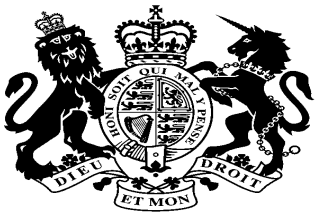

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DC/00082/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th September 2019	**On 18th September 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DT
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms A Harvey, of Counsel, instructed by Turpin Miller LLP Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in 1983. He arrived in the UK in October 1999 and claimed asylum with his true name but with an incorrect date of birth (1983 instead of 1979). He also said untruthfully that he was from Kosovo when in fact he was from Kukes in northern Albania. He was given four years exceptional

leave to remain from March 2000, and then indefinite leave to remain. He was naturalised as a British citizen in March 2006.

2. In 2007 the claimant married his wife in Albania, and she applied for entry clearance. The British Embassy in Albania notified the Secretary of State that the claimant had, in their opinion, obtained his naturalisation by means of fraud. In September 2008 the Secretary of State wrote to the claimant setting out that consideration was being given to the deprivation of his British citizenship, however on 28th October 2008 he was informed that no decision had been made to deprive him of his citizenship. On 11th January 2010 the respondent informed the claimant that steps were being taken to remove his citizenship and that he had a right of appeal. He exercised his right of appeal. This appeal was dismissed by the First-tier Tribunal, but an error of law was found by the Upper Tribunal in the decision and it was set aside. The deprivation decision of 11th January 2010 was withdrawn by the Secretary of State in July 2013 due to nullity proceedings being commenced.

3. On 22nd March 2013 the Secretary of State issued a decision that the claimant had never been a British citizen and, as a consequence, his certificate of naturalisation was null and void. A judicial review challenging this decision was commenced, and on 3rd February 2018 that decision was withdrawn following the decision of the Supreme Court in Hysaj & Ors v SSHD [2017] UKSC 82.

4. The Secretary of State then made a decision on 7th April 2018 stating that he was once again considering depriving the claimant of his citizenship under s.40(3) of the British Nationality Act 1981, which was followed by a decision giving notice of intention to deprive the claimant of his citizenship dated 14th December 2018. His appeal against this decision was allowed by First-tier Tribunal Judge Phull in a determination promulgated on the 29th April 2019, however for the reasons set out in my decision appended at Annex A I found that the First-tier Tribunal had erred and set aside the decision with no findings preserved.

5. The matter came before me to remake the appeal.

Submissions – Remaking

6. The Secretary of State submits, in short summary that the claimant committed fraud in order to obtain his British citizenship. He was untruthful about his age and citizenship when he applied for leave to remain in the UK and did not disclose that deception when he applied for citizenship; and, it is submitted by the Secretary of State he would not have been granted citizenship if he had told the truth about that deception; and thus the deception was therefore material in his obtaining citizenship.

7. As the claimant has a genuine and subsisting parental relationship with his British citizen children in the UK the Secretary of State argues that he has a strong claim to remain under Article 8 ECHR by application of s.117B(6) of the Nationality, Immigration and Asylum Act 2002, and possibly also by virtue of paragraph

276ADE(1)(iii) of the Immigration Rules as very shortly he will have been in the UK for 20 years, and so, it is argued, his removal from the UK is not a foreseeable consequence of deprivation of his citizenship as he could make a strong human rights application to remain. Whilst Mr Melvin accepted that there would be consequences of the deprivation, such as the claimant having no work permission and thus having to give up work, he argues that the impact on the claimant would not be sufficiently compelling given the weight that must be given to the public interest in depriving those who deceive the Secretary of State in the citizenship application process. It was not clear, in any case, that the claimant would not have savings which could tidy him over this period. This was not one of the rare and compelling cases where discretion should have been exercised in the claimant's favour not to deprive him of his citizenship despite the power to do so. As such his appeal under s.40(3) of the British Nationality Act 1981 should fail as discretion was exercised appropriately and fairly to deprive him of his citizenship.

