerns. Exchanges of correspondence followed, culminating in the decision of the Secretary of State dated 1 February 2022 to deprive the appellant of his British citizenship on the basis that it had been obtained by means of fraud, false representation or the concealment of a material fact, pursuant to section 40(3) of the British Nationality Act 1981 ("the 1981 Act").

8. The appellant appealed against the decision, and his appeal was heard by the First-tier Tribunal on 17 January 2023.

9. In their decision, the judges found that the Secretary of State was entitled to be satisfied that the condition precedent contained in section 40(3) of the 1981 Act was satisfied (paragraph 18). They also concluded that the public interest in the deprivation of citizenship of was sufficient to outweigh any interferences with the appellant's Article 8 ECHR rights that would be caused by the deprivation of his citizenship (paragraph 25).

10. The operative basis for the judges' decision to allow the appeal may be found at paragraphs 26 to 31. At paragraph 26, they said, "the appeal can only be allowed if we are satisfied that the respondent has acted in a way that no reasonable Secretary of State could have acted." At paragraph 27 they made the following findings:

> "The procedural irregularity relied upon in this case arises from the respondent's failure to have regard to her own policy. Based on the contents of the appellant's Home Office file we find that the respondent

> had the evidence before her regarding the appellant's immigration history at the time that she made the decision to grant him ILR and later citizenship. The appellant's file clearly sets out, in detail, all of the entry clearance applications made between 2004-2008 and the use of false documents within these. The respondent was also aware that his appeal had been dismissed and that the immigration judge had not been satisfied that the appellant was a citizen of Afghanistan."

11. That, the judges found, demonstrated that the Secretary of State had failed to apply or follow paragraph 55.7.10 of the Nationality Instructions, which provides:

> "55.7.10.2 Evidence that was before the Secretary of State at the time of application but was disregarded or mishandled should not in general be used at a later stage to deprive of nationality. However, where it is in the public interest to deprive despite the presence of this factor, it will not prevent the deprivation."

12. At paragraph 29, the judges found that the Secretary of State had "entirely failed" to take her own policy into account. She had evidence before her that the appellant had used two identities to make entry clearance applications, from outside the United Kingdom, at the time he claimed to have been resident in the United Kingdom as a failed Afghan asylum seeker. That information had been before the Secretary of State at the time she decided to grant the appellant's naturalisation application. Accordingly, evidence relating to such matters should not, in accordance with the policy outlined above, have been relied upon by the Secretary of State to pursue the deprivation of the appellant's British citizenship. The judges allowed the appeal.

Issues on appeal to the Upper Tribunal

13. The single ground of appeal contends that the judges made a mistake of fact when concluding that the Secretary of State had before her evidence of the appellant's past deception at the time she granted his application for naturalisation.

14. Mr Tufan submitted that there was no evidence to link the appellant's two identities before the Secretary of State at the time she granted his application for naturalisation. There was nothing before the Secretary of State to demonstrate that she was aware of the situation at the time. Mr Tufan also submitted that the judges misapplied the policy in any event, since, even where the Secretary of State *had* disregarded or mishandled the information, the policy nevertheless permits her to take a deprivation decision in any event.

15. Mr Saleem submitted that the appellant's case notes demonstrate that the Secretary of State had linked the Khan and Jan identities as early as 2008. He also submitted that it was not open to the Secretary of State to expand her grounds of appeal to challenge the judges' application of the policy. The appeal was brought on the narrow basis that there was an error of fact. It was inappropriate for the Secretary of State to expand the challenge before the Upper Tribunal to encompass broader grounds of challenge.

Scope of proceedings

16. The Secretary of State's grounds of appeal focused solely on the judges' findings of fact that the evidence pertaining to the appellant's fraud had been "before" the Secretary of State at the time she considered the appellant's application for naturalisation. Although Mr Tufan sought to expand the scope of

the challenge to other bases, including a misapplication of the policy itself, he made no formal application for permission to appeal on any additional basis.

17. Procedural rigour is important in this jurisdiction. The Upper Tribunal is a permission-based jurisdiction (see *Joseph (permission to appeal requirements)* [2022] UKUT 218 (IAC) at paragraph 1). The process of obtaining permission to appeal requires a party seeking to challenge a decision of the First-tier Tribunal to identify the alleged errors of law in the decision of the First-tier Tribunal at the permission stage. In turn, that enables the parties to identify the issues of relevance before a hearing and attend ready to address the Upper Tribunal on the previously identified issues. As the Presidential panel in *Joseph* observed at paragraph 1, "the process for obtaining permission to appeal, and the basis upon which it may be granted, perform important regulatory functions".

