IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001483
First-tier Tribunal No:
DC/50089/2021
IA/05414/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

IBRAHIM PONARI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Collins, Counsel, instructed by Law Lane Solicitors
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 5 July 2024

DECISION AND REASONS

Introduction

1. By decision dated 7 April 2021 the Respondent decided to deprive the Appellant of his British Citizenship on the grounds that his citizenship was obtained by misconduct of the sort described in s.40(3) of the British Nationality Act 1981 (which we refer compendiously to as "fraud"). The Appellant appealed that decision to the First-tier Tribunal ("the FTT") but First-tier Tribunal Judge Rayner ("the Judge") in a decision of 9 April 2022 ("the FTT Decision") dismissed his appeal. Pursuant to limited permission to appeal granted by Upper Tribunal Judge Norton-Taylor in a decision dated 13 May 2024, the Appellant now appeals to this Tribunal against the FTT Decision.

2. The Appellant is a citizen of Albania. He claims to have entered the UK on 27 July 1998. He claimed asylum on 28 July 1998. In that asylum claim, and subsequently, he falsely claimed, among other things, to be of Kosovan

nationality. On the basis of that false nationality, on 10 June 1999, the Respondent granted the Appellant indefinite leave to remain as a refugee and, on 29 October 2007, he was naturalised as a British Citizen.

3. As set out in her 7 April 2021 decision, the Respondent was satisfied that the Appellant had acquired his British citizenship by means of fraud and decided it would be in accordance with Article 8 ECHR and was otherwise appropriate to exercise the power to deprive him of it. On appeal to the FTT, the Judge concluded that the Respondent was entitled to be satisfied that the Appellant had acquired his citizenship by fraud and did not consider that there was otherwise any legal error in the Respondent's deprivation decision.

4. As already noted, the Appellant has been granted permission to appeal against the FTT on a limited basis. He has been refused permission to challenge the Judge's conclusion in respect of the Respondent's entitlement to find that the Appellant had acquired his British citizenship by fraud. That issue has therefore for present purposes been conclusively decided against the Appellant and we need say nothing more about it. However, Upper Tribunal Judge Norton-Taylor was persuaded to grant permission in so far as the grounds relate to the challenges to the Respondent's exercise of discretion under s.40(3) and Article 8 ECHR. As Judge Norton-Taylor noted, the central plank of the Appellant's challenge in that regard is the alleged unjustified differential treatment between his case and that of others whom he contends are in the same or a relevantly similar position.

5. At the hearing at Field House on 5 July 2024, we heard submissions from Mr Collins, on behalf of the Appellant, and from Ms Ahmed on behalf of the Respondent. We are grateful to them both for the assistance which they provided.

6. We announced at the end of the hearing that we would dismiss the Appellant's appeal for reasons which would follow. These are those reasons.

Deprivation process and decision

7. On 21 January 2021, the Respondent wrote to the Appellant to inform him that information had been received that indicated that no individual with his claimed identity was registered in Kosovo, but, rather, there was an individual registered in Albania with his correct identity details and that, as a result, the Respondent was considering depriving him of his citizenship. Conscious of the gravity of such a decision, the Respondent provided the Appellant an opportunity to provide comment and evidence in support of his claim to retain his citizenship status.

8. On 5 February 2021, Marsh & Partners solicitors ("Marsh") wrote on the Appellant's behalf to the Respondent. In this letter ("the Marsh letter"), it was accepted that the Appellant was from Albania. The Appellant explained that he did not wish to mislead and now regretted having done so. It was suggested that the Appellant would have been granted asylum in any event. It noted that he had three British children who have lived in the UK all their lives and that the Appellant plays an important role in their upbringing. It was also said that the Appellant would suffer psychologically if removed to Albania. Representations were then made in respect of Article 8 ECHR.

9. Finally, and importantly for present purposes, over the final 10 pages of this 17-page letter, the Appellant's solicitors provided details of a large number of other clients of Marsh in respect of whom, notwithstanding that they had also claimed

wrongly to be Kosovar refugees when in fact they were from Albania, it was said that the Respondent had decided not to exercise her power to deprive them of their British citizenship.

10. For present purposes it is important to note that the purpose of providing these details was stated to be "Just to assist the Secretary of State to make a right and proportionate decision in this case". It was not suggested that these other clients were in a materially indistinguishable situation or that it would be irrational or otherwise unlawful to exercise the discretion to deprive the Appellant as a result.

