Upper Tribunal
(Immigration and Asylum Chamber)

Walile (deprivation: self-incrimination: anonymity) [2022] UKUT 00017 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2021	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

Between

NOOR MOHAMMED WALILE

(ANONYMITY DIRECTION REVOKED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr A. Mackenzie and Mr L. Youssefian , instructed by City Law Immigration Ltd

For the respondent: Mr D. Clarke, Senior Home Office Presenting Officer

(1) An applicant for British citizenship who commits a criminal offence before the application is decided by the Secretary of State cannot rely upon the privilege against self-incrimination as a reason for not informing the Secretary of State of the crime.

(2) The mere fact that a foreign criminal has children is not a reason to impose an anonymity order, preventing disclosure of the foreign criminal's name in immigration proceedings in the First-tier Tribunal or the Upper Tribunal.

(3) Begum [2021] UKSC 7 authoritatively explained how the scope of an appeal against a decision under section 40(2) or (3) of the 1981 Act is narrower than the Upper Tribunal and the Court of Appeal previously thought; but it did not introduce the ability to bring an appeal based on public law grounds, which have always been available.

DECISION AND REASONS

1.
The appellant was born in India in 1978. He arrived in the United Kingdom on 15 February 2006. On 29 January 2010, the appellant applied for naturalisation as a British citizen. At that time he was a minister of religion at a mosque in the Midlands. The application contained a declaration by the appellant that:-

“To the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British citizenship. I promise to inform the Home Secretary in writing of any change in circumstances which may affect the accuracy of the information given whilst this application is being considered by the Home Office …”

2.
The appellant was supplied by the respondent with a guide to completing his application for citizenship. This was “Guide AN - Naturalisation as a British citizen - A guide for applicants” (February 2009). Under the heading “What we expect from you” there was the following:-

“While the application is under consideration we expect you to tell us about anything which alters the information you have given us. This will include changes of marital or civil partnership status or home address or agents acting on your behalf. It also includes police investigation or anything that may result in charges or indictment.”

3.
Shortly after submitting his application, on 26 March 2010 the appellant raped an 8 year old boy.

4.
According to a letter dated 6 July 2018 written by City Law Immigration on behalf of the appellant “because of the threats he was receiving from the victim’s family he was intimidated and so he was in fear for his life … and so within days of committing the offence, on 29 March 2010, he travelled to India. There he acquired spiritual cleansing and he returned to the UK on the 3 May 2010. He was issued with his naturalisation certificate on 4 May 2010 …”

5.
The letter also stated that, when he completed his application for citizenship, the appellant “did try and read the AN guidance notes but since his English was reasonable and not the best he may not have paid specific attention to every single paragraph inadvertently overlooking some aspects of it”.

6.
On 22 September 2016, following a plea of guilty to the charge of rape, the appellant was sentenced to six years’ imprisonment. The sentencing remarks make it evident that the appellant’s sentence would have been one of nine years, but for his guilty plea. The sentencing judge told the appellant:-

“The members of your community entrusted their young children to you for guidance and education. You were in a position of responsibility and leadership at the mosque. You abused that position and that trust, and defiled the faith which you were paid to uphold.

HM was a young boy entrusted to your care for guidance. When he was aged 8, you raped him. It is hard to think of any greater abuse of the trust that had been placed in you. Your actions not only betrayed that trust, but caused harm to that young boy”.

7.
Section 40(3) of the British Nationality Act 1981 provides as follows:-

“(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of -

(a) fraud,

(b) false representation, or

(c) concealment of a material fact.”

8.
Section 40(1) provides that a reference to a person’s “citizenship status” is a reference to his status as, inter alia, a British citizen. Deprivation under section 40(3) may take place, even where the Secretary of State is satisfied that a deprivation order would make a person stateless.

