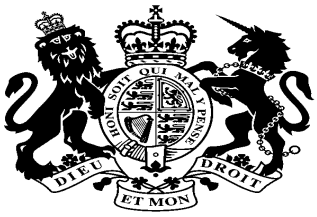

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00030/2018
DC/00031/2018

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Tuesday 19 February 2019	**On 26 February 2019**

Before

MR JUSTICE WAKSMAN
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE SMITH

Between

HAROON [V]
ANISA [V]

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr A Metzer QC, Counsel instructed by Addison & Khan solicitors
For the Respondent:	Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellants appeal under section 40A British Nationality Act 1981 against a decision of First-Tier Tribunal Judge Sweet promulgated on 28 November 2018 ("the Decision") dismissing their appeals against the Secretary of State's decision dated 15 June 2018 giving them notice of intention to deprive them of their British citizenship on the basis that they used a false identity when applying for citizenship.

2. The Appellants are originally nationals of India. We do not need to set out the details of the way in which British citizenship was obtained. The Appellants accept that they obtained it using false identities. It is also not disputed that the Appellants have four minor children aged between seventeen and eight years, all of whom are British citizens. The Respondent has not taken any steps to deprive them of citizenship. They therefore remain entitled to stay in the UK as British nationals.

3. As is clear from the findings at [25] to [28] of the Decision, the focus of the Appellants' appeals is the reasonably foreseeable consequences of deprivation. In those paragraphs, the Judge considered whether those foreseeable consequences would involve a breach of the Appellants' human rights and/or whether there was some exceptional feature of the case which means that discretion ought to have been exercised differently. He concluded that there was not and therefore dismissed the appeals.

4. The Appellants appeal on three grounds. First, they say that the reasonably foreseeable consequences involve them being left in "limbo" which would be a breach of their Article 8 rights and, more importantly, those of their four minor children. Second, they say that the Judge erred in his conclusion that the consequences did not impact on the best interests of the children. Third, they say that it was unfair and unreasonable for the Respondent to exercise discretion to deprive them of citizenship because of his own delay which they say was in the order of three years and that, in any event, that delay fell to be weighed in the balance when assessing the balance against the interference with their Article 8 rights.

5. Permission to appeal was granted by First-tier Tribunal SPJ Buchanan in the following terms so far as relevant:

> "…
>
> [3] The Grounds of Appeal [GOA] contend that the FTTJ arguably erred on three Grounds.
>
> [4] GOA1: "limbo and reasonably foreseeable consequences". It is contended that the FTTJ did not consider the true impact on the appellant and his children of the deprivation of citizenship. It is contended at (7) that in the interim period the appellant would be left without any immigration status and would have "no leave at all". It is contended that as a person without leave the appellant would be unable to work and unable to rent

and that it would be contrary to the children's best interests for such a state of affairs to prevail.

[5] At [26] of the Decision, the FTTJ states that he does not consider the deprivation of citizenship would violate the obligations of the UK government under the Human Rights Act 1998 for the reasons given in paragraphs [27] + [28]. However, the reasons given at [27] and [28] do not discuss the issue of financial resources and the impact on the British Citizen children if the appellants are unable to provide for them financially at some stage in the process.

[6] No authority is given for the proposition that pending any appeal, immigration status would be lost; however, Article 8 appears to have been considered by the FTTJ at [27] and [28] only in relation to matters of separation and/or removal. The reasons read more as conclusions than as reasoned argument.

[7] For these reasons, it is arguably by reference to the Grounds of Appeal that there may have been a material error of law in the Decision. I grant permission to appeal."

6. The appeals come before us to determine whether there is a material error of law in the Decision and if so either to re-make the decision or remit the appeals to the First-tier Tribunal for that purpose.

Discussion and Conclusions

7. Before turning to the submissions made and our conclusions, it is convenient to set out in full the relevant paragraphs of the Decision where the Judge reaches his findings on the issues:

"[25] The burden of proof is on the appellant and the civil standard of the balance of probabilities applies. The appellants' history is set out in paragraphs 6-11 above. The appellants have accepted their fraud in their respective applications, in particular their applications for British citizenship. The question for consideration at this appeal is whether it is appropriate for the Secretary of State to deprive them of their citizenship status. They accept their fraud, false representation and concealment of a material fact under Section 40(3) of the British Nationality Act 1981. The Secretary of State accepts that the four children, born respectively on 23 June 2001, 5 January 2004, 26 May 2008 and 15 October 2009 retain their British citizenship, but it is the effect of the appellants' deception on their own citizenship. The status of their oldest daughter ([N]) is not relevant to these appeals as she is now aged 24 and does not live in the UK.

