Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003037**
DC/50082/2021; LR/00018/2022

THE BRITISH NATIONALITY ACT

Decision & Reasons Issued:
On the 26 March 2023

Before

THE HON. MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DURIN AHMETAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Presenting Officer, Home Office
For the Respondent: Mr Gill KC, Counsel, instructed by Saifee Solicitors

Heard at Field House on 14 November 2022

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against the decision of the First Tier Tribunal (FTT), dated 16 May 2022, upholding Mr Ahmetaj's appeal against the decision of the Secretary of State to deprive him of British Citizenship. For ease of reference, the parties are referred to as they were in the FTT,

namely references to the Appellant are to Mr Ahmetaj and references to the Respondent are to the Secretary of State.

Background

2. The Appellant was born in Albania. He came to the UK as a minor, aged 15 years, claiming to be Kosovan and fleeing from the conflict in Kosovo. He was granted exceptional leave to remain. He subsequently made an application for naturalisation (on the basis he was Kosovan), which was granted on 7 September 2007. In 2008 he supported an application by his wife for entry clearance. She was an Albanian national. The application indicated he was also Albanian. In 2009, the Appellant received a letter from the Respondent indicating that she was considering deprivation action on the basis of his deception as to his nationality. In 2012 his wife came to the United Kingdom, her entry clearance application having been successful. They had a son, born on 17 September 2013, with British nationality (on the basis of his father's nationality), subsequently enrolled in a local school. In 2015, the Appellant set up a company, Swanley Tyres Ltd, a business selling tyres. In 2016, he applied for and was granted a renewed British passport. He purchased a family home and took on a mortgage in 2017. On 12 December 2019, his second son was born, also subsequently enrolled in a local school.

3. In March 2020, the Appellant re-entered the UK from Calais after a trip abroad. His passport was retained. On 18 March 2021 the respondent took the decision to deprive the appellant of his British nationality. That decision is a subject matter of the present appeal.

4. Before the FTT, the Appellant accepted that he obtained British citizenship by means of deception but contended that the delay of 13 years in progressing the decision to deprive him of citizenship, during which time he built up a family and private life in the UK, rendered the deprivation decision a disproportionate interference with his rights under Article 8 of the European Convention on Human Rights.

The Respondent's explanation for the delay in decision making

5. The Respondent's refusal letter did not provide an explanation for the delay in progressing the deprivation decision, despite referring to the submission by the Appellant's representatives that the lengthy period of delay should be taken into account, along with the development in the Appellant's family and private life during that time.

6. Prior to the hearing the Respondent's Presenting Officer produced a review of the case which, it was said, should be read alongside the refusal letter. The review disputed any egregious delay in the decision making and concluded that the Appellant could not bring himself within the factual matrix of the case of Laci ([2021] EWCA Civ 769) so as to be benefit from the principle that delay is capable of being a relevant factor in considering the proportionality of a decision to deprive.

7. Relevant extracts from the review are as follows:

'Delay

…

26 It is submitted that there is no egregious delay amounting to a disproportionate application of discretion on the part of the SSHD. There is correspondence within the records held by the SSHD that show contact between the SSHD and A, through his solicitor, about his citizenship status. It is with regret this was not included in the original decision letter or bundle, as has been rectified in providing copies of the correspondence with this review.

27 The SSHD wrote to A on 13 May 2009 to inform him of her investigations and considering of deprivation on 13 May 2009, to which a response was provided from Karis Law on 14 October 2009.

28 On 21 July 2010, Karis Law requested an update from the SSHD. The SSHD responded on 26 July 2010, outlining the protracted process often involved in deprivation cases. The letter also outlined that there were test cases before the AIT (as it then was) that would have an impact of the determination of A's case and his decision would follow. It is submitted that the correspondence of July 2010 is plain notification to A that the SSHD is not in a position to decide A's case as a result of other ongoing appeals with a potential implication on his case. The correspondence does not give any suggestion that the SSHD had ceased pursuing action against A.

29 On 22 November 2013, new representatives Scudamores Solicitors requested an update on A's case in which the letter of 26 July 2010 was acknowledged.

30 It is further submitted that consideration should be given to the legal context of deprivation cases that took place during the relevant period of correspondence between A and the SSHD, as referred to in the letter of July 2010.