9.
On 28 November 2019, the respondent decided to deprive the appellant of his British citizenship, on the basis that the appellant had obtained it by concealment of a material fact. Although, at paragraph 12, the respondent took the view that it was reasonable to surmise that the appellant must have been planning to commit his crime at the time he signed the application form, since “there would have been a process of ’grooming’ that occurred at least when you completed your application if not before”, paragraphs 23 and 24 of the decision letter contained the following additional reason why the respondent decided to invoke section 40(3)(c):-

“23. It is noted that you provided further representations on 19 July 2019, in which you reiterate that you believe that you have not committed any fraud because you hadn’t committed the offence when you had completed your naturalisation application form (Annex N1, Para. 3). However, in the application you ticked question ’6.2’ which states ’I confirm that I have read and understood the guide Naturalisation as a British Citizen (Annex G15, Sec. 6.2) and signed the declaration confirming this (Annex G15, Sec. 6.8). As the guide clearly states, ’while the application is under consideration, we expect you to tell us anything which alters the information you have given us … it also includes police investigation or anything that may result in charges or indictment’ (Annex E32, Sec. ’What we expect from you’, Para. 2), it is material fraud on your part by failing to inform the SSHD of the criminal offence that took place before you naturalised. You not only wilfully ignored that important section of the guidance but also ignored the section which states ’you may be deprived of British citizenship if it is found to have been obtained by fraud, false representation or the concealment of any material fact’ (Annex E32, Sec. ’Deprivation of Citizenship’).

24. The justification of your use of fraud has been carefully considered in the context of whether it satisfactorily explains the reasons for it and whether it was justified, but it is clear that you committed the offence after you made your Naturalisation application in the expectation that the SSHD would grant you status, and the concealment of it was the fraud to ensure that you did.”

10.
The appellant exercised his right of appeal against the respondent’s decision. His appeal was heard at Nottingham on 17 March 2020 by First-tier Tribunal Judge Law. In a decision promulgated on 20 March 2020, the First-tier Tribunal Judge dismissed the appellant’s appeal.

11.
At the hearing before Judge Law, the appellant gave evidence. He told the judge that the rape was the result of a temporary loss of self-control and that he was “of good character”. He confirmed what was

said in the letter from City Law Solicitors Ltd concerning the immediate aftermath of the rape. Whilst in India, the appellant said he was found by a physician to have “anxiety and depression”.

12.
The appellant also told the First-tier Tribunal Judge that he had received help from his wife with his application for naturalisation, as “his English was not good”. Asked about the declaration at page G15, which he agreed he had signed, the appellant said that his wife “told me briefly about it, not fully”. Asked if he had been aware that he was supposed to tell the Home Office of any changes in his circumstances, the appellant said “my wife did not tell me that”.

13.
The appellant’s wife gave evidence. She said that she had translated the questions on the form, as the appellant’s English was limited and she did not want to make any mistakes. She said that she had “read to him as much as I could, there is a lot of detail”. Asked if she had read out the information on the declaration page at G15, she confirmed that she had. She had “translated it as best I could”. Asked if she had told the appellant that he should inform the Home Office if there was a change of circumstances, the appellant’s wife said she had.

14.
Beginning at paragraph 20, the First-tier Tribunal Judge set out what was then the relevant case law regarding deprivation; namely, Arusha and Demushi (deprivation of citizenship - delay) [2012] UKUT 80 (IAC); [2012] Imm AR 645, BA (deprivation of citizenship: appeals) [2018] UKUT 85 (IAC); [2018] Imm AR 807, AB (British citizenship: deprivation; Deliallisi considered) (Nigeria) [2016] UKUT 451 (IAC); [2017] Imm AR 226 and Aziz & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1884; [2019] Imm AR 264.

15.
At paragraph 23, the First-tier Tribunal Judge noted that it was for the respondent to prove that the appellant’s conduct came within the scope of section 40 of the 1981 Act. The First-tier Tribunal Judge considered that this required the respondent to identify matters showing on a balance of probabilities that at the time of his application or subsequently up until the grant of citizenship, the appellant concealed from the respondent information which would be material to the respondent’s decision on whether his application should succeed.

16.
At paragraph 24, the First-tier Tribunal Judge noted the allegations in paragraphs 12 and 13 of the decision letter that the appellant must have groomed his victim and that it could not have been an isolated incident. The First-tier Tribunal Judge found that there was “no evidence to support either of these allegations”.

17.
At paragraph 25, however, the First-tier Tribunal Judge confirmed, by reference to paragraph 23, that it fell to the appellant to provide an innocent explanation for his conduct, given that the appellant had committed a criminal offence between making the application and being granted citizenship, failing to inform the respondent about conduct that was relevant to the grant of citizenship.