8. Ms Harvey, for the claimant, submits that the appeal should be allowed for the following reasons. She contends that I erred in law in my error of law decision in finding that the policy generally not to deprive those who had been in the UK for 14 years of their citizenship, which was in force until the 20th August 2014, was not relevant to the legality of the decision to deprive this claimant of his citizenship made on 14th December 2018. She accepts however that this is a point that she will have to argue in an application for leave to appeal to the Court of Appeal if the appeal does not succeed on the alternative basis which she puts forward: namely that discretion should have been exercised differently and the applicant should not have been deprived of his citizenship because it would amount to a disproportionate interference with the claimant and his family's right to respect for family and private life as protected by Article 8 ECHR.

9. The claimant has a British citizen son, A, born in May 2008 in Albania, who entered the UK clandestinely in 2011 with his mother, the claimant's wife. His son has now lived in the UK for more than 7 years. The couple also have a daughter, AA, who was born in the UK on 1st December 2012, and who is also a British citizen. The claimant's wife is currently on the ten year route to settlement as a wife of a British citizen. She will complete the first 30 months of this process in October 2019, and thus will have to apply next month for a further tranche of Article 8 ECHR leave, which she will be unable to do if her husband is no longer a British citizen. It is argued by Ms Harvey that the reasonably foreseeable consequences of deprivation of the claimant's citizenship are disproportionate as there is no assurance in this case that the claimant will not be left without any form of status for a period of time, in fact the submissions of Mr Melvin made it clear that this would be the case and it would be up to the claimant to make an application on human rights grounds and that he will therefore have a period in "limbo" of many months.

10. Ms Harvey argues that as someone with no status the claimant will not be permitted by law to to rent property; work; claim benefits; drive; his bank account can be closed; and he will not be permitted free access to all of the National Health

Service. These provisions make up the "compliant environment" policy of the government designed to make it hard for those without permission to remain to stay in the UK. The claimant is currently in work, and his wife works part-time as a warehouse operative, and the probable outcome of his being unable to continue in his work and being unable to remain in his rented property once he has no leave to remain is that the family would be forced out of their current accommodation and would have to rely upon Social Services to provide accommodation; or that the claimant and his wife would be forced to leave the UK and return to Albania, which would in turn have a detrimental impact on the welfare of their young British citizen children, who would thereby be deprived of the benefit of their British citizenship and their EU rights. It is also argued that deprivation of citizenship on the basis of deception under s.40(3) of the 1981 Act should be seen as a less serious basis of deprivation than deprivation under s.40(3) of the 1981 Act on the basis that the deprivation is conducive to the public good, and therefore ultimately on consideration of all of the facts of this case it should be found that deprivation of the claimant's citizenship is a disproportionate interference with the claimant and his family's right to respect for family and private life.

Conclusions – Remaking

11. Under s.40(3) of the British Nationality, Act 1981 the Secretary of State may deprive a person of citizenship if the Secretary of State is satisfied that the naturalisation was obtained by means of a) fraud, b) false misrepresentation or c) concealment of a material fact. As set out in Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC) at paragraph 9C the deception must have motivated and been operative in the grant of citizenship. It is accepted by all that the claimant lied about his age and nationality when he obtained his exceptional leave to remain and indefinite leave to remain. I have found, in the error of law decision, that these deceptions were operative in the grant of his leave to remain, and the failure to declare these deceptions on the application for naturalisation and the confirmation instead that the claimant was of good character, motivated the acquisition of citizenship.

12. I must now go on to consider whether the Secretary of State should have exercised his discretion differently. As Ms Harvey sets out s. 40(3) of the 1981 Act gives the Secretary of State the power to deprive the claimant of his citizenship not a duty to do so. It will not be lawful to exercise that power if it would amount to a disproportionate interference with the Article 8 ECHR rights of the claimant and his family.