11. By her decision dated 7 April 2021, the Respondent decided that the Appellant's British citizenship was obtained fraudulently and that he should therefore be deprived of it. This letter considered the application of the Respondent's relevant policy on deprivation in detail, concluding that deprivation would be both reasonable and proportionate. The letter then turned to consider Article 8 ECHR, noting that in relation to deprivation it was not necessary to take into account the impact that removal would have, that the effects of deprivation would be to remove benefits of citizenship to which the Appellant had no proper entitlement and that, while loss of citizenship would entail a loss of identity for the Appellant given how long he had been in the UK, this was because the Appellant's misrepresentation had only come to light in 2020. It was further said that a further decision would be taken within eight weeks from the making of the deprivation order, subject to any representations the Appellant might make, on whether to remove the Appellant from the UK. Nothing was said about the other Albanian nationals named in the Marsh letter.

Appeal to the FTT

The parties' submissions

12. In the FTT, the Appellant relied on an Appeal Skeleton Argument ("ASA"). In that ASA, the Schedule of Issues indicated that the issues to be determined were, firstly, whether the Appellant acquired his citizenship by fraud, in answering which, it was said that it was necessary to consider the caselaw on the meaning of "acquire", and second, whether the reasonably foreseeable consequences of deprivation breach the Appellant's Article 8 rights.

13. In relation to the first issue, the Appellant accepted (para.20) that he obtained his refugee status in a false identity, but submitted that it was unclear whether that played a role in his grant of ILR and nationality. We pause to note that ASA is dated over 4 months after the decision in *R (Begum) v Special Immigration Appeal Commission* [2021] UKSC 7 which made it clear that it is not for the FTT to decide for itself whether an appellant in fact acquired his or her citizenship status by means of fraud, but, rather, whether the Secretary of State was entitled to be satisfied that he or she had done so. No mention is made of that decision or the changed approach to such appeals.

14. In relation to the second issue (Article 8), the ASA submitted that it was of significance that the Respondent did not engage with the Marsh letter "where they set out a litany of clients who have been in similar situations to the appellant however faced no deprivation action." It was noted that such a list may be considered not to be persuasive, but in this case, it was noted that the Appellant's wife is one of those not deprived of her nationality. This was said to demonstrate a wholly inconsistent approach from the Respondent in dealing with deprivation cases, and it was submitted that there was no logical sense why this

appellant had had his British citizenship taken away from him when his wife has kept hers. Given the length of time that the Appellant had been in the UK, and the fact the Appellant's wife had not been deprived of her British citizenship, this was, it was submitted, a case in which, per EB (Kosovo) v SSHD [2008] UKHL 41, there was delay resulting from a dysfunctional system yielding unpredictable, inconsistent and unfair outcomes, in which less weight should be given to the requirements of firm and fair immigration control.

15. In light of the ASA, the Respondent undertook a review of the case. In that review, dated 24 October 2021, the Respondent said the following in relation to the other individuals referred to in Marsh letter:

> "That the A's representatives refer to other cases of similar facts but where the outcome was different to this case, is respectfully a red herring which has no legal standing. First, it is unclear whether consent and/or authority from those named individuals was granted to the solicitors for the purpose of being referred to in this particular case. If those cases were conceded extra-judicially, they are a product of legal privilege and therefore fall within the solicitors' GDPR obligations as data handlers. Second, no authority is required to reiterate that the Secretary of State cannot, will not and should not be expected to comment on cases of other migrants. She is bound by her data protection protocol and GDPR, and she takes her privacy obligations with utmost seriousness."

FTT Decision

16. After setting out the background and chronology, legislative background, the details of the notice of deprivation and a summary of the parties' written submissions, the Judge noted (para.12) that the Appellant, in evidence, had, *inter alia*, confirmed that he and his wife were in the process of divorcing and that his three children were 21, 25 and 30. The Appellant is recorded as stating that the Home Office had not deprived his wife of her British citizenship but he did not know why that was. The Judge then summarised the parties' oral submissions, some relevant case law and the uncontested facts.

