Cases Nos: CO/12634/2012 and CO/12042/2012
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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
EC4A 1NL

Date: Friday 28th November 2014

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

The Queen on the application of Ylian RUSHITI and Adriatik LACI	**Claimants**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

ames Collins (**Marsh & Partners**) for the **Claimants**
Jacqueline Lean (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 21 November 2014

- -

Judgment

The Hon. Mr Justice Popplewell :

Introduction

1. The applicants Ylian Rushiti ("YR") and Adriatik Laci ("AL") are Albanian nationals formerly resident in Albania, who entered the UK illegally and made fraudulent but unsuccessful claims for asylum on the basis that they were Kosovars, had been exposed to Serbian atrocities, and were at risk of persecution if returned to Kosovo. They were subsequently granted indefinite leave to remain under the Defendant's legacy programme. They applied for Home Office travel documents, maintaining the deception that they were of Kosovan nationality. They subsequently made applications for naturalisation as British Citizens, in which they admitted to being Albanian and confessed to the earlier deception. The Secretary of State refused their applications on the grounds that their long history of intended deception in the asylum process and thereafter meant that they were not of good character, whether or not the deception had been material to the grant of indefinite leave to remain. They apply, with permission, to challenge the Secretary of State's decision. Their applications were heard together because they raise similar issues, although the factual circumstances of each case are not identical.

The Facts: YR

2. YR is a citizen of Albania where he was born on 28 April 1979. He claims to have arrived in the United Kingdom on 5 November 1999, although that is unconfirmed. On 9 November 1999 he claimed asylum on the basis that he was of Kosovan nationality.

3. On 18 July 2000 he was interviewed as to the circumstances giving rise to his claim for asylum. He maintained that he was of Kosovan nationality and born in Kosovo. He claimed that Serb authorities had beaten up and killed members of his family in his presence at their home in Kosovo. He claimed to have been a former member of the Kosovo Liberation Army ("KLA") and that he feared retribution from the KLA. He said that his family were still living in Kosovo. All this was untrue and was an elaborate fabrication designed to support a fraudulent asylum claim.

4. In a letter dated 18 July 2000 but sent on 12 September 2000 the Defendant refused YR's application for asylum. YR appealed to the Special Adjudicator. In mounting that appeal he maintained the pretence that he was of Kosovan nationality and had been resident in Kosovo. He supported his appeal with an account of atrocities which he said he had witnessed. He submitted reports from two medical practitioners certifying that he was suffering from post traumatic stress disorder which he procured by giving a fictitious account of atrocities he had witnessed and suffered, and their traumatic effect on him. This was an elaborate deception practised on the medical practitioners as well as the immigration authorities.

5. On 22 January 2003 the Special Adjudicator dismissed YR's appeal. He was deceived into finding that YR had suffered shocking and upsetting experiences during the ethnic cleansing period in Kosovo in 1998/1999. He dismissed the appeal on the basis that there was no continuing risk of persecution in Kosovo and there were adequate medical facilities there to deal with YR's post traumatic stress disorder.

6. On 13 June 2004 YR, through his solicitors, made a further application for leave to remain, invoking his rights under Article 3 and Article 8 of the European Convention on Human Rights. The application maintained the deception that he was a Kosovan national of Kosovan origin who had suffered torture and persecution by his own national authorities. The application again relied on the fraudulently procured medical reports as showing that he had suffered post traumatic stress disorder as a result.

7. The human rights based application was not dealt with promptly by the Defendant. On 10 November 2009, some 5 ½ years after the application, YR's solicitors wrote seeking a decision.

8. On 12 April 2010 YR was sent the Defendant's standard letter pursuant to its legacy programme, which involved dealing with stale claims by either ordering removal or granting leave to remain. The letter invited YR to provide updated information.

9. On 19 April 2010 YR responded through his solicitors. His letter maintained the deception that he was of Kosovan nationality. The letter sought leave to remain on three grounds, namely long residence, a fear of returning to Kosovo, and a strong connection with the UK.

