



**Michaelmas Term
[2017] UKSC 82**

On appeal from: [2015] EWCA Civ 1195

JUDGMENT

**R (on the application of Hysaj and others)
(Appellants) v Secretary of State for the Home
Department (Respondent)
Bakijasi (Appellant) v Secretary of State for the
Home Department (Respondent)**

before

**Lady Hale, President
Lord Kerr
Lord Wilson
Lord Hughes
Lord Hodge**

JUDGMENT GIVEN ON

21 December 2017

Appellants

Stephen Knafler QC
Sonali Naik
Helen Foot
(Instructed by Naim
Hasani of Duncan Lewis
Solicitors (Harrow))

Respondent

Lisa Giovannetti QC
Jonathan Moffett QC

(Instructed by The
Government Legal
Department)

LADY HALE: (with whom Lord Kerr, Lord Wilson, Lord Hughes and Lord Hodge agree)

1. This judgment is given in unusual circumstances. The Secretary of State, as respondent to these appeals, has applied pursuant to rule 34(2) of the Supreme Court Rules 2009 for these appeals to be allowed by consent. The appellants of course agree. However, this court took the view that we could not make an order allowing the appeals and setting aside the orders in the courts below without understanding the reasons for doing so and their impact upon the point of law of general public importance raised by the appeals. The Secretary of State has supplied those reasons, with which this court agrees. This judgment is accordingly based upon them.

2. Although there are only two appeals before this court, these cases were heard in the Court of Appeal along with a third case, that of Mr Kaziu, which was decided on the same basis: *R (Kaziu) v Secretary of State for the Home Department* [2015] EWCA Civ 1195, [2016] 1 WLR 673. The Secretary of State therefore accepts that the principles adopted in this judgment should also apply to him.

3. The issue is whether the misrepresentations made by the appellants in their applications for United Kingdom citizenship made the grant of that citizenship a nullity, rather than rendering them liable to be deprived of that citizenship under sections 40 and 40A of the British Nationality Act 1981.

The facts

4. Mr Hysaj was born Dinjan Hysaj in Albania in 1977. He came to this country and claimed asylum in July 1998. He gave his true name, but claimed to have been born in 1981 and thus to be a child at the time of his asylum claim. He also falsely claimed that he was a citizen of the Federal Republic of Yugoslavia from Kosovo, and that he had been persecuted there. He was accepted as a refugee and given indefinite leave to remain (ILR) here in 1999. In 2004 he applied for and was granted naturalisation as a British citizen, using the same false details as he had used in his asylum claim. Thus he obtained British citizenship in his own name but using a false date of birth, a false nationality and a false place of birth.

5. Mr Bakijasi was born Agron Bakijasi in Albania on 22 October 1972. He came to this country and claimed asylum in 1999. He gave a false name, Agron Adjini, a false date of birth, and falsely claimed to be a citizen of the Federal Republic of Yugoslavia from Kosovo, and that he had been persecuted there. His

asylum claim was refused on the basis that it was safe for him to return to Kosovo. But his later application for ILR, using the same false details, was granted under the Family ILR exercise in September 2005. Using the same false details, he applied for and was granted naturalisation as a British citizen in November 2006. Thus he obtained British citizenship using a false name, a false date of birth, a false nationality and a false place of birth.

6. When these frauds came to light, the Secretary of State decided that, in each case, the grant of citizenship was a nullity, so that the appellants were not, and never had been, British citizens. They had therefore remained at all times on ILR, which had been validly granted to them. She did so on the basis of binding Court of Appeal authority. In these judicial review proceedings, that decision was upheld, albeit with some reluctance, by Ouseley J in the High Court ([2014] EWHC 832 (Admin), [2015] 1 WLR 945) and by the Court of Appeal ([2015] EWCA Civ 1195, [2016] 1 WLR 673). Sales LJ described the interpretation given by the binding Court of Appeal authorities as “problematic in various respects” (para 64).

The legislation

7. Section 6(1) of the British Nationality Act 1981 provides that:

“If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.”

8. Section 40 of the 1981 Act makes provision for the Secretary of State to deprive a person of citizenship obtained by registration or naturalisation if satisfied that the registration or naturalisation was obtained by means of “fraud, false representation or concealment of a material fact”. On the face of it, fraud or false representation would include the sort of misrepresentations as to identity made by the appellants, so that, if the Secretary of State sees fit, they could be deprived of their citizenship under that provision. Section 40A makes provision for a right of appeal against most such deprivations to the First-tier Tribunal.