17. At para.22, the Judge turned to his decision and reasons. At para.25 he concluded that the Respondent was entitled to conclude that the Appellant had obtained his naturalisation by means of fraud. He then turned to Article 8 and proportionality. The Judge dealt with the Appellant's 'dysfunctional system' and 'unpredictable results' submission at paras.28-29 as follows:

> "28. Mr Wilding [counsel for the Appellant] submitted that the 'dysfunctional system' and the 'unpredictable results' should be a factors at this point of the decision making process, and that could be encompassed by the part of the headnote [to EB (Kosovo)] that states that the weight to be attached to the Secretary of State's position is because of the importance of '*maintaining the integrity of British nationality law*': if in fact they *[sic]* system has no integrity (because it is dysfunctional, chaotic, unpredictable) there is less or no public interest in its maintenance, and that should also be weighed in the Article 8 assessment. Mr Wilding also asserts that not only is that the case, but in any event the respondent has failed to provide a response to it. The RR [Respondent's Review] states, at paragraph 12, '*That the A's representatives refer to other cases of similar facts but where the outcome was different to this case, is respectfully a red herring which has no legal standing..... no authority is required to reiterate that the Secretary*

of State cannot, will not and should not be expected to comment on cases of other migrants....' I accept that submission. At the very highest, the schedule of cases referred to in the letter responding to the intention to deprive letter is an indication that cases with superficially similar circumstances (and there is little detail given that would even establish the similarity or otherwise of those cases to that of the appellant) may have different outcomes. That is unsurprising, and of little relevance. It does not establish, as a matter of fact, a dysfunctional or unpredictable system, or, more importantly, unreasoned outcomes. Even in the case of the appellant's wife, who it is suggested may be a direct comparator, I only [have] the most cursory account of her immigration history, and no explanation of the reasons given by the respondent for not depriving her of her citizenship.

29. The appellant does not establish that they *[sic]* system of decision making is so flawed that the weight to be given to the Secretary of State's interest in maintaining the integrity of British national *[sic]* law should be reduced below that prescribed in paragraph 4 of the headnote of **Ciceri**. In terms of the respondent's decision to deprive the *[sic]* Mr Ponari of citizenship, that balancing exercise weighs heavily on the side of the respondent in maintaining the integrity of British nationality law. I do not have to determine where the balance might lie in terms of any theoretically potential action to attempt to remove him, which may not occur on any event."

18. As to whether the exercise of the Respondent's discretion was lawful, the Judge described this as "proportionality" and addressed it after the question of Article 8, but nothing turns on the sequencing of these issues in this appeal. As to this, the Judge noted that the only basis on which it could be said that no reasonable Secretary of State could have deprived the Appellant of his citizenship was the Appellant's submissions about the chaotic, dysfunctional and unpredictable nature of the decision-making process. At para.30, the Judge rejected that submission for the same reasons that he did not accept that they carried weight for the purpose of the Article 8 assessment.

19. The Judge accordingly dismissed the Appellant's appeal.

Appeal to the UT

The parties' positions

20. The Grounds of Appeal is not the clearest of documents. We discern the following two grounds of appeal in respect of the exercise of discretion and Article 8 on which the Appellant has permission:

    a. first, that the Respondent had failed to provide adequate or any reasons for the difference in treatment between the Appellant and his wife and the Judge erred in not so concluding; and,

    b. second, that the Respondent's treatment of the Appellant in a manner different to his wife was unlawful and the Judge erred in concluding to the contrary.

21. The Respondent filed a rule 24 response out of time. Mr Collins did not object to us granting the Respondent an extension of time and we accordingly do so. The rule 24 response makes, in summary, the following points relevant to the issues we have to decide. It continues to rely on the Respondent's Review that was

before the FTT. It raises the issue of whether Marsh (or the Appellant) obtained the consent of the 50-odd individuals whose case details are summarised in the Marsh letter, or even the Appellant's wife, whose name, it notes, was not in the list of individuals detailed in the Marsh letter. It contends that this was 'a data breach' by Marsh. It seeks to further suggest that in suggesting that the Respondent was "hiding behind" GDPR, the Appellant was in fact seeking to undermine her upholding her GDPR obligations. The Respondent relied on HA (Iraq) v SSHD [2020] EWCA Civ 1176, where, it is said the issue of factual precedents was addressed. The Rule 24 response does not identify the principles to be derived from that case, but suggests that they are "analogous here". It is suggested that it was open to the Appellant to confirm that Marsh had obtained permission to disclose the details of his wife's case and to adduce evidence insofar as her case was concerned. The rule 24 response goes on to submit that, if the Appellant's position were correct, this would mean that the Respondent has a duty in all immigration cases to compare an applicant's case with a non-exhaustive list of others before reaching a decision.