10. On 11 May 2010 the Defendant wrote to YR recording her decision to grant YR indefinite leave to remain ("ILR"). The letter said that this was being granted exceptionally outside the Immigration Rules and due to the length of YR's residence in the UK. The case notes indicate that length of residence was not regarded as the sole, or indeed sufficient, ground for the decision. The case notes record that it was understood that the basis of the application was the long outstanding Human Rights Act application. Length of residence was regarded as a factor but not sufficient of itself to justify leave to remain. The conclusion was that leave to remain should be granted both because of length of residence and because the human rights application had been left outstanding for so long.

11. On 27 May 2010 YR applied, through his solicitors, for a Home Office travel document. The application enclosed a declaration signed by YR with a statement of truth which declared that he was a Kosovan national born in Kosovo. The covering letter from the solicitors repeated those details and also said:

> "Please note that our client is exempted from completing section 3, 4.1 and 4.2 of the application as there are no national authorities representing our client in the UK to enable him approaching them and apply for any national TD or passport."

12. This was untrue. As an Albanian national YR would have been required to apply to the Albanian Embassy for a passport or travel document. Accordingly the lie about YR's nationality was of central materiality to the application for the travel document. On 13 July 2010 YR was issued with a Home Office Travel Document.

13. On 19 October 2011 YR made an application, again through his solicitors, for naturalisation as a British Citizen. In this application he identified for the first time that he was an Albanian national and born in Albania. The application attached Albanian documents in support of those details. The letter making the application stated that he had applied for the travel document to visit his very ill father who was receiving intensive medical treatment and that the urgency rendered it impossible to apply for a passport from the Albanian Embassy in London. This too was untrue. In a subsequent letter of 25 September 2012 he said that the purpose was to visit his mother who was ill. No explanation has been offered for the falsity of this aspect of the application. Nor is there any documentary evidence to support this subsequent averment of his mother's illness. On 25 May 2012 YR's solicitors sent a chasing letter asking for a decision on the naturalisation application in which they suggested that the application needed to be determined urgently because YR's mother was imminently to have surgery for cancer. The attached medical report suggested that this was a very recent diagnosis, which does not therefore support the suggestion that she was seriously ill when the travel document was applied for.

14. On 12 September 2012 the Defendant refused YR's naturalisation application. The letter addressed to his solicitors stated:

> "Re: Mr Ylian Rushiti Albania 28 April 1979
>
> I refer to your client's application for British citizenship.
>
> As you know from the guide that accompanied your client's application form, before reaching a decision on whether to grant naturalisation we must be satisfied that a number of statutory requirements have been met, one of which is the good character requirement. Character is not defined in law and a broad view is taken of an applicant's conduct and behaviour when deciding whether this requirement has been met. This includes the extent to which an applicant has been honest and co-operative in their dealings with the Home Office.
>
> In this instance we recognise that you have brought to our attention that your client has knowingly employed a false nationality status since his arrival in the United Kingdom up until such time that he has submitted an application for naturalisation.
>
> Because of this, the Secretary of State cannot be satisfied that any person who had <u>intended</u> to deceive the UK Border Agency by maintaining that he was a Kosovan national until he had acquired indefinite leave to remain in the United Kingdom can

> be regarded to be of "Good Character" for the purposes of naturalisation, as Mr Rushiti then applied for British citizenship on 21 October 2011 and stated that his true place of birth was not Kosovo, but Drashovice, Albania. He has maintained a long standing period of deception between November 1999 and 21 October 2011 when he informed the Home Office of his true nationality.
>
> In view of his failure to disclose his true citizenship status to the Home Secretary for over a decade, thereby constituting a deliberate attempt by him to mislead a Government department, the Secretary of State cannot be satisfied that Mr Rushiti meets the "Good Character" requirement for naturalisation, she has therefore refused Mr Rushiti's application for British Citizenship. This decision has been reached irrespective of whether or not the deception that has been knowingly practised by Mr Rushiti turned out to be material to the valid indefinite leave to remain status that he subsequently obtained. It is also noted that your client has fraudulently obtained a Home Office travel document number T0031542 which further detracts from his ability to comply with this requirement."