13. This interference with the claimant's Article 8 ECHR rights might include removal from the UK if this is a reasonably foreseeable consequence of deprivation of citizenship, see paragraph 40 of BA (deprivation of citizenship: appeals) [2018] UKUT 85 citing AB (British citizenship: deprivation: Deliallisi considered) Nigeria [2016] UKUT 451. There is agreement by the parties that the claimant would have a strong Article 8 ECHR claim to remain in the UK, particularly by reference to

s.117B(6) of the Nationality, Immigration and Asylum Act 2002 as he has two British citizen children, one of who has resided in the UK for 7 years. There are no removal directions and no deportation order with respect to the claimant. In these circumstances I do not find removal from the UK would be a reasonably foreseeable consequence of the deprivation of citizenship, particularly when consideration is given to what is said by the Court of Appeal at paragraphs 28 and 29 of Abdul Aziz & Ors v Secretary of State for the Home Department [2018] EWCA Civ 1884 regarding it not being necessary to conduct a proleptic analysis of whether an appellant would be likely to be deported or removed at a later stage.

14. I do not find that the deprivation of the claimant's citizenship would affect the ability of the claimant's wife to make a new application to extend her leave to remain in October 2019 on Article 8 ECHR grounds. She could put forward the same strong Article 8 ECHR grounds to be permitted to remain which it is agreed are open to the claimant in an application to extend her leave to remain. She would continue to have s.3C 1971 Act leave to remain whilst her application was considered. She would continue to be lawfully present and would be able to work part time as a warehouse operative as she current does. She would be able to rent a property, drive, have a bank account and use the national health service. The children are British citizens and their entitlements to all forms of educational, health and social support in the UK would also be unaltered, and likewise they would continue to benefit from being EU citizens.

15. I do find that it is reasonably foreseeable however that the claimant will find himself in the UK without leave to remain for a period of a number of months. There is no assurance that he will be granted leave at the point when he deprived of his citizenship; and as Ms Harvey has observed Mr Melvin clearly took the position that it would be up to the claimant to make an application at that stage which would then be considered in due course by the Secretary of State. As a result during this period of time, as set out in Ms Harvey's skeleton argument, the claimant would not be entitled to work; he would not be entitled to benefits; he would not be permitted to drive; and his bank account could be closed down. He would not be entitled to free NHS treatment bar in limited circumstances, such as emergency treatment. There is no evidence before me that the claimant has any current health problems however, and further I have no evidence which shows on the balance of probabilities that the family's income would become so low as to impact on the welfare of the British citizen children as I have no evidence about the earnings of the claimant's wife or anything in the way of a family budget, and as Mr Melvin has pointed out there is no evidence regarding the current level of the family's savings.

16. I find that the most serious of the consequences flowing from the "compliant environment" legislation on the evidence before me is that under s.21 of the Immigration Act 2014 the claimant would be disqualified from occupying premises under a residential tenancy agreement as he is a person who needs leave to enter or remain and does not have it, and I find that the claimant does currently live (with his family) in rented accommodation with an assured tenancy

agreement. Under further provisions of the 2014 Act his landlord and/ or any agent might be subject to a penalty notice or be found to have committed a criminal offence if he were to remain in the property. As a result, I find that a foreseeable consequence of the decision to deprive the claimant of his citizenship is that he will not be able to live in his current home. As I have indicated above I have no evidence to find on the balance of probabilities that the claimant's wife and his children could not continue to reside in the property as I have no evidence indicating that his wife would not be able to pay the rent either from income, savings or help from friends or family. There is also no evidence before me indicating that the claimant, or indeed his entire family might not be able to live with friends or neighbours in the UK during this period. It follows I have no basis to make any negative findings going to the likely impact on his family life, and that of his family, of his losing his right to occupy premises under a residential tenancy agreement.