22. At the hearing we heard submissions from Mr Collins and Ms Ahmed that were in line with and expanded upon those in their grounds and rule 24 response respectively.

Discussion

23. In our view, both parties have, in different ways, overcomplicated this case and lost sight of some of the basics. We therefore start by reminding ourselves of the following elementary legal principles:

    a. Unless s.40(5A) of the 1981 Act applies (which it is not suggested it does here), there is a duty on the Respondent to give reasons why she has decided to deprive an individual of their British citizenship status: see s.45(5)(b).

    b. Where there is a duty to give reasons, the reasons given must be proper, adequate and intelligible. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. The degree of particularity required depends on the nature of the issues falling for decision. See South Bucks DC v Porter (No 2) [2004] UKHL 33, [2004] 1 WLR 1953 at para.36.

    c. It is, in principle, possible for an administrative decision to be unlawful because comparable situations are treated differently. However, at common law, this arises as an aspect of rationality, not as a distinct principle of administrative law. See R (Gallagher Group) v Competition and Markets Authority [2018] UKSC 25, [2018] 1 AC 96 at paras. 24-27, 50.

    d. However, it is often difficult to be sure that the facts of two cases are in truth substantially similar. And, even if they are, decision makers may reasonably differ in respect of a legal test which requires an evaluative exercise. See HA (Iraq) v SSHD [2020] EWCA Civ 1176, [2021] 1 WLR 1327 at para. 129. This applies, in our judgment, equally to the exercise of a discretionary power, such as that contained in s.40(3) of the 1981 Act, which definitionally "presupposes that there is no unique legal answer to a problem" (de Smith's Principles of Judicial Review, (9th ed., 2023), 5-009.

    e. While, as the Appellant submitted, a dysfunctional system that does not bring about consistent outcomes in similar cases may reduce the weight to

be given to firm and fair immigration control in immigration cases, the approach to Article 8 in the deprivation context is somewhat different. The ECtHR's analysis has been limited to two issues: whether the decision was arbitrary, which is a stricter standard than that of proportionality, and second, what consequences the deprivation has for the individual. See R3 v SSHD [2023] EWCA Civ 169, [2023] Imm AR 63 at para. 107.

f. In relation to the arbitrariness question, the ECtHR takes into account whether the revocation was in accordance with the law, whether it was accompanied by the necessary procedural safeguards, including whether the applicant was given an opportunity to challenge the decision before courts affording the relevant guarantees, and whether the authorities acted diligently and swiftly: R3 at para. 66.

g. On a statutory appeal of a deprivation decision, the FTT is limited in its consideration to whether there is a public law error in the decision or unlawful under s.6 of the Human Rights Act 1998. As such, only evidence that was before the decision maker or is otherwise relevant to the public law error alleged is admissible. See Chimi [2023] UKUT 115 (IAC).

24. Applying those, the FTT was limited in its consideration of the Appellant's appeal to determining (insofar as is now relevant) whether the Respondent had either failed to give adequate reasons for what was said to be a difference in treatment between the Appellant and his wife, and/or the other individuals mentioned in the Marsh letter, and whether the Respondent's decision to deprive the Appellant in circumstances in which it was said that there were others in a materially similar position who had not been deprived of their citizenship was either irrational (at common law) or arbitrary and/or disproportionate (for the purposes of Article 8).

25. As to the Respondent's failure to engage with (i.e. to provide reasons in relation to) the purported comparator individuals listed in the Marsh letter, we are in no doubt that the FTT did not err in its conclusion, albeit we do not agree entirely with the Judge's reasoning. As noted, what requires to be explained for the purpose of complying with the duty to give reasons depends on the circumstances and is generally limited to the principal controversial issues. In a deprivation decision, that will most obviously include whether the Respondent is satisfied that the statutory preconditions to the exercise of the deprivation power are made out and whether it is exercised in accordance with any relevant policy. Where it is said that the duty to give reasons extends to matters contained in representations, that must in our judgment be assessed by reference to what was said in those representations. Here, we are accordingly concerned with the Marsh letter and what it said about the alleged comparator individuals. In relation to the Appellant's wife, it said nothing as she was not, so far as we are aware (and Mr Collins did not suggest otherwise), named or otherwise mentioned in the Marsh letter. Moreover, and in any event, the Marsh letter sought to rely on the other cases "Just to assist the Secretary of State to make a right and proportionate decision in this case". In our judgment, for this to have required the Respondent to explain why it was appropriate to deprive the Appellant when those others listed had not been, it would have been necessary to go considerably further than this. At the very least, it would have been necessary to suggest that the individuals mentioned in the Marsh letter were in a materially indistinguishable situation to the Appellant, which the Marsh letter did not do. In those circumstances, the Judge was right to find that there was no legal error in the Respondent's deprivation decision by failing to explain why the Appellant was being deprived when those others listed in the Marsh letter had not been.