15. On 25 September 2012 YR's solicitor wrote requesting the Defendant to reconsider the decision. On 18 December 2012 the Defendant wrote maintaining the refusal. The letter stated:

> "Mr Rushiti entered the United Kingdom in 1999 and applied for asylum in the details of Yuan Ryshyti, born 26 April 1979 in Kosovo. He maintained this deception throughout his stay in the United Kingdom until he applied for British citizenship. He applied using the details of Ylian Rushiti, born 28 April 1979 in Drashovice, Albania. Although Mr Rushiti's deception proved not to be material to his acquisition of Indefinite Leave to Remain (which was eventually granted outside of the rules after earlier refusal of his asylum claim), it was material to his acquisition of a Home Office travel document. The broad requirement for such a document is for the applicant to have no other means of travel. As a national of Kosovo Mr Rushiti would have had no means of acquiring a passport in the United Kingdom. As an Albanian he would have been able to apply for an Albanian passport. His deception was material to the acquisition of the Home Office travel document. I have reviewed the consideration given to this application and the decision made on it and I am satisfied that the correct procedures were followed and the correct decision was taken to refuse. There are no grounds for reconsideration of the application"

16. Meanwhile on 26 November 2012 YR issued this application for judicial review. Permission was refused by HHJ Kaye QC sitting as a Deputy High Court Judge on

26 March 2013. On 31 October 2013 Collins J granted permission after an oral renewal application.

The Facts: AL

17. AL is a citizen of Albania where he was born on 2 May 1977. He arrived in the UK on 15 May 1999 at Waterloo station. He told immigration officers that he was of Albanian nationality and this was recorded on the SAL 1 form.

18. Thereafter AL claimed asylum. He did so claiming to be a national of Kosovo and using a false name, Adriatik Elezi. This was the false identity which he used in all communications with the immigration authorities and Home Office up until the time he made his application for naturalisation. In a statement of 20 November 2013 he says that he did this because he was told by his solicitors that if he told the truth about his Albanian nationality, his application would be bound to be rejected.

19. The grounds for claiming asylum appear at least in part from the Defendant's letter refusing the asylum claim. AL claimed that he feared persecution by the Serbian military police; that his house in Kosovo was burnt down during the war; that he now had no home in Kosovo to which to return; and that his father was a member of the KLA which caused AL to be a target of persecution. All this was untrue, and amounted to an elaborate fabrication to support a fraudulent claim for asylum.

20. On 3 August 2000 the Defendant refused the asylum claim. The letter noted that the Defendant seriously doubted that AL was of Kosovan nationality and that it was likely that the evidence was submitted solely in order to embellish his account, but refused the claim on the grounds that conditions in Kosovo had improved sufficiently to remove any well founded fear of persecution.

21. AL launched an appeal against the refusal of the asylum claim, but the appeal was abandoned as recorded on an order dated 8 January 2001.

22. On 21 June 2010 AL made an application, through his then solicitors Joy & Co, for indefinite leave to remain in the false name of Adriatik Elezi. The covering letter referred to his nationality as Albanian, and also contained a reference to there being an absence of close relatives in Albania.

23. On 22 October 2010 the Defendant wrote to AL seeking passport photos and other identity information. The letter included an information summary to be returned with the requested documents, which listed the Claimant's nationality as being the Federal Republic of Yugoslavia (which is consistent with him being Kosovan but not Albanian). This was not corrected.

24. On 19 November 2010, AL was granted ILR by the Defendant. The covering letter referred to AL as being from Kosovo. AL did not respond to correct this misimpression. The letter did not identify the grounds upon which ILR was granted, save that it was based on AL's individual circumstances. The case notes suggest that leave to remain was granted due to the length of AL's residence here and the fact that he had worked here during that period.

25. On 10 January 2011 AL applied, again through Joy & Co, for a Home Office travel document. The letter enclosed a declaration signed by AL with a statement of truth that AL was of Kosovan nationality and born in Kosovo. The covering letter repeated those details. It went on to say:

> "Please note that our client is exempted from completing Section 3, 4.1 and 4.2 of the application because his own national authorities in the UK are unable to issue any Passport or Travel Document to the applicant because this applicant is yet to register in his own country.
>
> Please note that this applicant left his country of origin in fear of persecution for his own life and was completely unable to attend the register office as he did fear persecution by his own national authorities due to his ethnicity.
>
> It is his own national authorities' policy that unless someone already exists on the national register, they will be unable to issue any passport or travel document to any applicant such as this applicant."