The previous case law

9. There are four relevant decisions in the Court of Appeal before this one but none in the House of Lords or Supreme Court. For convenience, the applicant for

citizenship is referred to as X and the identity in which he applied for citizenship is referred to as Y.

10. In *R v Secretary of State for the Home Department, Ex p Sultan Mahmood* [1981] QB 58, decided in 1978, X impersonated Y, a real person, who was his dead brother-in-law and cousin, to obtain registration as a British citizen under section 5A of the British Nationality Act 1948. Roskill LJ held that there were three possible effects of the purported grant. First, it might have been a grant to Y; but it could not have been, because Y was dead. Second, it might have been a grant to X; but it could not have been, because the Secretary of State had no knowledge of X, believing him to be Y. Third, it might have been of no effect at all; as it could not be the first or the second, it could only be a nullity. Accordingly, X had never become a citizen of the United Kingdom.

11. The next case, decided in 1980, was *R v Secretary of State for the Home Department, Ex p Parvaz Akhtar* [1981] QB 46. X was registered as a citizen by his purported father, Z, in the name of Y, under section 7(1) of the 1948 Act, which allows for the registration of a minor child of a British citizen. X was not the son of Z. Applying *Mahmood*, the Court of Appeal held that the Secretary of State had no power or intention to register X or any Y other than an actual son of Z. Accordingly, X never became a citizen of the United Kingdom.

12. Next came *R v Secretary of State for the Home Department, Ex p Ejaz* [1994] QB 496. X applied for citizenship in her real name under section 6(2) of the 1981 Act, which provides for the naturalisation of a person who is married to a British citizen. Later, it turned out that X's husband was not, and never had been, a British citizen, having been granted a British passport in a false identity. The Court of Appeal declined to hold that the grant of citizenship was a nullity, pointing to the uncertainty and injustice which could be caused by holding that a person had never been a citizen, which could have effects upon third parties such as children, and was highly undesirable in matters of status. Deprivation of citizenship, on the other hand, did not have such retrospective effect.

13. Then came *Bibi v Entry Clearance Officer, Dhaka* [2007] EWCA Civ 740, [2008] INLR 683. X had obtained entry to the United Kingdom by assuming the identity of Y, another real person who had been granted an employment voucher to enable him to enter. After living here for five years, X was registered as a British citizen in the name of Y. The appellants were the wife and four children of X and claimed a right of abode in the United Kingdom based on the purported citizenship of X. The Court of Appeal held that, because X had applied for citizenship in a false identity, *Mahmood* and *Akhtar* applied and there never was a grant of citizenship to him.

14. As the Secretary of State points out, these cases demonstrate a gradual expansion of the nullity approach since *Mahmood*. Thus, *Mahmood* established that if X adopts the identity of Y, another real person, and Y has the characteristics required to obtain citizenship, the purported grant of citizenship to X in the identity of Y is a nullity. *Akhtar* decided that if X adopts the identity of Y, where Y is not a real person but a false identity created by X (or someone else for him) having the characteristics required to obtain citizenship, the purported grant of citizenship to X as Y is a nullity. *Bibi* decided that, if X adopts the identity of Y, another real person, and X acquires the characteristics needed to obtain citizenship by using the identity of Y, the purported grant of citizenship to X as Y is a nullity.

15. The present case went a stage further than *Bibi* and decided that if X adopts the identity of Y, where Y is a false identity created by X and X acquires the characteristics needed to obtain citizenship by using the identity Y, the purported grant of citizenship to X as Y is a nullity.

The Secretary of State's position

16. Having reviewed the matter after permission to appeal was granted in this case on 27 February 2017, the Secretary of State has come to the conclusion that the law took a wrong turning after *Mahmood*. The *Mahmood* type of case involves two real people, X and Y. X impersonates Y for the purpose of applying for citizenship. Y has the characteristics required for citizenship. Y is considered by the Secretary of State and is granted citizenship. But Y has never applied for it, may not want it, or may even be dead. Thus it cannot be said that citizenship has been granted either to Y or to X. Accordingly there was no grant of citizenship. *Mahmood*, in the Secretary of State's view, remains good law.