[26] I am satisfied that there was the necessary causal link between the appellants' deception and their grant of British citizenship. Pursuant to **BA [2018]** the fact that the Secretary of State has decided in the exercise of his discretion to deprive the appellants of British citizenship will in practice mean that the Tribunal can allow the appellants' appeal only if satisfied the reasonably foreseeable consequence of deprivation would violate the obligations of the UK government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means that

> discretion in the sub-section concerned should be exercised differently. I consider that no such circumstances apply in this case for these reasons.
>
> [27] It is accepted that the appellants' four children retain their British citizenship and there is no attempt to remove their citizenship. They are all at UK schools and continuing their current education. If these appeals are dismissed, the next step will be for the Secretary of State to consider removal and/or deportation (as confirmed in the refusal letters) and the appellants will retain a right of appeal against any subsequent decision. There can therefore be no breach of their Article 8 ECHR rights in the meantime, because they are not being separated from their children, nor are they being required to return to India. Nor is there any failure of the Secretary of State in respect of the welfare of the children under Section 55 of the Borders, Citizenship and Immigration Act 2009. I do not consider that the three-year delay (2015-2018) in the respondent's decision is excessive – and therefore any delay is not material to my decision.
>
> [28] In respect of the alleged statelessness due to the loss of their Indian nationality under Section 40(4) of the Act, no evidence was provided by the appellants. In any event it was reasonable and proportionate for the respondent to reach its decision as to deprivation of citizenship in the light of the seriousness of the fraud, the need to protect and maintain confidence in the UK immigration system and the public interest in preserving the legitimacy of British nationality. Nor was there any evidence that the appellants could not reinstate their Indian citizenship if they lost their British nationality."

8. Before we turn to the substance of the submissions, we record Mr Metzer's complaint that he was provided with the Respondent's written submissions only on the morning of the hearing. This is contrary to the directions given on 16 January 2019 requiring the Respondent to provide a Rule 24 response by 30 January 2019 which was to be sufficiently particularised to stand as the Respondent's skeleton argument. We also record Mr Lindsay's acceptance that this was not done and his apology for that oversight. He had however been able to provide written submissions which were of assistance to us, coming as they did after Mr Metzer's very helpful skeleton argument and in response to it. Whilst it goes without saying that directions are made for the purpose of assisting the parties' focus and to assist the Tribunal with its task, we do not consider that the Respondent's non-compliance has on this occasion prejudiced our consideration of the issues nor, more importantly, the Appellants' ability to prepare their case.

9. We also wish to clarify one further matter which arose in the course of Mr Metzer's submissions and that is the position as regards the Appellants' evidence. As we were obliged to point out to Mr Metzer and as we note below, the Appellants' evidence which was before the First-tier Tribunal is, in relation to the issues which arise from the grounds, virtually non-existent. Mr Metzer pointed out that he was not counsel before the First-tier Tribunal nor was he the barrister who drafted the grounds. However, we were not assisted by the lack

of any application made to adduce the sort of evidence which Mr Metzer indicated might be forthcoming if we were to find an error of law.

10. Mr Metzer said that his solicitors had not presented such evidence at this stage as it would not be admissible. He is of course right to say that such evidence could not be considered by us at the error of law stage. However, it might be pertinent to consideration whether any error would make a difference. It is also inaccurate to say that such evidence is inadmissible at this stage. As the original directions sent with the permission grant make clear, the Tribunal may, if it finds an error of law and sets aside a First-tier Tribunal decision move directly to the re-making of the decision. Indeed, those directions envisage that this may be the usual course. As such, those directions also provide for the parties to be able to apply under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for further evidence to be adduced in the event of re-making. The further directions given on 16 January 2019 in this case indicated that any such application should be made by no later than 13 February 2019. That was not done.

Ground Three

11. We begin our consideration of the substance of the grounds with ground three as Mr Metzer accepted that this was not his strongest ground, at least taken alone. We can therefore deal with it shortly. Mr Metzer submitted that the Judge failed to explain why a three-year period of delay was not excessive. He directed our attention to the case of EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 and the ways in which delay can impact on the proportionality assessment (see in particular [14] to [16] in the speech of Lord Bingham of Cornhill). We accept that as a proposition; it is clearly binding on us. However, the issue here is whether the delay which the Judge says is of a three-year length from 2015 to 2018 is such as to give rise to a factor relevant to the exercise of discretion and/or as part of the balancing exercise when considering Article 8 ECHR.