26. There is no evidence to substantiate any of this in relation to AL as an Albanian national, and by stating that he was of Kosovan nationality, AL was deceiving the immigration authorities in a matter which was of central materiality to the application. In a statement dated 20 November 2013, signed by AL for the purposes of these proceedings he says:

> "8. Even though I wanted Joy &. CO to write back to HO returning the original Home Office grant of status documents amending the details, I was in urgent need to travel abroad because my father, was very ill, he had an operation due to heart attack at that time **(the evidence from the hospital is enclosed)**.
>
> 9. I attended Albanian Embassy in London and asked them to issue to me Albanian passport so I could use it to travel, however, I was advised by them that any passport application had to be made in person in Albania and not in the UK.
>
> 10. At the same time my mother informed me that my father's health deteriorated, and there was a possibility that I would never see him again.
>
> 11. I decided to scarify and apply for the HO TD using the ISD issued to me by HO, however, Joy & CO Solicitors refused to assist me in relation to the HO TD application.
>
> 12. The main reason for them to refuse to assist me was that in the file they found that I told them that I was from Albania and HO granted me as a Kosovan national, however, I tried to convince them by telling them that I was an ethnic Albanian. I

> did this in order to obtain the HO TD and see my father after so many years."

27. This statement is demonstrably untrue: the travel document application was made by a letter sent by Joy & Co and signed on behalf of those solicitors. Notwithstanding what he says at the end of paragraph 8, no medical evidence about AL's father's health has been provided.

28. On 23 March 2011 the Defendant issued a Home Office Travel Document to AL explaining that it was issued on the basis that some Kosovan nationals were experiencing difficulty in obtaining passports.

29. On 10 February 2012, AL made his application, through his solicitors, for naturalisation as a British citizen. The application letter revealed the falsity of his previous name and nationality, admitted that he is an Albanian citizen and sought naturalisation in the name of Adriatik Laci. At paragraph 10, the letter sought to explain the deception involved in obtaining the Home Office Travel Document in the following terms:

> "In addition to this representation we wish also to state that it is accepted that the Secretary of State has issued to the above named applicant a HO TD, however, this documents (sic) has been issued to him under truly compassionate circumstances. This was done to enable the applicant to visit his very ill family members that were receiving intensive medical treatments at that time. We are also inviting the Secretary of State not to place weight on this issue because our client attended his Albanian Embassy in London and they advised him that they were unable to issue Albanian passports to Albanian citizens in the UK due to the fact that Albanian Government was issuing to its citizen biometric passports, so, the applicant had to apply in person in Albania to have his fingerprints taken. As you may be aware from your records, our client was in need to travel as a matter of urgency to see his very ill and old father that he did not see for 11 years, he was unable to get a passport through his national authorities in London, so, he had no choice but to apply for HO TD using his ILR status which was granted to him by the Secretary of State outside the Immigration Rules."

30. It is not right to say that AL had no choice but to apply to the Home Office maintaining the deception that he was Kosovan. No reason is advanced why it was not possible to obtain a travel document from the Albanian authorities for the specific purpose required, even if there were difficulties in getting a passport. If it were impossible, there is no reason why this could not have been explained to the Home Office in applying for a Home Office Travel Document. The explanation put forward in this letter is inconsistent with what was said when the Travel Document was being applied for.

