

## **United Kingdom - KV v Secretary of State for the Home Department**

This case, heard first before the First-tier Tribunal (Immigration and Asylum Chamber) (the “First-tier Tribunal”) followed by the Upper Tribunal (Immigration and Asylum Chamber) (the “Upper Tribunal”), concerned the Secretary of State for the Home Department’s decision under section 40(3) of the British Nationality Act 1981 (the “1981 Act”) to deprive the appellant of his British citizenship granted on 11 December 2007 on the ground that, in his application, the appellant had deliberately concealed the fact that he had earlier obtained a grant of British citizenship using false details.

Before the Court of Appeal, the key issues to be determined were (i) on whom the burden of proof lay to prove that the appellant would be stateless if deprived of British citizenship, and (ii) whether the Upper Tribunal had correctly determined that the First-tier Tribunal’s failure to consider the issue of the appellant’s statelessness was immaterial.

**Case status:** Decided

**Case number:** [2018] EWCA Civ 2483

**Date of decision:** 08/11/2018

**State:** United Kingdom

**Court / UN Treaty Body:** Court of Appeal (Civil Division)

**Language(s) the decision is available in:** English

**Applicant's country of residence:** United Kingdom

**Legal instruments:** 1961 Statelessness Convention, 1997 European Convention on Nationality, European Convention on Human Rights (ECHR)

**Key aspects:** Burden of proof, Deprivation of nationality, Respect for private and family life, Statelessness determination

**Relevant Legislative Provisions:**

- Section 40 of the British Nationality Act 1981

- Article 8 of the European Convention on Human Rights

## **Facts**

The appellant was born in 1973 in Sri Lanka. In June 1994, he arrived in the United Kingdom from Sri Lanka and claimed asylum on arrival. In June 1996, his asylum claim was refused. He appealed against that decision and in November 1997 his appeal was allowed. On the basis of his successful asylum appeal, he was on 12 June 1999 recognised as a refugee and granted indefinite leave to remain in the UK. In March 2007, the appellant applied for British citizenship and his application was granted on 11 December 2007.

The appellant did not disclose when he applied for British citizenship that he had previously applied, first for indefinite leave to remain in the UK and then for British citizenship, using the name and date of birth of another individual of Sri Lankan origin. The first application, for indefinite leave to remain, was granted on 16 October 1999 and the second, for British citizenship, on 16 December 2003.

The Home Office subsequently discovered those facts and on 27 May 2015 notified the appellant that the grant of British citizenship made on 16 December 2003 was considered to be a nullity. The Home Office also gave notice under section 40(5) of the 1981 Act of the Secretary of State's decision under section 40(3) to make an order to deprive the appellant of his British citizenship granted on 11 December 2007. This was on the ground that, in his application, the appellant had deliberately concealed the fact that he had already obtained a grant of British citizenship using false details. The Home Office took the position that (i) had this information been known, his application would have been refused, and (ii) once a deprivation order was made, the appellant would be granted discretionary leave to remain in the UK for 30 months.

Section 40 of the 1981 Act provides as follows:

*"(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that the deprivation is conducive to the public good."*

*(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.*

*(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless."*

Pursuant to section 40A(1) of the 1981 Act the appellant appealed to the First-tier Tribunal.

### **The First-tier Tribunal and the Upper Tribunal decisions**

On his appeal to the First-tier Tribunal, the appellant raised four main arguments:

1. That he had assumed a false identity "under duress" at a time when he faced being returned to Sri Lanka and therefore the fact that he had previously applied for citizenship using this false identity should not be regarded as material.
2. That depriving him of his British citizenship would violate his right to respect for private life under article 8 of the ECHR.
3. That depriving him of his citizenship would be inconsistent with the best interests of his children, a factor to which the Secretary of State was required to have regard by section 55 of the Borders, Immigration and Asylum Act 2009.
4. That deprivation of British citizenship would have disproportionate impact on him and his family because it would make his stateless.

In support of his position that he would be made stateless, the appellant relied on the text of the Ceylon Citizenship Act No. 18 of 1948, downloaded from an entry on the Act on Wikipedia. The entry provided that "*A person who is a citizen of Ceylon by descent shall cease to be a citizen of Ceylon if he voluntarily becomes a citizen of any other country*". The appellant also provided up to date evidence, obtained in a telephone call between his lawyer and the High Commission of Sri Lanka, confirming that he would have to make a formal application to reacquire Sri Lankan citizenship. As he was a recognised refugee he was not willing to do that.