17. I find therefore on the state of the evidence before me concerning the impact of a period of this period of "limbo" on the claimant and his family, which I have assessed as his being likely to have a number of months without leave to remain whilst his application on human rights grounds is considered, dose not suffice to show that on the balance of probabilities that the deprivation of his citizenship would amount to a disproportionate interference with his Article 8 ECHR rights or otherwise would amount to a breach of his or his family's human rights. I also do not find that there is any other exceptional feature of this case which means that discretion should have been exercised differently. I note what was said by the Upper Tribunal at paragraph 44 of BA (deprivation of citizenship: appeals) [2018] UKUT 85: namely that the Tribunal is required to place significant weight on the fact that the Secretary of state has decided, in the public interest, that a person who has employed deception to obtain citizenship should be deprived of that status. On the totally of the evidence before me I am satisfied that the Secretary of State acted properly in exercising his discretion to deprive the claimant of his citizenship under s.40(2) of the 1981 Act.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I dismiss the appeal.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication

thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to protect the anonymity of family members.

Signed: *Fiona Lindsley* Date: 10th September 2019
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in 1983. He arrived in the UK in October 1999 and claimed asylum with his true name but with an incorrect date of birth (1983 instead of 1979) . He also said untruthfully that he was from Kosovo when in fact he was from Kukes in Northern Albania. He was given four years exceptional leave to remain from March 2000, and then indefinite leave to remain. He was naturalised as a British citizen in March 2006.

2. In 2007 the claimant married his wife in Albania, and she applied for entry clearance. The British Embassy in Albania notified the Secretary of State that the claimant had, in their opinion, obtained his naturalisation by means of fraud. In September 2008 the Secretary of State wrote to the claimant setting out that consideration was being given to the deprivation of his British citizenship, however on 28th October 2008 he was informed that no decision had been made to deprive him of his citizenship. On 11th January 2010 the respondent informed the claimant that steps were being taken to remove his citizenship and that he had a right of appeal. He exercised his right of appeal. This appeal was dismissed by the First-tier Tribunal, but an error of law was found by the Upper Tribunal in the decision and it was set aside. The decision of 11th January 2010 was withdrawn by the Secretary of State in July 2013 due to the nullity proceedings set out below.

3. On 22nd March 2013 the Secretary of State issued a decision that the claimant had never been a British citizen and, as a consequence, his certificate of naturalisation was null and void. A judicial review challenging this decision was commenced, and on 3rd February 2018 that decision was withdrawn following the decision of the Supreme Court in Hysaj & Ors v SSHD [2017] UKSC 82.

4. The Secretary of State then made a decision on 7th April 2018 stating that he was once again considering depriving the claimant of his citizenship under s.40(3) of the British Nationality Act 1981, which was followed by a decision giving notice of intention to deprive the claimant of his citizenship dated 14th December 2018. His appeal against this decision was allowed by First-tier Tribunal Judge Phull in a determination promulgated on the 29th April 2019.

5. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge SH Smith on 16th May 2019 on the basis that it was arguable that the First-tier judge had erred in law in taking account of a former policy which stated that deprivation would not normally be pursued in cases of 14 years residence; in giving consideration to the withdrawn decision to treat the claimant's citizenship

as a nullity; and in applying Part 5A of the Nationality, Immigration and Asylum Act 2002 in an Article 8 ECHR assessment when removal is not an issue.

6. The matter came before me to determine whether the First-tier Tribunal had erred in law.

7. At the start of the hearing I raised with Ms Willocks-Briscoe the issue of whether she accepted that the grounds of appeal did not challenge the findings at paragraph 33 of the decision of the First-tier Tribunal which finds that there was not an operative misrepresentation by the appellant. She argued that there was a general challenge to paragraph 39 but accepted that the grounds did not include a challenge to this finding specifically. She applied to amend her grounds to include a challenge that there was an error of law in paragraph 33 of the decision in failing to take into account material evidence (namely the reasons for refusal letter dated 14th December 2018) and adequately reason this finding. Mr Malik argued that I should not permit the amendment as the Secretary of State was applying very late and had been on notice of the issue with paragraph 33, as it was raised by the claimant's representatives in their responses to this appeal. However, he said that he would not feel prejudiced if the Secretary of State were permitted to amend the grounds and was ready to argue the point as he was confident he could succeed in showing there was no error of law in this paragraph.