31. On 13 August 2012, the Defendant refused AL's naturalisation application. The letter to his solicitors stated:

> "As you know from the guide that accompanied your client's application form, before reaching a decision on whether to grant naturalisation we must be satisfied that a number of statutory requirements have been met, one of which is the good character requirement. Character is not defined in law and a broad view is taken of an applicant's conduct and behaviour when deciding whether this requirement has been met. This includes the extent to which an applicant has been honest and co-operative in their dealings with the Home Office.
>
> In this instance we recognise that you have brought to our attention that your client has knowingly employed a false identity since his arrival in the United Kingdom up until such time that he has submitted an application for naturalisation.
>
> In light of the prevailing circumstances the Secretary of State cannot be satisfied that any person who had intended to deceive the UK Border Agency by maintaining that he was a Kosovan National named Adriatik Elizi born in Peje, Kosovo on the 2 May 1977 in pursuit of asylum status in the United Kingdom, whilst in reality this individual was fully aware that he was an Albanian national whose true identity is that of Adriatik Laci born in Tirana, Albania on 2 May 1977, can be regarded to be of "Good Character" for the purposes of naturalisation. Your client has maintained a long standing period of deception between May 1999 and May 2012 at which point he has now informed the Home Office of his true identity. We also note that in March 2011 your client has also acquired a Home Office travel document T00320437 in a false identity.
>
> In view of your client's failure to disclose his true identity to the Home Secretary for well over a decade thereby constituting a deliberate attempt by him to mislead a Government department, the Secretary of State cannot be satisfied that Mr Laci meets the "Good Character" requirement for naturalisation, she has therefore refused your client's application for British Citizenship. This decision has been reached irrespective of whether or not the deception that has been knowingly practised by Mr Laci turned out to be material to the valid discretionary leave/indefinite leave to remain status that he subsequently obtained."

32. On 29 August 2012, AL's solicitors sought a reconsideration of the Defendant's refusal. On 9 November 2012 AL issued this application for judicial review. Permission was refused on paper by HHJ Curran QC sitting as a Deputy High Court Judge on 9 April 2013. On 21 November 2013, Simon Picken QC, sitting as a Deputy High Court Judge, granted permission on AL's renewed oral application.

The Legal framework

33. A person may acquire naturalisation as a British citizen in accordance with section 6(1) of the British Nationality Act 1981 ("the 1981 Act"):

> "***6.— Acquisition by naturalisation.***
>
> *(1)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.*"

34. Schedule 1 to the 1981 Act sets out the requirements for naturalisation as a British citizen. This includes at paragraph 1(1)(b) "*that he is of good character*". Good character is not defined under the 1981 Act.

35. A number of principles are well established:
    (1) An applicant bears the burden of satisfying the Secretary of State that he is of good character. It is not for the Secretary of State to establish that the applicant is not of good character: see ***Secretary of State for the Home Department v SK (Sri Lanka)*** [2012] EWCA Civ 16 per Stanley Burnton LJ at [31], [38]; ***MH & others v Secretary of State for the Home Department*** [2008] EWHC 2525 (Admin) per Blake J at [41].

    (2) Establishing good character is a condition for the grant of naturalisation. As is clear from the wording of the statute, it is a necessary but not a sufficient condition. If good character is established, the Secretary of State "may, if [she] thinks fit" grant the application; she is not bound to do so. If the condition is not fulfilled, she has no power to grant British citizenship. She has no power to waive the requirement that the applicant must satisfy her that he is of good character: see ***SSHD v SK (Sri Lanka)*** per Stanley Burnton LJ at [36].

    (3) The concept of good character involves standards of behaviour on which views may reasonably differ. Within that range of reasonable views it is for the Secretary of State, not the Courts, to set the standard in assessing whether the applicant has established that he is of good character. As Nourse LJ observed in ***R v Secretary of State for the Home Department ex parte Mohamed Fayed (No 2)*** [2001] Imm AR 134 at [41]:

> "41. In ***R v. Secretary of State for the Home Department, ex parte Fayed*** [1998] 1 WLR 763, 773F-G, Lord Woolf MR referred in passing to the requirement of good character as being a rather nebulous one. By that he meant that good character is a concept that cannot be defined as a single standard to which all rational beings would subscribe. He did not mean that it was incapable of

> definition by a reasonable decision-maker in relation to the circumstances of a particular case. Nor is it an objection that a decision may be based on a higher standard of good character than other reasonable decision-makers might have adopted. Certainly, it is no part of the function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances."