18.
At paragraph 26, the First-tier Tribunal Judge noted the requirement to report a change in circumstances, which appeared in the declaration at G15 underneath the appellant’s name, where he promised to inform the Home Secretary in writing of any change of circumstances.

19.
At paragraph 27, the First-tier Tribunal Judge noted that the appellant had put forward two arguments; first, that the appellant was somehow “possessed” or “of unsound mind and so unable to report his offence to the respondent”. The second reason was that the appellant did not know he was under an obligation to report such matters because he was unable to read the forms and relied on what his wife had told him.

20.
At paragraph 28, the First-tier Tribunal Judge found that there was no acceptable medical evidence to justify the first of the appellant’s arguments. The First-tier Tribunal Judge was not satisfied that anxiety or depression would render the appellant unable to inform the respondent before he was granted nationality.

21.
At paragraph 29, the First-tier Tribunal Judge turned to the second argument. Having reviewed the evidence in detail, the First-tier Tribunal Judge concluded at paragraph 34 that there were contradictions in the evidence. Against that background, the First-tier Tribunal Judge was not satisfied that the appellant required his wife’s help to understand the form and that he did, in fact, understand the requirement to report a change in circumstances. The judge found that the appellant:-

“Left the UK three days after the offence knowing that it should be reported but hoping by having removed himself from the UK at the request of the boy’s family that no more would be heard about the offence”.

22.
Also at paragraph 34, the judge noted evidence from the appellant’s father-in-law and the chairman of the mosque, to the effect that the appellant was persuaded to leave the United Kingdom and “think of the community” at the mosque. The judge concluded that “the involvement of senior figures at the mosque and the decision not to involve the police would have made the appellant realise, if he had not already done so himself, that the matter would have to be reported to the Home Office”.

23.
At paragraph 35, having rejected the appellant’s arguments, the First-tier Tribunal Judge found he was satisfied that the appellant “dishonestly concealed what was a material fact from the respondent, the effect of which was that he obtained citizenship when he was not entitled to it”. Accordingly, the First-tier Tribunal Judge dismissed the appeal.

24.
The grounds of application for permission to appeal against the First-tier Tribunal Judge’s decision submitted that there were no findings of fact in relation to whether the appellant’s circumstances amounted to exceptional ones, which, according to BA, was the only basis upon which the First-tier Tribunal could decide that the discretionary decision in section 40(3) should be exercised differently.

25.
The grounds further contended that there was no inconsistency in the evidence put forward to the First-tier Tribunal Judge, on the question of the appellant’s English language abilities. In summary, the remaining grounds contended that the judge had failed to make findings of fact as to whether the appellant would become stateless; failed to make findings of fact on material matters in the light of the material evidence; and had failed properly to consider the evidence “without giving irrational or perverse reasons” (sic).

26.
Permission to appeal was refused by Resident Judge Zucker on 13 July 2020. He held that the issue of statelessness was not material in a section 40(3) case. It was open to the First-tier Tribunal Judge to find that the burden had been discharged by the respondent on the basis of the ongoing obligation on the part of the appellant to make disclosure of material facts. That finding was open to the judge and the grounds were, in general, no more than an attempt to re-argue the case.

27.
The grounds of application to the First-tier Tribunal appear to have been settled by City Law Immigration Ltd, whose Mr Nadeem appeared as the appellant's representative before the First-tier Tribunal Judge. The renewed grounds of permission, as put to the Upper Tribunal, were, however, drafted by Mr Youssefian. They are dated 22 July 2020. Ground 2 of these grounds asserted that there had been a material misdirection of law by the First-tier Tribunal Judge concerning the burden of proof for dishonesty. Ground 3 contended that there had been a failure to conduct a full assessment under section 40(3), which was a discretionary provision. A two-stage process should have been adopted, whereby the judge had, first, to establish whether the appellant had in fact used deception and, if so, secondly, whether discretion should be exercised not to deprive the appellant of his nationality. This was said to be consistent with Deliallisi (British citizen: deprivation appeal: Scope) Albania [2013] UKUT 439 (IAC). Ground 4 contended that the First-tier Tribunal Judge had arguably erred in law by failing to take account of the rights of the appellant and his family under Article 8 of the ECHR, when considering whether to deprive.