8. Whilst the Secretary of State was in a very weak position to apply orally to amend the grounds at this point in time I permitted him to do so as I concluded that it was ultimately in the interests of justice that the point was considered as it was possible that this litigation was more likely to become even further extended if this issue was not considered at this point in time, and in the context of Mr Malik being certain he was fully prepared to argue the issue.

Submissions – Error of Law

9. In his skeleton argument the Secretary of State contends that the claimant committed fraud when applying for citizenship because he said that was a person of good character on his naturalisation application form when he had created a false identity and lied throughout the immigration process to obtain leave to remain in the UK, and so should have answered no to the question regarding good character. It is argued that he therefore falls to be deprived of his citizenship under s.40(3) of the British Nationality Act 1981.

10. Ms Willocks-Briscoe argued her new ground with respect to paragraph 33 of the decision as follows. She argued that it was unequivocally stated in the refusal letter of 14th December 2018 which led to this appeal that the claimant had been granted exceptional leave to remain, and thus subsequently indefinite leave to remain, because he had said he was a minor from Kosovo, see paragraphs 12 to 15 of that letter. In accordance with the decision in BA (deprivation of citizenship: appeals) [2018] UKUT 00085 it was necessary to see if the deception motivated the grant of citizenship. The evidence was clearly there that it did; it had not been apparently considered; and the decision not properly reasoned on this point.

11. It was also argued for the Secretary of State that the First-tier Tribunal erred in law in allowing the appeal by reference to a previous policy in Chapter 55 of the Nationality Instructions on the basis that it might have protected him against deprivation proceedings (as it was operative between June 2010 and August 2014 and stated that when a person had 14 years residence that the Secretary of State would not normal deprive him of his citizenship) and would have applied to him as he had 14 years residence when the nullity proceedings were commenced. The First-tier Tribunal found that reliance on this policy was unfairly denied him because these proceedings were brought after the policy had ceased to have affect because the respondent had wrongly pursued nullity proceedings, which had then to be withdrawn as they were not lawful in accordance with Hysaj. The Secretary of State argues that the First-tier Tribunal have inadequately reasoned the conclusion that an inoperative past policy could benefit the claimant at this point, see particularly what is said in MO (Date of Decision: Applicable Rules) Nigeria [2007] UKAIT 00057. The Secretary of State had good reason not to pursue these deprivation proceedings whilst it was thought that the claimant's citizenship was a nullity following decisions of the Court of Appeal, and thus properly did not do so again until it was clear that his citizenship was not a nullity following the decision in Hysaj in the Supreme Court made in 2018. There is no question of the Secretary of State having delayed improperly in taking the nullity proceedings or in bringing these proceedings when the nullity issue concluded, or his having acted in bad faith or incompetently. The Secretary of State had to apply his policies which applied at the time of decision and there was no basis to think the claimant could have the benefit of this past policy. It would create considerable uncertainty if where the law was found to have been misunderstood by a higher court the Secretary of State had to apply old policy to applicants. Further in 2010, when the first decision was made to deprive the claimant of his citizenship, the claimant had not actually been present in the UK for 14 years, and there was discretion within the policy for the Secretary of State not to grant to those who had been present for 14 years if that was in the public interest, see paragraph the policy and paragraph 23 of the refusal letter of 14th December 2018, and the Secretary of State properly decides issues of the public interest. The issue of general discretion is further considered at paragraph 33 of the refusal letter where the overall proportionality of the decision to deprive the claimant of his citizenship is considered.

12. The Secretary of State also argues that the First-tier Tribunal also erroneously considered it relevant that he had British wife and children, and had private life ties with the UK, and that there would be an unlawful interference with his Article 8 ECHR rights, and applied s.117B of the 2002 Act when that is only applicable to appeals under the Immigration Acts, which does not include an appeal such as this one under the British Nationality Act 1981. Further the claimant does not face removal from the UK as a foreseeable consequence of deprivation of his citizenship as it is found that he has a strong Article 8 ECHR claim to remain and there is no removal decision, see BA. There was a general failure to look at forward looking issues in this analysis.