The argument

36. Against this background Mr Collins on behalf of YR and AL submits that the Secretary of State was not entitled to take the view that the long history of their deceptive behaviour prevented them from having established good character. This somewhat startling conclusion was said to follow from the terms of paragraph 9.5 of Annex D to Chapter 18 of the Nationality Policy Guidance and Casework Instruction issued to caseworkers by the Home Office at the relevant time ("the Nationality Instructions"). The relevant passages have since been amended in a way which would make Mr Collins' argument untenable. At the time of the decisions they provided as follows:

Chapter 18

> *"18.1.3 Naturalisation is at the discretion of the Home Secretary. Under section 6 of the British Nationality Act 1981, he <u>may</u> grant a certificate of naturalisation to a person of full age and capacity if he is satisfied that person meets the requirements set out in Schedule 1 to the Act. He <u>can</u> refuse to grant a certificate to a person who meets these requirements, but he cannot grant a certificate to a person who does not meet them."*

> *"18.1.7 In considering the exercise of discretion it is important to look at the case as a whole. We need to be sure, before we agree to waive a requirement, that applicants are of good character and have genuinely thrown in their lot with this country. The points which need to be considered are set out in the Annexes to this Chapter."*

Annex D

> *"2.1 Caseworkers should not normally consider applicants to be of good character if, for example, there is information to suggest:*
> ...

e. They had practiced deceit in their dealings with the UK Government (see Section 9);

....

*9. **Deception***

9.1 Caseworkers should count heavily against an applicant any attempt to lie or conceal the truth about an aspect of the application for naturalisation - whether on the application form or in the course of enquiries. Concealment of information or lack of frankness in any matter must raise doubt about an applicant's truthfulness in other matters.

…

*9.5 **Evidence of fraud in the immigration and nationality process***

9.5.1 Where there is evidence to suggest that an applicant has employed fraud either:

- *during the citizenship application process or*
- *in previous immigration application processes and*
- *in both cases the fraud was directly material to the acquisition of immigration leave or to the application for citizenship*

*caseworkers should refuse the application **unless** the circumstances in 9.5.2 apply. In such cases, the applicant should be advised that an application for citizenship made within 10 years from the date of refusal on these grounds would be unlikely to be successful.*

9.5.2 Where deception has been employed on a previous immigration application and was identified and dismissed by UKBA or was factually immaterial to the grant of leave, caseworkers should not use that deception as a reason by itself to refuse the application under section 9.5.1.

Examples:

***A**. Mr A applied for and was granted asylum status as a refugee on the basis that he was a Kosovan national and therefore at risk on return to Kosovo. This resulted in a subsequent grant of Indefinite Leave to Remain (ILR) in the UK. The individual was in fact Albanian who was therefore not at risk on return to Kosovo as he would in fact have been removed to Albania if his true nationality had been known by UKBA.*

*This deception was clearly material to the grant of ILR as **BUT FOR** the deception regarding nationality refugee status would not have been secured and so, therefore, nor would have ILR been secured. The application should therefore be refused on this basis.*

***B**. Mr B applied for asylum on the same grounds as Mr A. However, he was not granted ILR on the basis of a successful refugee claim. He was instead granted ILR under a Family Concession to which a consideration of nationality was not the primary factor. The deception was not therefore material to the grant of ILR as regardless of that fact that he claimed to be Kosovan on entry to the UK Mr B would in any case have been granted ILR*

under the Concession as a result of his family arrangements. In this scenario UKBA has already disregarded the claimed nationality of the individual as being immaterial to the grant of ILR under the Concession. It would therefore be perverse to assert that a previously disregarded fact could be relevant at a later date to a consideration of good character. Nationality on the date of application is, in any case, irrelevant to the naturalisation consideration.