31 There was significant litigation and change to policy undertaken – relating to nullity and deprivation of citizenship - that put a pause on deprivation action, as considered in R (Hysaj) v. Secretary of State for the Home Department [2017] UKSC 82 and later Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC). The litigation of Hysaj in the Supreme Court only concluded in 2017. References hereafter to Hysaj will refer to the case before the Upper Tribunal unless stated otherwise.

32 Although A's case does not relate to a nullity decision, Hysaj still makes clear that the SSHD was under no obligation to make a decision between 7 July 2012 and 20 August 2014, when the relevant policy was withdrawn, and if there was an obligation to make a deprivation decision within a reasonable period of time, the failure to do so does not establish an illegal abuse of discretion [Hysaj, 74].

33 The SSHD had sought clarification on the law relating to delay with respect to deprivation from around 2010 and made amendments to her policy during this period and was entitled to do so [46]-[63]. It is submitted the Secretary of State was therefore acting appropriately in the intervening period by not taking action on deprivation during the litigation in Hysaj, so as to ensure a consistent policy and litigation strategy in deprivation cases arising from deception/fraud.

34 Whilst it is accepted that the SSHD did not directly inform the A of the Hysaj litigation, she did inform him that his case was in hand and that, in essence, she could not advise when his case would proceed.

35 The SSHD then contacted the appellant on 18 September 2018 with a new investigation letter under a cover letter addressed to Karis Solicitors Ltd. From Home Office records, no response was received. Following the conclusion of Hysaj, it is submitted the SSHD acted swiftly in the circumstances.

…

38 This correspondence history during the alleged period of delay shows the SSHD engaging with A through his solicitors about his nationality and consideration of deprivation. It is submitted save for the appended letters to this review, this correspondence history has not been appropriately engaged with by the ASA. The appellant in this case cannot bring himself within the factual matrix of the case of Laci so as to benefit from the arising principle on delay. For the avoidance of doubt, it is submitted the time between letters do not amount to delay sufficient to satisfy principles under EB Kosovo or that of 'prolonged' or unexplained inaction' from the SSHD as in Laci [paras 74, 76, 77].

…

44 For these reasons, it is submitted there has been no delay by the SSHD. Alternatively, that any delay has not been prolonged, unexplained so as to constitute delay under administrative principles so as to amount to procedural impropriety or unreasonableness.' (underlining is Tribunal's emphasis).

The FTT decision

8. Relevant parts of the FTT decision include as follows:

> *'9. The appellant explained….*
>
> *10. …Then, in 2009 he received a letter from respondent indicating they were investigating matters. Meantime he applied for passport which was granted.*
>
> *11. Time went by and he heard nothing more and concluded everything was fine. His first child was born in 2013. The second child two years later. He was establishing his tyre business. In 2020 he had gone to Albania to obtain an Albanian passport. He was questioned by the British authorities based in France whilst returning.*
>
> *…*
>
> *15. The appellant's representative referred me to the Court of Appeal decision of Bujar Laci. The facts are very similar to the present.'*
>
> [the decision sets out the relevant legal framework as to which there is no dispute and continues as follows]:
>
> *'Consideration.*
>
> *21. The next stage to consider is whether article 8 is engaged. It clearly is here, the appellant having an established family and private life. I have to consider what the effect of deprivation would have on those rights. The deprivation is quite distinct from removal or deportation. The respondent must comply with timescales in determining how to proceed. This period has been described as a `limbo 'period.During this period the appellant would be faced with uncertainty as to his future. He will no longer be able to use a British passport and will be subject to immigration control. His travel will be restricted as evidence when he attempted to return from France. He is not however stateless, having renewed his Albanian passport. The situation of uncertainty for the appellant is undoubtedly very stressful and will leave him very uncertain as to his future. It has a direct effect upon his family, business and home ownership.*
>
> *22. The reasons for decision letter are detailed and sets out the relevant facts. The respondent's review is similarly detailed but has the advantage of specifically addressing the issues from specified facts whereas the decision letter is more generic. I will not repeat the content in detail save to say that the points raised are valid.*

23. I am required to have regard to the proportionality of the decision. Significant weight must be attached to the maintenance of immigration control. The appellant's deception undermines that control. However, there are mitigating factors. Primarily, when he told a lie he was only 15 years of age and was arriving in a new country having fled home difficulties. He persisted in the deception at various stages until he volunteers the information indirectly in supporting his then girlfriends application and in sponsoring his parents visits. Eventually, the respondent began to investigate the matter.