13. In his skeleton argument and oral submissions Mr Malik argues that it is accepted that the claimant made false representations with respect to his age and nationality to the Secretary of State when he claimed asylum, but there were also elements which have not been challenged as false including the claimant being injured because of a land mine in the Kosovan/Serbian war. The claimant got exceptional leave, according to his document granting his exceptional leave to remain, due to his "particular circumstances" which could mean those circumstances in the Balkans at that time and not his age and nationality. There was no evidence that the claimant's age and nationality were operative reasons for the grant of indefinite leave to remain or his naturalisation. This was the submission that was accepted at paragraph 33 of the decision of the First-tier Tribunal.

14. It is argued for the claimant that when coming to the conclusion at paragraph 33 it is clear that the First-tier Tribunal did consider what was said in the reasons for refusal letter, but there was no supporting or contemporaneous evidence Home Office records and further what is said in the letter of 14th December 2018 is not compatible with what is written in decision letter. At paragraph 12 of the decision letter of 14th December 2018 it says: "Had it been known that you were in fact an adult from Albania, your claim for asylum would have been refused and you would not have qualified for exceptional leave, as you would not have been in need of international protection under the Refugee Convention." The grant of exceptional leave documents dated 18th March 2000 explicitly state however that the claimant was refused refugee status under the Refugee Convention and so clearly he did not get this status because he was a Kosovan minor (as opposed to an Albanian adult) found to be in need of international protection and it was not accepted that he had a well founded fear of persecution in Kosovo. Instead that grant was due to the "particular circumstances of your case". As a result the First-tier Tribunal was properly not satisfied that there was an operative deception on the facts of this case, and in turn was properly not satisfied that his naturalisation was acquired by means of false representations under s.40(3) of the British Nationality Act 1981.

15. If this argument is correct any issues with the failure to exercise discretion under s.40(3) due to the policy are immaterial. However, even though previous policy in Chapter 55 of the Nationality Instructions would not have applied to the claimant at the time of the original decision in 2010, it would have applied at the point when a First-tier Tribunal Judge considered the matter if the ill-judged nullity decision had not been made in March 2013, as by October 2013 the applicant would have had 14 years presence in the UK. It is argued by Mr Malik that the First-tier Tribunal acted properly in considering the application of this policy as the Secretary of State had committed an unlawful act in purporting to nullify the claimant's citizenship. He argued that getting the law wrong had the same affect as the Secretary of State acting in bad faith, or acting in a culpable way with undue delay as was found in FH (Bangladesh) v SSHD [2009 EWCA Civ 385, and in FH (Bangladesh) the appellant was found to be able to benefit from a previous policy because of that delay. He also identified that the policy had been put to the

Secretary of State in the grounds and by the previous representatives and there had been a failure by the Secretary of State to say that they would not have applied the policy to the claimant had it been still in force on public policy grounds, and hence the decision of the First-tier Tribunal that the applicant was entitled to the consideration and benefit of this policy, as set out at paragraph 39 of that decision, was entirely proper.

16. Mr Malik accepted that there was a failure to look for the issue of reasonably foreseeable consequences of deprivation of citizenship in the decision of the First-tier Tribunal when considering Article 8 ECHR but argued that the First-tier Tribunal were permitted to look at discretion under s.40(3) of the British Nationality Act 1981 as was found in Deliallisi (British citizen: deprivation appeal: Scope) [2013] UKUT 00439. As a result it was correct for the First-tier Tribunal to have looked at the issue of balancing public policy considerations against an individuals rights.

17. Mr Malik also drew attention to the fact that at paragraph 7 of the decision the First-tier Tribunal had seemingly applied the wrong burden of proof as it was said to be on the claimant when clearly it was for the Secretary of State to show that the conditions for deprivation of citizenship in s.40(3) of the British Nationality Act 1981 were met.