28.
In relation to ground 4, permission was sought, should it be necessary, to withdraw what was said to be a concession apparently made before the First-tier Tribunal Judge and recorded by him at paragraph 11 of his decision, where he stated:-

"At the hearing before me, Mr Nadeem agreed that Article 8 was not relevant as the decision under appeal would not interfere with the appellant's right to respect for his family or private life."

29.
Ground 4 argued that the Tribunal has a wide discretion to permit a concession to be withdrawn if there were a good reason to do so. It was submitted that a good reason did exist in the present case.

30.
On 22 July 2021, the Upper Tribunal granted permission to appeal. Although no grounds were excluded, it is manifest from the Upper Tribunal's decision that the decision to grant was driven by ground 1, which the Upper Tribunal described as "novel".

31.
Ground 1 asserts that the First-tier Tribunal Judge erred in law because it is arguable that an obligation to disclose the rape "is contrary to the well-established and fundamental privilege against self-incrimination, protected both under common law … and Article 6 ECHR". Anticipating the possible objection that this ground was not raised before the First-tier Tribunal Judge, ground 1 contended that, if the ground were correct, "then as a matter of law there could not have been dishonesty and [the appellant] could not have been deprived of his nationality under s.40(3) of the 1981 Act". The ground argued, in the alternative, that the point regarding privilege against self-incrimination was "Robinson obvious": R v Secretary of State for the Home Department, ex parte Robinson [1997] 3 WLR 1162; [1997] Imm AR 568. As such, the First-tier Tribunal Judge should have considered it, whether or not the matter was argued before him.

32.
On 28 September 2021, the respondent filed a response to the grounds of appeal, pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The response pointed out that the privilege against self-incrimination is a privilege against being "compelled" to give self-incriminating evidence. This is made plain by L v C [2001] EWCA Civ 1509. Given that the focus of the case law is upon self-incrimination in the course of legal proceedings, the response argued that this was "far removed [from] the situation of the appellant who was answering questions on a naturalisation application form and who was not participating in or a part of any legal proceedings". The response also pointed out that the appellant "was not compelled to make a citizenship application and it was open to him not to do so". Had the truth of the appellant's conduct been known to the respondent prior to the grant of citizenship, the appellant would have failed to meet the character requirements set out in Chapter 55 and at Annex D Chapter 18 of the Nationality Instructions.

33.
The response also dealt with the important Supreme Court judgment in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7; [2021] Imm AR 879. In Begum, the Supreme Court held that, if deprivation of citizenship would not amount to a breach of the obligation imposed on the respondent by section 6 of the Human Rights Act 1998 not to act in a way that was incompatible with the ECHR, the Tribunal may allow the appeal only if the respondent has, in effect, committed a public law error in reaching a deprivation decision. There is, accordingly, no scope for the Tribunal to allow an appeal, on the basis that it concludes (however exceptionally, given the weight to be accorded to the respondent's views in this area) that the discretionary decision of the respondent should have been exercised differently.

34.
In connection with the hearing in the Upper Tribunal on 16 November 2021, Mr Mackenzie and Mr Youssefian submitted an application to amend the appellant's grounds. In the light of the respondent's rule 24 response on the issue of self-incrimination, the application states that "ground 1 is no longer pursued". Furthermore, the application accepts that the appellant now "considers on reflection that existing grounds 2 and 3 add little and does not seek to pursue them".

35.
We consider that the appellant was right to withdraw grounds 1, 2 and 3, as put before the Upper Tribunal. Ground 1 is entirely met by the respondent's response: the privilege against self-incrimination simply does not arise in a case of this kind.

36.
In place of grounds 1, 2 and 3, the new application seeks to substitute an entirely new ground, which is that, in the light of Begum, the First-tier Tribunal Judge erred in law in not considering whether the respondent's decision to deprive contained a public law error.