18. I accept Mr Saleem's submissions that the Secretary of State did not seek, and does not enjoy, permission to appeal on the broader bases advanced by Mr Tufan at the hearing. The sole focus of the grounds of appeal is whether the judges erred in reaching findings of fact. See paragraph 7 of the grounds of appeal:

> "It is submitted that the panel's findings at [26-31] are based on a material error of fact. This error resulted in a material error of law."

19. The restricted focus of the challenge was reflected by Judge Gumsley's grant of permission to appeal, which quite properly identified the central basis upon which he considered the grounds to be arguable:

> "… on the assumption that the assertions made as to the state of the evidence of the SSHD's state of knowledge are correct, I am satisfied that it is arguable that the FtT Judges made a material error of law by proceeding to consider the issue of discretion on the basis of a material error of fact."

20. I apply these principles to my analysis of these proceedings.

Relevant legal principles

21. The grounds upon which the Secretary of State enjoys permission to appeal are based on the premise that it was a mistake of fact for the First-tier Tribunal to conclude that the Secretary of State had before her evidence pertaining to the appellant's past dishonesty at the time she considered his application for naturalisation. This is, in other words, an appeal on a point of fact. There are many authorities governing the approach of appellate tribunals to findings of fact reached by first instances judges. See, for example, *Volpi v Volpi* [2022] EWCA Civ 464 at paragraph 2, per Lewison LJ:

> "2. The appeal is therefore an appeal on a pure question of fact. 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:
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> 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.
>
> 3. If authority for all these propositions is needed, it may be found in *Piglowska v Piglowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services (UK) Ltd* [2016] EWCA Civ 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352."

22. See also *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 at paragraph 62:

> "It does not matter, with whatever degree of certainty, that the appellate 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."

First-tier Tribunal's findings of fact open to it

23. In 2008, the appellant applied for entry clearance from Venezuela in the Khan identity. The application was refused. In the Entry Clearance Officer's "Case Notes" for 29 February 2008, there is an entry stating "*08/01/2001 Asylum – Refused*". The appellant had never claimed asylum using the Khan identity. On 8 January 2001, however, the appellant had claimed asylum in the Jan identity. That means that, as long ago as 2008, the Secretary of State, through her officials discharging the functions of the Entry Clearance Officer, had identified a link between the appellant's applications as Mr Iltaz Khan and the Jan identity.

24. It was therefore open to the judges to conclude that the Secretary of State had previously linked the two identities. The Secretary of State had constructive knowledge of the appellant's fraudulent use of the Jan identity over four years before the Secretary of State granted his naturalisation application. In reaching their conclusion that the evidence of fraud, false representation or concealment of a material fact was before the Secretary of State at the time of the naturalisation application, the judges reached a finding of fact that was rationally open to them on the evidence that was before them. It was open to the judges to conclude that the reference in the 2008 Khan notes to the Jan claim for asylum meant that the link had been made at a much earlier stage.

25. In light of the scope of the grounds of appeal, I have not scrutinised the judges' application of the policy against their findings of fact. I have resolved the sole basis upon which the Secretary of State sought and obtained permission to appeal: the judges did not make a mistake of fact when concluding that the Secretary of State had before her information pertaining to the appellant's fraud and false representation at the time he applied to naturalise as a British citizen.

Postscript

26. The judges' operative 'Notice of Decision' stated (at paragraph 33) that "the appellant should not be deprived of his citizenship status". That phrase perhaps misunderstands the scope of a statutory appeal against a section 40(3) decision, which is akin to a public law review. The decision of the Secretary of State has effectively been quashed because it cannot be implemented in its current form. There is no statutory bar to the Secretary of State taking a further decision, if so advised, addressing the defects identified by the judges. Paragraph 33 of the First-tier Tribunal's decision should therefore be read as though it stated, "the appellant should not be deprived of his citizenship status *on the basis of the Secretary of State's decision of 1 February 2022.*"

27. It follows that, in light of the qualification in the preceding paragraph, and on the narrow and discrete basis upon which this appeal was brought, it must be dismissed.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 June 2023