24. There has been significant delay on the part of the respondent. The allegation was first raised on 13 May 2009. The appellant instructed solicitors who wrote on 14 October 2009 and acknowledged that he had lied about his nationality and circumstance. Thereafter, there was a delay of 13 years before the present action was instigated. The refusal does not set out the reasons behind the delay. It may be attributable to the respondent staying action in the significant number of similar cases whilst case law was being developed. The original view was that any grant based upon deception was a nullity. This has now been rejected and the law has become more settled. Nevertheless, in the interval the appellant set down deeper roots including his marriage, the starting of a family and the development of his business. He has now been in the United Kingdom 21 years. Had a decision been taken at an earlier stage then the respondent's own guidance would have been favourable to him as there was a 14-year policy. Furthermore, with the delay the public interest in deprivation reduces correspondingly.

Conclusion

It is my conclusion the deprivation would breach his article 8 rights.'

Grounds of appeal

9. Before us, the main ground of appeal advanced by Mr Clarke on behalf of the Respondent was that the FTT decision fails to engage with the review document and to address the Respondent's case on delay.

10. The other grounds of appeal are as follows:

- The Judge failed to engage with the Respondent's submissions challenging the Appellant's case that deprivation of citizenship would have a disproportionate interference with his family and private life (ground 2);

- The Judge erroneously concluded that the Appellant would have retained his citizenship on the basis of long residence, under a policy

then in place but subsequently revoked, had the Respondent decided the matter sooner (ground 3)

- The judge failed to engage with the date when the Home Office could be said to be aware of the appellant's true nationality. The inclusion of correct details within a visa application falls far short of making a good faith admission directly to the Secretary of State (ground 4)

- The judge erred in finding that Section 117B of the Nationality Immigration [AA] 2002 appliable because the decision by the Secretary of State was made under the British Nationality Act 1981 (ground 5).

The legal framework

11. The legal framework was common ground and may be briefly summarised.

12. The Secretary of State may deprive a person of citizenship status if satisfied that naturalisation was obtained by means of fraud, false representation, or concealment of a material fact (Section 40(3) of the British Nationality Act 1981). The Appellant accepts that he obtained citizenship by means of false representation (claiming to be Kosovan when he is Albanian) so this was not a matter in issue before the FTT.

13. Any decision to deprive a person of British citizenship must be compatible with the European Convention on Human Rights and, in particular, the right to a family and private life under article 8.

14. Unreasonable delay by the Secretary of State in making a decision under section 40(3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8 (Laci ([2021] EWCA Civ 769) and Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC)). This is because a person may, during the period of any delay, develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The sense of impermanence and precariousness will fade and the expectation will grow that if the authorities had intended to remove a person, they would have taken steps to do so. These factors may affect the proportionality of the decision(EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159).

15. Nonetheless, heavy weight is to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. In all ordinary circumstances a person can expect to have citizenship withdrawn if obtained by fraud. It requires an exceptional combination of circumstances to justify a decision that deprivation is disproportionate. Mere delay without more will not be sufficient. The strength of the Appellant's case in Laci was that he was entitled to, and did, believe that

no further action would be taken and got on with his life on the basis that his British citizenship was no longer in question (Laci at §77, §81 and §83).

16. Any period during which the Secretary of State was adopting the ultimately mistaken stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay (Ciceri). This proposition refers to the Hysaj litigation [2017] UKSC 82, explained at paragraphs 31-33 of the Respondent's review, set out at paragraph 7 above.

Discussion

17. The FTT Judge finds significant a delay, of 13 years, by the Respondent in her decision making. Paragraph 25 of the decision sets out the Judge's reasoning in this respect. The judge refers to the Respondent's letter, dated 13 May 2009, when the Appellant was told an investigation into his deception had been opened. Reference is also made to correspondence from the Appellant's solicitors in October 2009 before the judge makes a finding of a delay of 13 years and concludes that "The refusal does not set out the reasons behind the delay". No reference is made to the other correspondence cited in the review or to the review itself and the Judge does not specifically address the Respondent's case on delay. Nonetheless, it is apparent, from paragraph 23 of the decision that the Judge was aware of the review document ('*The respondent's review is similarly detailed but has the advantage of specifically addressing the issues from specified facts whereas the decision letter is more generic. I will not repeat the content in detail save to say the points raised are valid*.'). In addition, we observe that the document did not have the status of a decision-letter or supplementary decision letter. It was a document produced by the Respondent's presenting officer.