37.
We refuse to consent to this application. Begum has authoritatively explained how the scope of an appeal against a decision under section 40(2) or (3) of the 1981 Act is narrower than the Upper Tribunal and the Court of Appeal previously thought. The ability to bring an appeal based on what is a public law challenge to the respondent's decision has, however, always been present. This is manifest from the decision in BA. At paragraph 45, summarising the case law as it then stood, it was held that:-

"(1) The Tribunal must first establish whether the relevant condition precedent exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.

…

(3) In a section 40(3) case, the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) were used by P in order to obtain British citizenship. As held in Pirzada [2017] UKUT 196 (IAC)], the deception must have motivated the acquisition of that citizenship."

38.
The present appellant was professionally represented before the First-tier Tribunal Judge. The appellant could, and should, have mounted any public law challenge at that time. The appellant finds himself before the Upper Tribunal only because he later advanced the "self-incrimination" ground, which he has now accepted to be devoid of merit.

39.
In the light of all this, a very good case would have to exist for us to grant permission to advance yet another ground of challenge, as described in paragraph 36 above. It most certainly is not a case of "Robinson" obvious error.

40.
In fact, no error exists. The high point of Mr Mackenzie's submission on the issue is paragraph 55.7.5 of the respondent's policy guidance "Deprivation and Nullity of British citizenship". So far as relevant, this provides as follows:-

"55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:

•
Where fraud postdates the application for British citizenship it will not be appropriate to pursue deprivation action.

…

However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation."

41.
It is common ground that, in the guidance, the reference to "fraud" covers concealment of any material fact: paragraph 55.4.3.

42.
It is plain that there are difficulties with the first bullet point in 55.7.5. Read without any qualification, it would undermine the entire purpose of requiring applicants to inform the respondent of any material matter arising after submission of the application and before receipt of the citizenship decision. As we have seen, the application materials are at pains to ensure that applicants are under a continuing obligation in this regard.

43.
For this reason, significant weight needs to be afforded to the opening words "in general" in paragraph 55.7.5 and the closing words, concerning the public interest. In the present case, it is, in our view, obvious that the Secretary of State took the view that the immense gravity of the material fact which the appellant concealed from the respondent meant that there was a significant public interest in depriving the appellant of British citizenship. It is in our view beyond any reasonable argument that confidence in the naturalisation process would be severely undermined if the

respondent declined to remove the British citizenship of someone who had raped a child, following the submission of his naturalisation application, and who knowingly failed to inform the respondent of that fact, before his application was determined.

44.
We are, accordingly, left with ground 4. Before us, Mr Clarke sought to withdraw the concession contained in the rule 24 response. We permit him to do so. The concession was made without reference to paragraph 11 of the First-tier Tribunal Judge's decision. There, as we have seen, the appellant's representative was recorded as agreeing with the judge that Article 8 was not relevant, as the decision would not interfere with the appellant's right to respect for his private or family life.

45.
An examination of the First-tier Tribunal Judge's Record of Proceedings suggests that the representative's agreement may have been given in the light of the judge's strongly expressed view on that issue. There is, however, no evidence before us that the representative was improperly coerced by the judge into agreement; still less, that the representative did not, in fact, agree.

46.
Mr Mackenzie submitted that it might be necessary, in these circumstances, to approach Mr Nadeem in order to establish his recollection. There has, however, been more than ample time for that to occur.

47.
Apart from the suggestion that the appellant might, following deprivation, be stateless, we were given no indication of what any Article 8 would comprise. In any case, we were informed that deportation proceedings concerning the appellant are under way. The issue of Article 8 issue is much more likely to be relevant in those proceedings.

Decision

The decision of the First-tier Tribunal Judge does not involve the making of an error on a point of law. The appellant's appeal is accordingly dismissed.

Anonymity

Judge Law made an anonymity order in respect of the appellant "due to the effect which disclosure might have on the appellant's children." We asked Mr Mackenzie to justify this order. We find he was unable to do so. There is a compelling public interest in open justice. The position of the appellant's children did not feature in Judge Law's decision, and it does not in ours. Understandably, the appellant does not rest his case on any e ffect that deprivation of citizenship might have on the children. Equally understandably, we are not aware that the appellant's identity was withheld from the public at his criminal trial or following his conviction, because of any concern regarding his children.

Mr Justice Lane

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

3 December 2021