18. At the end of the hearing I reserved my determination, but I sought the views of the parties on where the matter should be remade if I found that there was an error of law. It was agreed that it should be remade in the Upper Tribunal if an error was found.

Conclusions – Error of Law

19. Under s.40(3) of the British Nationality, Act 1981 the Secretary of State may deprive a person of citizenship if the Secretary of State is satisfied that the naturalisation was obtained by means of fraud, false misrepresentations or concealment of material fact. As set out in Pirzada at paragraph 9C the deception must have motivated and been operative in the grant of citizenship.

20. At paragraph 33 of the decision the First-tier Tribunal finds that the Secretary of State has "not elaborated what the operative misrepresentations were" and that there was a "lack of evidence" that the reason the claimant got his exceptional leave was just age and nationality. At paragraph 39 the First-tier Tribunal find that for all of these reasons the deprivation is not lawful or appropriate, so I find that this was one basis on which the deprivation decision was found not to be lawful, along with the argument about the failure to apply the previous policy in Chapter 55 of the Nationality Instructions and the incompatibility with Article 8 ECHR.

21. I find that there was an error of law by way of a failure to consider material evidence and give reasons for why the evidence as set out in the reasons for refusal letter of 14th December 2018 did not satisfy the First-tier Tribunal that it was for reason of his falsely provided age and nationality that the grant of

exceptional leave was made to the claimant. The Secretary of State says at paragraph 9 of that letter explicitly that the grant was on the basis that the claimant was an unaccompanied minor from Kosovo, and reference is made at paragraph 12 to policies relating to unaccompanied minors and to a country policy relating to "Nationals of Kosovo". I do not find that the statement in paragraph 12 that the claimant would not have been granted refugee status as an Albanian adult is contradictory with the grant of discretionary leave papers issued in March 2000 to the claimant. This statement is added to explain that whilst he was granted discretionary leave under the above policies (and obviously therefore not refugee status) if he had told the truth he would not have qualified for refugee status on the true facts either.

22. I likewise find that the First-tier Tribunal erred in law in finding that the decision was legally flawed for want of consideration and benefit from the respondent's previous policy at Chapter 55 of the Nationality Instructions, which was removed in August 2014 and which gave weight to presence in the UK for 14 years as a factor which would generally not lead to deprivation proceedings being initiated. The Secretary of State acted properly, and not in bad faith or in any way which could properly be described as culpable, in pursuing the nullity proceedings against the claimant as there was a generally accepted basis in law for those proceedings prior to the decision in the Supreme Court in Hysaj. There is a long line of caselaw which flows from the House of Lords decision in Odelola v SSHD [2009] UKHL 25 which says that the policies of the Secretary of State (in that case as set out in the Immigration Rules) which prevail at the time of decision are the ones that must be applied and not those that prevail at the time of application. This policy was not in force at the time of decision on the 14th December 2018, and in addition it would create considerable legal uncertainty if absent bad faith or some other culpable or undue behaviour leading to delay in dealing with a matter, as identified in FH (Bangladesh), that a previous policy could be deemed to have applicability.

23. As accepted by Mr Malik the discussion of Article 8 ECHR errs in law as it fails to focus on the foreseeable consequences of deprivation as is required, see AB, as the reasons for finding that the deprivation is a disproportionate interference with the claimant's Article 8 ECHR rights relate to the past (the conduct of the nullity proceedings and the failure to apply the previous policy at Chapter 55 of the Nationality Instructions).

24. As a result I find that all three separate reasons for the First-tier Tribunal finding that the deprivation proceedings were not lawful contain errors of law, and conclude that the decision of the First-tier Tribunal must be set aside with no findings preserved.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I adjourn the remaking hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to protect the anonymity of family members.

Signed: *Fiona Lindsley* Date: 17th July 2019
Upper Tribunal Judge Lindsley