12. As Mr Lindsay pointed out, it is difficult to categorise this as delay at all taken in context given that the Appellants admitted their fraud only in response to a letter from the Status Review Unit on 19 June 2015 and after they had continued to use the false identities for all purposes for about nine years. Following further enquiries, the decision to deprive them of citizenship was made on 15 June 2018. The enquiries are set out in more detail at [20] to [25] of the Respondent's decision letter although we accept that the Judge does not make reference to this as the reason for the delay. However, the question whether the delay was excessive and therefore a relevant factor to take into account either as an exceptional factor or as part of the proportionality balance was a matter for the Judge to weigh. We consider that Mr Metzer's submission amounts to requiring the Judge to give reasons for his reasons. He did not include delay as a relevant factor because he did not consider the delay to be excessive. He did not need to go further.

Grounds One and Two

13. It is convenient to take grounds one and two together as there is some overlap between the two. Before we look at the substance of these grounds, however, we record our exchange with Mr Metzer about whether the "limbo" point was put to Judge Sweet at all. Mr Metzer very frankly accepted that he had been unable to establish whether that had been the Appellants' submission to the Judge.

14. We have seen a copy of the written submissions made to the First-tier Tribunal Judge. Those do not include a submission that Article 8 would be breached in the interim period whilst the Respondent considers what further action to take following deprivation. We note the reference to the First Appellant working and owning his own property as part of the Appellants' submissions recorded at [15] of the Decision. However, we are quite unable to read that paragraph and the following paragraph as a submission that there would be a period of "limbo" which would involve a breach of the Appellants' human rights or would impact on the children's well-being.

15. Mr Metzer submitted however that it was an obvious point that the Judge should have taken for himself. He submitted that it is part of the responsibility of an immigration judge to identify what he says is a potentially significant matter for himself and if necessary to ask for further evidence to be provided or for submissions to be made.

16. We pointed out that this would depend on the nature and extent of the evidence before the Judge. As we have already indicated, in particular the witness evidence of the Appellants was not extensive. The statements appear at [AB/65-69] and [AB/76-80]. They are mainly concerned with their immigration history and their right to acquire Indian nationality. There is an indication that the First Appellant works but what is said about the situation they would face if deprived of citizenship is focussed on the position if they were returned to India.

17. As we pointed out, therefore, we do not know for example, whether the children attend state schools or private schools, if fees are payable for their education and if so the extent of their fees. We do not know whether the Appellants face costs of accommodation although we do note from the submission made on their behalf at [15] of the Decision that the First Appellant owns his own home. Nothing is said there about any mortgage over that property and what amount is payable in that regard (although we do note that there is a mortgage statement in the Appellants' bundle). The Appellants' bundle includes some bank statements. Those of the First Appellant show a balance which fluctuates between a debit balance of several hundred pounds to a credit balance of several thousand pounds. He has an overdraft limit of £2,600. There is no witness evidence from either of the Appellants as to their means and ability to support the family during any period when they are unable to work. There is no information about what other means of support might be available to the Appellants in the short to medium term. We note for

example that the Appellants have an adult daughter who no longer lives in the UK. We do not know whether she may be able to provide some support. There may be other family members whether in the UK or India who can assist.

18. As Mr Lindsay pointed out in his oral submissions the effect of Mr Metzer's submission is that we are still being invited to speculate on what evidence there may be which could be put forward in support of the legal submission.

19. Further, the lack of such evidence does not point in the direction of the "limbo" point being an obvious point which the Judge should have taken for himself, particularly since the Appellants were legally represented before the Judge and could therefore be expected to take the point themselves if it had any evidential foundation. Although it may be said that a First-tier Tribunal has a partially inquisitorial function, particularly as regards protection claims, the system remains an adversarial one. The burden of proof in these appeals is on the Appellants to evidence the existence of and extent of interference with their human rights. It is also convenient for us to record at this juncture, Mr Lindsay's submission by reference to (i) of the headnote in Ahmed and Others (deprivation of citizenship) [2017] UKUT 118 (IAC) that "the onus of making representations and providing relevant evidence relating to a child's best interests rests of the appropriate parental figure".

20. Notwithstanding the above, we allowed Mr Metzer to develop his submissions on this point on the assumption that it was a submission made or that the Judge should have considered it for himself.

21. We have set out the relevant passage from the Decision above. Although Mr Metzer suggests in his skeleton argument that the Judge has misunderstood the test which he had to apply (because he says that the Judge did not understand the tests of breach of human rights or other exceptional factors to be in the alternative) we did not understand him to make that point in oral submissions. Indeed, he accepted that the test was correctly set out at [26] of the Decision. The Judge clearly understood by reference to the words "and/or" that he had to consider either or both of the two relevant heads of challenge. The test as there set out is precisely the same as set out at [4] of the headnote in BA (deprivation of citizenship: appeals) [2018] UKUT 00085 (IAC).