18. Having considered the relevant material before the FTT and listened carefully to oral submissions, we are not persuaded that further reference to the review would have made a difference to the outcome of the decision. Our reasons are as follows.

19. In Laci, Underhill LJ emphasised that "mere" delay in decision making is not sufficient. The strength of the Appellant's case in Laci was that he was entitled to, and did, believe that no further deprivation action would be taken and got on with his life on the basis that his British citizenship was no longer in question [77].

20. The review explains that the Respondent wrote to the Appellant by letter dated 13 May 2009 to inform him of her investigation. Reference is then made to a letter from the Respondent, dated 26 July 2010, written in response to a request for an update from the Appellant's solicitors. This is the only correspondence from the Respondent to the Appellant/his advisors until a letter dated 18 October 2018, which the Appellant disputes

receiving and which is considered further below. The review places reliance on the content of the July 2010 letter as follows:

> *'It is submitted that the correspondence of July 2010 is plain notification to A that the SSHD is not in a position to decide A's case as a result of other ongoing appeals with a potential implication on his case. The correspondence does not give any suggestion that the SSHD had ceased pursuing action against A.'*

21. The Appellant does not refer in his evidence to having received the document. As conceded by Mr Clarke, the letter was not put before the FTT Judge. The letter was not in our papers either. Following a discussion at the start of the hearing, Mr Clarke offered to email it to us, but we declined to receive it on the basis we accepted Mr Gill's submission that whether there was a material error of law by the FTT must be decided on the evidence before the FTT, particularly when Mr Gill (who appeared before the FTT) explained that the Respondent's presenting officer did not have the document at the hearing.

22. In the absence of the July 2010 letter, Mr Clarke pointed to a letter from the Appellant's solicitors (Scudamores) dated 22 November 2013 to the Respondent, which was before the FTT, and which referred to the July 2010 letter as follows: '*very careful consideration is given as to whether it is appropriate to deprive someone of their citizenship and this is inevitably a protracted process.'* This reference does not however support the Respondent's assertion in the review that the letter was 'plain notification' that the Secretary of State could not make a decision due to pending cases.

23. The Scudamore letter refers to a letter dated 24 May 2011 by another former adviser to the Appellant, Malik and Malik solicitors, who had taken over by 2011 from Karis Law requesting an update on the Respondent's decision making. Malik and Malik received no response. Scudamores went on to '*ask that the Secretary of State provide us with an indication from the deprivation unit in relation to whether they propose to instigate deprivation proceedings against our client'.* There was no response to that request or to the letter as a whole.

24. Accordingly, any reference by the Respondent to the protracted nature of decision making in the letter dated 26 July 2010 was followed by a failure to respond to chaser letters from the Appellant's solicitors in 2011 and 2013. We accept Mr Gill's submission that, even if the 2010 letter referred to pending cases, cases pending in 2010, may not have been pending in 2013. The outcome of the cases was never communicated to the Appellant.

25. The Respondent's failure to take a decision or to communicate further with the Appellant continued into 2011, 2012, 2013 and through-out the next decade.

26. The review refers to the Hysaj litigation as a reason for the delay, but that was not communicated to the Appellant, as the review expressly conceded (‘*Whilst it is accepted that the Respondent did not directly inform the A of the Hysaj litigation*…’). In any event, we accept the force of Mr Gill’s submission that a distinction is to be drawn between Hysaj and the present case, so far as relevant to delay, on the basis that the Appellant in Hysaj was told that his case was test case litigation on whether his grant of citizenship had no effect (because it was treated as a nullity). Subsequent delay in decision making cannot be said to remove a sense of impermanence in the way that delay in the circumstances of the present case (and Laci), where a person is being told that the Secretary of State is not sure whether to exercise a discretion to deprive, may do. As the Scudamores letter of 2013 asked rhetorically; when does the length of time in these circumstances become unreasonable? As matters transpired in the present case, the delay was to continue for a further 8 years after the Scudamores letter. Mr Gill made the further (unchallenged) point that any reference in the July 2010 letter to pending litigation could not have been a reference to the Hysaj litigation because decision making in that case did not start until 2013.