17. By contrast, in the later cases, X uses a false identity created by him (or someone on his behalf) and in that identity he acquires the characteristics needed to obtain citizenship. X applies for citizenship using the false identity Y. But X meets the requirements for citizenship albeit having acquired them by using the false identity Y. X is considered for citizenship by the Secretary of State in identity Y and is granted citizenship in that identity. In such a case, in the Secretary of State's view, the grant of citizenship is valid, albeit that the person may later be deprived of it under section 40. *Ejaz* was rightly decided but *Akhtar* and *Bibi* were wrongly decided.

18. Those cases, and the Court of Appeal's decision in this case, were based on the principle that there is a category of fraud as to identity which is so serious that a purported grant of citizenship is of no effect. But, argues the Secretary of State, the courts have not articulated any clear or principled definition of the types of fraud

which will be so serious as to have this consequence. In the current cases, for example, neither appellant pretended to be someone he was not. Mr Hysaj used his real name but put forward a false date of birth, nationality and place of birth in gaining his ILR and gained citizenship on the basis of the ILR that he himself had obtained. Mr Bakijasi used a false name in gaining his ILR but otherwise gained citizenship in the same way. Ouseley J held that the key characteristics of identity for this purpose were the name, date of birth, and nationality or the country and place of birth, because this was the information on the certificate. But he also held that there had to be fraud - innocent mistakes or misunderstandings were not enough (paras 46, 47). Such uncertainty means that the law is difficult to apply in practice.

19. It also has a number of illogical and unsatisfactory consequences. Thus it is not clear when the use of a false identity to obtain citizenship by one person will lead to the nullification of the grant of citizenship to those making a derivative claim, whether as a spouse or child. It is not easy to reconcile *Akhtar*, *Ejaz* and *Bibi*. Logically, as Ouseley J pointed out in this case (para 55) either all derivative citizenship should be of no effect if the citizenship from which it is derived is of no effect, or the nullity should be confined to the person who obtained citizenship using the false identity. As Ouseley J also pointed out (para 69) the logic of the position then adopted by the Secretary of State would also nullify the grant of ILR, but the Secretary of State has never contended for this.

20. This court agrees with the reasoning now put forward by the Secretary of State. It follows that the decisions of the Court of Appeal in *Akhtar* and *Bibi* must be overruled and that this appeal must be allowed by consent in terms of the detailed order proposed.

ANNEX

SC/2016/0209
SC/2016/0211

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

THE QUEEN

on the application of

DINJAN HYSAJ
AGRON BAKIJASI

Appellants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DRAFT ORDER

UPON the Respondent accepting that the Appellants are British citizens by naturalisation under section 6(1) of the British Nationality Act 1981 (“the 1981 Act”), and that that citizenship remains valid unless and until a formal deprivation order is made pursuant to section 40(3) of the 1981 Act

AND UPON the Respondent accepting that her decisions, dated 13 February 2013 and 27 June 2013, that the Appellants’ British citizenships were ‘nullities’ (i.e. that the Appellants were not, and had never been, British citizens) were wrong in law

AND UPON the Respondent agreeing to withdraw the said decisions dated 13 February 2013 and 27 June 2013

AND UPON the Respondent accepting that the elder child of Mr Dinjan Hysaj, born in Albania on 23 November 2010, is a British citizen by virtue of section 2(1) of the 1981 Act

AND UPON the Respondent accepting that the younger child of Mr Hysaj, born in the United Kingdom on 19 September 2015, is a British citizen by virtue of section 1(1) of the 1981 Act

AND UPON the Respondent accepting that the elder child of Mr Bakijasi, born in the United Kingdom on 23 August 2003, and registered as a British citizen on 11 October 2006, is a British citizen by virtue of section 1(3) of the 1981 Act

AND UPON the Respondent accepting that the younger child of Mr Bakijasi, born in the United Kingdom on 14 June 2007, is a British citizen by virtue of section 1(1) of the 1981 Act

IT IS ORDERED BY CONSENT THAT:

1. The appeals be allowed.
2. The Order of the Court of Appeal dated 26 November 2015 be set aside.
3. The Respondent do pay the Appellants' reasonable costs of the claim, the appeal to the Court of Appeal and the appeal to the Supreme Court on standard basis, to be assessed, if not agreed.
4. The Appellants' publicly funded costs be subject to a detailed assessment.
5. The Respondent make a payment to each Appellant on account of that Appellant's costs, equivalent to 25% of the relevant Appellant's total bill of costs, such payment to be made within 28 days of the relevant bill of costs being served on the Respondent.