The First-tier Tribunal dismissed the appellant's appeal on 16 September 2015. The Tribunal found:

1. The Appellant had obtained naturalisation as a British citizen by means of fraud, false representation and/or concealment of a material fact.
2. Given that the Secretary for State would grant the appellant discretionary leave to remain in the UK for 30 months, depriving him of citizenship would not interfere with his article 8 right to respect for his private life.
3. Proper account had been taken of the interest of the appellant's children, who would not be deprived of their own British citizenship.
4. Despite recording the submission that the appellant would be stateless if he was deprived of his British citizenship, the First-tier Tribunal did not address this point anywhere in its decision.

At the Upper Tribunal, the appellants' main ground of appeal was that the First-tier Tribunal had failed to consider the contention that removal of his British citizenship would make him stateless. The Upper Tribunal dismissed the appeal on 9 March 2016. It found that although the First-tier Tribunal had erred in law in failing to consider whether the appellant would be made stateless, the error was immaterial as the burden of proving statelessness lay on the appellant and he had not discharged the burden.

### **Legal arguments by the applicant**

The appellant's arguments before the Court of Appeal are summarised as follows:

1. The Upper Tribunal was wrong to hold that the burden lay on the appellant to prove that he would be stateless if deprived of British citizenship.
2. Alternatively and in any event, there was evidence before the Tribunal which provided not only that the appellant would be stateless but that he could not re-acquire Sri Lankan citizenship.
3. Alternatively, the appellant should, if necessary, be permitted to rely on additional evidence, which was not before the First-tier Tribunal or the Upper Tribunal to prove those facts.
4. The Upper Tribunal was wrong to conclude that the failure of the First-tier Tribunal to consider the issue of statelessness was immaterial.

### **Decision & Reasoning**

The Court of Appeal held that the Upper Tribunal was right to hold that the burden of proving statelessness in the present context lay on the appellant. The Court of Appeal distinguished the present case from one where the Secretary of State had made an order under section 40(2) of the 1981 Act. Section 40(4) required the Secretary of State to identify whether or not an order made under section 40(2) of the 1981 Act would make the person concerned stateless. That in turn would require the Secretary of State to identify whether the person had another nationality at the date of the order. The Court of Appeal noted that no similar requirement was required under section 40(3) of the 1981 Act.

The Court of Appeal stated that although a determination under section 40(3) required a form of proportionality even where article 8 was not engaged, it did not follow that, before taking the decision, the Secretary of State had a duty to make enquiries to find out what, if any, further adverse consequences not already known (or reasonably foreseeable from the facts already known) to the Secretary of State over and above the deprivation of citizenship itself would result from such deprivation. The Court of Appeal could see no reason why, before depriving a person of citizenship on the ground that his naturalisation as a citizen was obtained by fraud, the Secretary of State should be required to investigate whether that person has, or previously had, another nationality. The Court stated that the burden must lie on the individual to identify and prove the further consequences on which he seeks to rely including any assertion that the person would be made stateless.

On the meaning of statelessness, the Court of Appeal clarified that the term in section 40(4) of the 1981 Act had the same meaning as that found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons which provides that it is a *“person who is not considered a national by any state under the operation of its law”*. In the circumstances, the appellant was required to show that if he ceased to be a national of Sri Lanka he would not automatically re-acquire Sri Lankan nationality if deprived of his British citizenship.

Relying on the evidence put before the Upper Tribunal of the 1948 Sri Lankan Citizenship Act, being the current and relevant legislation, the Court of Appeal determined that there was a reasonable inference that the appellant was a citizen of Sri Lanka (by descent) until he was granted British citizenship on 11 December 2007 and that the effect of his voluntarily becoming a British citizen was that he ceased to be a citizen of Sri Lanka.

The Court of Appeal held that the Upper Tribunal had palpably misread the Citizenship Act. The provisions in evidence before the Upper Tribunal had unequivocally showed that, if deprived of British citizenship, the appellant would not be considered as a national of Sri Lanka under the operation of its law and accordingly, would be made stateless.

The Court of Appeal therefore held that the Upper Tribunal had erred in treating the failure of the First-tier Tribunal to address the question of statelessness as immaterial. The Court of Appeal determined that the Upper Tribunal should have found that depriving the appellant of his British citizenship would make him stateless and that, on the evidence before the Tribunal, he had no right to resume and no realistic prospect of being able to resume Sri Lankan citizenship. It was therefore necessary for the Tribunal to address the question of whether, given those consequences, a deprivation order should nevertheless be made.

### **Decision documents**

[%5B2018%5D%20EWCA%20Civ%202483.pdf](#)

### **Outcome**

The Court of Appeal allowed the appeal and remitted the case to the Upper Tribunal to determine whether the discretion exercised by the Secretary of State under section 40(3) of the 1981 Act should be exercised differently in the light of the evidence that a deprivation order would make the appellant stateless and that he would not be in a position to re-acquire Sri Lankan citizenship.

The Court of Appeal also stated that in the interests of justice, the appellant would be entitled to rely on any new evidence before the Upper Tribunal.