22. Mr Metzer's submissions were focussed rather on what he said was a failure properly to apply the test, a failure to provide adequate reasons for the conclusion that the two heads of challenge were not met and a failure to take into account whether there would be a breach of human rights or impact on the children's best interests in the interim period. In essence, he says that the Judge has failed to engage with the point that the Appellants will be unable to work and provide for their children whilst they have no leave.

23. As Mr Metzer points out, there is authority for the proposition that the Appellants will be without leave once deprived of citizenship. That is to be found at (3) of the headnote to AB (British citizenship: deprivation; *Deliallisi* considered) Nigeria [2016] UKUT 00451 (IAC) which applies by analogy the

case law in relation to deportation appeals following the Supreme Court judgment in R (George) v Secretary of State for the Home Department [2014] UKSC 28. Whilst we are unaware of any higher court authority in support of that proposition in deprivation cases, we are content to assume that AB is correctly decided and, unless and until overturned, we should follow it as a reported case. We therefore assume that the Appellants will be without leave during the period whilst the Respondent considers what further action should be taken.

24. However, that point has no direct relevance to the correctness of the Decision as the point is raised only in the grant of permission. As Mr Lindsay also points out in his written submissions, the assumption said to have been made at [5] and [9] of the Appellants' grounds by reference to [23] of the Decision is misconceived as the Judge was there recording the Respondent's submission and not his view of the position. We do not read what is said at [27] of the Decision as involving any assumption that the Appellants would have leave during that interim period. Indeed, quite the opposite. We infer from what is there said that the Judge was well aware that this would be the position.

25. The Respondent in his decision letter sets out the next steps in the event that the Appellants' appeals are unsuccessful in the following terms:

> "[44] Once deprived of citizenship you become subject to immigration control and so may be removed from the UK or prevented from returning to the UK if deprivation action occurs whilst you are abroad. Consideration may also be given on whether a limited form of leave may be given. A decision on this matter will follow once the deprivation order is made.
>
> [45] In order to provide clarify regarding the period between loss of citizenship via service of a deprivation order and the further decision to remove, deport or grant leave, the Secretary of State notes this period will be relatively short:
>
> - A deprivation order will be made within four weeks of your appeal rights being exhausted, or receipt of written confirmation from you or your representative that you will not appeal this decision, whichever is the sooner.
> - Within eight weeks from the deprivation order being made, subject to any representations you may make, a further decision will be made either to remove you from the United Kingdom, commence deportation action (only if you have less than 18 months of a custodial sentence to serve or have already been released from prison), or issue leave."

26. As we read [27] of the Decision, the Judge did have regard to what would happen following deprivation and in consequence of it and specifically to the prospect that removal or deportation action would be considered alongside the possibility of a grant of leave to remain within a very short time. It was that period which he was considering when he said that there would not be any breach of the Appellants' rights in that period because they would not be separated from their children and would remain in the UK.

27. Similarly, it is in relation to that short period that the Judge was required to consider the best interests of the children. We have already referred to the paucity of evidence about the circumstances of the family in the short interim period. There is even less said about the children other than that they are British citizens. Judge Sweet records at [16] the submission of the Appellants' representative that "[t]here will be a detrimental impact on the children if the appellants' citizenship is taken away" but there is no development of that submission by reference to the possible impacts. The Judge records also at [15] the submission that the children are "well established in the UK" and reference is there made to school reports. However, the Judge deals with that at [27] of the Decision where he points out that the children will continue their education in the UK and that the Respondent has no intention of removing their citizenship. In light of the lack of evidence as to consequences for the children in the short, interim period, there is no error in the Judge's conclusion at [27] that the children's welfare will be safeguarded.

28. Nor do we understand, contrary to what is suggested at [25] of Mr Metzer's skeleton argument, that the Judge relied on the Appellants' poor conduct when considering the children's best interests. The Judge's conclusion is simply that, on the evidence, there would be no impact and that those best interests would be safeguarded.

29. Mr Metzer also raises a further issue at [27] of his skeleton argument concerning the different position of the Second Appellant from that of the First Appellant as to the extent of the fraud perpetrated. However, this is not a point raised in the grounds nor, so far as we can see, in submissions before Judge Sweet. It is not a point which the Appellants have permission to argue.

30. For the above reasons, we are satisfied that the Decision does not contain an error of law. It follows that we uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

DECISION

We are satisfied that the Decision does not contain a material error of law. We uphold the decision of First-tier Tribunal Judge Sweet promulgated on 28 November 2018 with the consequence that the Appellants' appeals stand dismissed

Signed Dated: 22 February 2019
Upper Tribunal Judge Smith

Signed
Mr Justice Waksman