C. *Mr C entered the UK in a false name, as he had previously been removed from the UK in his previous identity. On applying for citizenship he has now admitted his true identity. As the fraud was material to the good character requirement, we should refuse the application and impose a ten year ban.*

D*. Mr D entered the UK in a false name, as he had previously been removed from the UK in his previous identity. Prior to making his application for ILR he admitted to the deception. UKBA took this into account, but decided not to take any action and granted ILR on compassionate grounds. As the fraud had been dismissed during an earlier consideration of the facts by UKBA we should not take it into account when deciding the citizenship application.*

E*. Mr E did not declare on his application form for citizenship that he had a minor conviction, which has since come to light through our internal checks. The conviction was one that would normally fit into our definition of a minor offences and which would not result in refusal of British citizenship. This means the individual should not be refused as the deception in question is not material to the decision."*

37. Based on these provisions Mr Collins submitted that:

(1) The deception practised, or intended to be practised, by YR and AL did not result in any benefit to them. They were not granted asylum. The basis of the Defendant's decision on their naturalisation applications was that the deception had been immaterial to the decision to grant ILR, as the Defendant expressly conceded in her Grounds on this application.

(2) YR and AL's cases are therefore directly analogous to the example of Mr B in paragraph 9.5.2 of the Nationality Instruction. Their ILR was granted pursuant to criteria to which their nationality was not material in the same way as would apply to someone granted ILR under a family concession.

(3) The deception of the Home Office in relation to the Travel Documents falls into the same category; it had no materiality to the decision to grant ILR, upon which the naturalisation application was based.

(4) Accordingly the Secretary of State was in breach of the public law principle that in the interests of achieving consistency and fairness she should follow her own published policies and not depart from them without good reason (see for example ***R (Lumba) v Secretary of State for the Home Department*** [2012] AC 245; ***Kambadzi v Secretary of State for the Home Department*** [2011] 1 WLR 1299 at [36].)

38. I have some doubt whether the Defendant was right to concede that the deception was immaterial to the grant of ILR. In YR's case it appears from the case notes that the ILR application would not have succeeded but for the existence of the long outstanding human rights application, which was an application predicated on YR's fraudulent account of his nationality and background and which could not have been advanced in the first place had YR not deployed the deception. Moreover, in both YR's and AL's case they were allowed to remain here as asylum seekers for the substantial period until the appeals were rejected or abandoned, which was the springboard for the long residence which led to the grant of ILR. However the applicants are entitled to hold the Defendant to the concession, which was not withdrawn.

39. Nevertheless I am unable to accept Mr Collins' argument for a number of reasons.

40. The question whether YR and AL obtained any benefit from their deception is not the right starting point, and is of little significance in comparison to the deception itself. The starting point is that the Secretary of State has to be satisfied that the applicant is of good character and any deliberate attempt to deceive the immigration authorities must necessarily count against an ability to establish good character.

41. In ***SSHD v SK (Sri Lanka)*** Stanley Burnton LJ said at [36]:

> "I would add two further comments. First, the judge, and indeed counsel, referred to the Nationality Instructions as policy guidance. However, most of them are not guidance as to policy in the sense of a statement as to the Secretary of State's exercise of a discretion or power, of the kind considered in ***R(Lumba) v Secretary of State for the Home Department*** [2011] UKSC 12 [2011] 2 WLR 671. They are in the main practical instructions to decision-makers as to how they are to go about deciding whether to be satisfied that an applicant for naturalisation has shown that he is of good character. Secondly, since the Secretary of State cannot waive the statutory good character requirement, the Instructions could not require her to accept the good character of an applicant who could not sensibly be regarded as such."

42. The Secretary of State is not entitled to adopt a policy which prevents her from taking into account circumstances which are relevant to the exercise of the discretion: see Lord Browne Wilkinson in ***R v Home Secretary ex parte Venables*** [1998] 1 AC 407, at 496H.

43. A policy is not a rule and must be applied flexibly so as to allow departure from it where fairness and good sense require in order to do justice in the particular circumstances of the case: see Sedley LJ in ***Pankina v. Secretary of State for the Home Department*** [2011] QB 376 at [28]; and Lang J in ***Poloko Huri v Secretary of State for the Home Department*** [2014] EWHC 254 (Admin) at [50].

44. The Nationality Instructions must be approached and interpreted against this background. Paragraph 18 identifies that all the circumstances of the case must be considered and paragraph 2.1(e) of Annex D recognises as the starting point in cases of this kind that applicants who have practised deceit in their dealings with the UK Government will not normally be treated as of good character. Paragraph 9.5.1 reinforces this approach where the deceit is practised in the naturalisation application or in previous immigration application processes: any such deceit will normally be fatal to the applicant's ability to establish good character. Paragraph 9.5.2 identifies limited exceptions where the caseworker *may* treat the deception as not being determinative of a lack of good character, but it cannot require the Secretary of State to ignore a circumstance which must be a relevant factor, whether or not determinative, in assessing whether she is satisfied that the applicant is of good character.