27. The Appellant gave evidence to the effect that as he did not hear anything, he believed no action would be taken and he got on his with his life. He developed his private and family life in the UK, put down greater roots, started a business, had his first child in September 2013 and a second child in December 2019, and purchased a family home and took on mortgage liabilities in 2017. Further, in 2016 he obtained a renewal of his British passport. The Respondent did not take a point on the application to renew his passport that there were pending cases which could impact on his case. She did not say there was still a pending decision to be made on whether or not to deprive him of citizenship.

28. Mr Gill submitted that the events detailed in the paragraph above involved expenditure and a commitment to and an investment in the UK in financial, emotional, social and cultural aspects. The Appellant continued to entrench and immerse himself in British society and culture and to develop his private and family life in the UK.

29. In our judgment, on the evidence before the FTT, the judge cannot be criticised for not placing reliance on an unevidenced assertion in a review conducted by a presenting officer that the content of (unseen) correspondence in 2010 was sufficient to counter the evidence of the Appellant before the FTT that as time went on, he believed that no further deprivation action would be taken and he got on with his life.

30. The review refers to the Respondent contacting the Appellant on 18 September 2018 with a new investigation letter. However, the letter was sent to the solicitors instructed by the Appellant when the investigation started in 2009, when it ought to have been apparent to the Respondent from (unanswered) correspondence from Malik and Malik Solicitors (2011)

and Scudamores (2013) that Karis Law may no longer have been instructed by the Appellant. The review acknowledges that no response was received from Karis Law. The evidence from the Appellant before the FTT was that the first time he became aware of any issue was when he was detained on return to the UK in 2020 and his passport was retained.

31. It follows that, on the evidence before the FTT, we do not consider the Judge fell into error in considering the facts of the present case to have parallels with Laci. In both cases, the appellants commenced their deception as minors. In both cases, delay was significant and unexplained, so far as the appellants were concerned. Mr Gill submitted that the present case arguably presents a stronger case than Laci as to the proportionality of the decision given the delay is longer and the Appellant has been in the UK longer (at the time of the decision the Appellant had lived in the UK since the age of 15, over 23 years).

32. As to overall proportionality, the Judge attached significant weight to the maintenance of immigration control (§24), as stipulated by Laci. Mr Gill explained that the Respondent's oral evidence showed that, if he is deprived of citizenship and is thereby rendered unable to work for some 8 weeks (and probably longer) (the limbo period), there would be several types of detriments such as financial impacts, inability to pay mortgage, risk to the business, risk to the home, etc. Whilst the FTT Judge did not set out the evidence it is apparent that he accepted that there would be detriments for the business (§22). Ground 2 of the Respondent's challenge is, in essence, a merits disagreement in this regard. Ground 3 does not have merit. The Judge's reference to the proposition that the Respondent's (since withdrawn) guidance on long residence would have been favourable to the Appellant had the decision making been speedier is not a statement that the Appellant would automatically have benefitted from the policy and the reference cannot be said to be irrelevant. As to Ground 4: the precise timing of when the Respondent can be said to have had notification of the Appellant's true nationality is not material give the undisputed delay. Whilst it is correct that the appeal was under s40A British Nationality Act 1981 which is not listed in the definition of the 'Immigration Acts' in s61 the UK Borders Act 2007, and that therefore s117B Nationality, Immigration and Asylum Act 2002 did not strictly speaking need to be considered or satisfied, the reference to s117B was not material to the outcome (Ground 5).

33. Accordingly, the judge was entitled to regard the Respondent's inaction as sufficiently compelling when taken with the other circumstances of the case to justify a decision that the Appellant should not be deprived of citizenship. As Underhill LJ observed in Laci, we are concerned here with the exercise of judicial discretion. The weight to be given to the delay was a matter for the FTT judge.

Conclusion

34. The appeal is dismissed for the reasons set out above.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed: MRS JUSTICE THORNTON DBE Date: 19 January 2023

The Hon. Mrs Justice Thornton DBE sitting as an Upper Tribunal Judge.