26. However, as we have said, while we agree with the Judge that there was no legal error in the Respondent's decision in not engaging with the list of names in the Marsh letter, we do not agree with all of the Judge's reasoning. The Judge accepted the Respondent's submission "[t]hat the A's representatives refer to other cases of similar facts but where the outcome was different to this case, is respectfully a red herring which has no legal standing… no authority is required to reiterate that the Secretary of State cannot, will not and should not be expected to comment on cases of other migrants." This is in fact two submissions, which it is necessary to consider in turn.

    a. As to the point that the argument is "a red herring with no legal standing", quite apart from the unhelpfully flowery language which obscures what appears to be the point being made, namely that comparing the Appellant's case with those of others is not a legally valid approach, this is not correct in principle. As set out above, a failure to treat like cases alike may, where there is no justification for the difference, amount to *Wednesbury* unreasonableness. This will be rare, given that the facts of two cases will almost never be on all fours such that there is no rational basis for treating them differently, but that is not the same as suggesting that the argument is legally invalid.

    b. Second, we do not agree that the Respondent's assertion that she "cannot, will not and should not be expected to comment on cases of other migrants" can be accepted, at least not in such an unqualified form. If it is necessary to comment on other cases for the Respondent to comply with her statutory duty to give reasons for her decision under s.40(5)(b), it is unclear to us on what basis the Secretary of State could avoid doing so. Ms Ahmed at the hearing sought to emphasise the Respondent's GDPR obligations, albeit without actually referring the Tribunal to any part of the Regulation or domestic law incorporating it. In those circumstances, we do not express firm conclusions in relation to the point. We would however note that we are doubtful that any reasons given by the Respondent in relation to a representation that someone was in a materially similar situation to a person whom it was proposed would be deprived of their British citizenship would need to disclose any personal data (still less special category personal data). If however in order to give intelligible reasons, it were necessary to do so, Article 6(1)(c) GDPR nonetheless provides that the processing of personal data is lawful if that processing is necessary for compliance with a legal obligation to which the controller is subject. At least in the generality of cases, we therefore struggle to see that GDPR provides the Respondent with a basis for not complying with her statutory duty to provide reasons for her decision (which, needless to say, is a legal obligation to which she is subject). We consider however that a concluded view on this should be left for a case where it required to be determined.

27. For the above reasons, the FTT did not materially err in its conclusion that the Respondent was lawfully entitled not to give reasons for the alleged differential treatment between the Appellant and others listed in the Marsh letter and/or between the Appellant and his wife.

28. As to the substance, we can detect no error in the Judge's conclusion that "At the very highest, the schedule of cases referred to in the [Marsh] letter … is an indication that cases with superficially similar circumstances (and there is little detail given that would even establish the similarity or otherwise of those cases to that of the appellant) may have different outcomes. That is unsurprising, and

of little relevance. It does not establish, as a matter of fact, a dysfunctional or unpredictable system, or, more importantly, unreasoned outcomes." As noted in HA, supra, the important question in relation to issues on which decision makers may properly come to different conclusions is whether the test has been applied. There can be no doubt that the Respondent considered the relevant legal tests and applied her policy to the exercise of the discretion to deprive. In those circumstances, and in light of the scant high-level information provided in the Marsh letter, the Appellant has, with respect, not come close to establishing that the Respondent's decision to deprive him of his British citizenship was not rational on the basis of a comparison of his treatment with that of others.

29. As to Article 8, the Judge concluded that the Appellant had not shown that the system was dysfunctional. In our judgment, on the evidence before the FTT, the Judge was amply entitled (indeed we would venture to suggest bound) to conclude that the high threshold for dysfunction in the system had not been reached, such that it would have justified a reduction in the weight to be accorded to the public interest in the maintenance of the integrity of British nationality laws, a fortiori such that it would, taking into the factors set out in para. 23(f) above, render the decision arbitrary or disproportionate. This is for essentially the same reasons as expressed above in relation to the exercise of discretion.

30. It follows that the appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and the appeal is accordingly dismissed.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 July 2024