45. The approach is therefore not, as Mr Collins would have it, to start with paragraph 9.5.2 and to conclude that if an applicant falls within one of the excepted situations or a directly analogous one, he must be treated as being of good character. The exercise requires an assessment of good character taking into account all the circumstances of the case which will include an attempt to deceive as a highly relevant consideration. If an applicant brings himself within the circumstances of paragraph 9.5.2, his attempted deception in the immigration application process may, exceptionally, be treated as a factor which is not fatal to his establishment of good character; but it will not necessarily do so and paragraph 9.5.2 does not require the deception to be ignored in considering all the circumstances of the case.

46. Accordingly even were Mr Collins correct in his contention that YR's and AL's circumstances are analogous to those of Mr B, the Secretary of State was nevertheless entitled, and indeed bound, to take into account their long history of deception as relevant to the issue of their good character. This includes the deception in applying for the Home Office travel documents, which were outside the scope of 9.5.1 or 9.5.2. They were not "immigration application processes" within the meaning of the paragraph but rather applications consequent on the ILR status which had already been obtained in the immigration application process.

47. In any event the case of Mr B in paragraph 9.5.2 is not analogous to the circumstances of YR and AL in this case. The example given in that subparagraph can only sensibly be understood as assuming that when the ILR application is made by Mr B, the deception is known to the immigration authorities and disregarded as immaterial to the decision based on the family concession. The reasoning set out is that because the deception has been consciously disregarded in granting ILR, it would be "perverse" to take it into account when considering good character upon the subsequent naturalisation application. I leave open the question whether it would indeed be perverse in such a case to leave the deception out of account, or whether that would involve the Secretary of State failing to take account of behaviour which is material to the establishment of good character. But on any view it could not be said to be perverse to take into account a deception when considering good character if in an earlier application for ILR the deception was unknown, even if the deception were immaterial. If the paragraph were to be interpreted as effectively wiping the slate

clean once the ILR decision had been made it would be an unlawful fetter on the Secretary of State's discretion: it would be perverse NOT to take into account a prior deception of which the immigration authorities became aware for the first time only when considering good character under a naturalisation application.

48. As for the argument that AL and YR obtained no benefit from the deception, there are two answers. First, whether any benefit is derived has little relevance to the central question of good character. Deliberately lying in an attempt to obtain a benefit is as much evidence of dishonesty and bad character when the attempt fails as when it succeeds. The impact of the attempt on an assessment of good character is not to be measured by whether the fraudulent purpose is successful or the hoped for benefit obtained. Secondly it is not right to say that YR and LA derived no benefit from their false asylum claims because they were ultimately unsuccessful. Had the deception not been practised, they would have been liable to immediate removal. Whilst the deception was being practised they were asylum seekers who were entitled to remain pending the determination of their claims (and potentially to accommodation and other support under sections 95 to 98 of the Immigration and Asylum Act 1999). Their deception gained them the benefit of being here for that period without risk of removal. Moreover their deception in relation to the travel document applications, which was central to those applications, resulted in the travel documents being issued, which would not have occurred but for the deceit.

49. For all these reasons the applications must fail. Kenneth Parker J recently reached a similar conclusion in ***R (Kurmerkaj) v Secretary of State for the Home Department*** [2014] EWHC 1701 (Admin) on facts which are not materially distinguishable. Mr Collins sought to distinguish the case on the grounds that the applicant there had obtained exceptional leave to remain before obtaining ILR. It was accepted that the existence of the previous ELR had been immaterial to the decision to grant ILR. The critical distinction was said to be that the applicant in that case had derived a benefit from the deception in acquiring ELR whereas YR and AL had obtained none. That is a distinction without a difference: benefit is not the main consideration in whether an applicant has established good character, and in any event YR and AL obtained benefits from their deception, as I have explained.