



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DC/00061/2018

THE IMMIGRATION ACTS

Heard at Bradford (via Skype)
on 21 April 2021

Decision & Reasons Promulgated
On 10 May 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LIRIM KOVACI

(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer.

For the Respondent: Mr Hodgetts instructed by Paragon Law Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Flynn promulgated on 1 July 2019 in which the Judge allowed Mr Kovaci's appeal against the Secretary of State's decision of 12 October 2018 to deprive him of his British citizenship pursuant to section 40 British Nationality Act 1981 on the basis the decision was not in accordance with the law.

Background

2. Mr Kovaci arrived in the United Kingdom on 25 June 1999 and claimed asylum stating he was a citizen of Kosovo who had fled persecution from the Serbian authorities. That claim was refused but Mr Kovaci was granted four years Exceptional leave to remain on 28 April 2001.
3. On 10 September 2005, Mr Kovaci was granted Indefinite Leave to Remain (ILR), and on 29 November 2006 was issued with a Certificate of Naturalisation as a British citizen.
4. On 11 June 2009 Mr Kovaci's wife submitted an application for entry clearance. The date of their marriage was 3 March 1999, and they have a daughter born on 4 December 2004.
5. As a result of the application the British Embassy in Tirana advised the Home Office that it had in its possession an Albanian marriage certificate clearly showing Mr Kovaci to be a citizen of Albania.
6. As a result, the Secretary of State wrote to Mr Kovaci on 30 September 2009 stating he had reason to believe that he obtained his status as a British citizen as a result of fraud.
7. By letter dated 15 October 2009 Mr Kovaci's legal representatives, Duncan Lewis, submitted a statement in which Mr Kovaci denied making any false representations and claiming that in his asylum claim he gave his correct details.
8. On 22 January 2013 Tuckers Solicitors wrote to the respondent advising that Mr Kovaci had admitted he was born in Albania but expressing regret for providing incorrect details and arguing any deprivation of citizenship would be disproportionate as Mr Kovaci had lived in the United Kingdom for almost 14 years and was integrated.
9. By letter dated 21 March 2013 the Secretary of State stated the grant of citizenship was null and void as it was based on false information, and on 23 October 2013 a decision was made to revoke Mr Kovaci's ILR.
10. Following the decision of the Supreme Court in *Hysaj* [2017] UKSC 82 the Secretary of State accepted Mr Kovaci was a British citizen and that the nullity decision was wrong in law.
11. The decision under challenge before the Judge is the later decision of the 12 October 2018 in which it was said by the Secretary of State that having exercised discretion it was decided to deprive Mr Kovaci of his British citizenship on the grounds of fraud, even having taken into account the period of time that had elapsed since Mr Kovaci had been first contacted about his citizenship status of nearly 10 years and the fact the Secretary State awaited clarification of the law before taking the correct decision. The Judge noted the Secretary of State's reasoning including it being stated that had she known that Mr Kovaci had obtained his ILR to remain fraudulently as a direct result of maintaining false representations he would have failed the "Good Character" requirement for naturalisation.
12. Having considered the documentary and oral evidence and have heard submissions from the advocates the Judge sets out the core findings between [40 - 48] of the decision under challenge which are in the following terms:
 - "40. I listened carefully to the appellant's evidence, but I do not find him to be a credible or reliable witness. In his oral evidence, he continued to

maintain that he had not intended to make false statements and either did understand what he was signing; or that he did so only because he was following advice from more knowledgeable people. I do not accept that any of his explanation is credible. In particular, I do not find it credible that he told his lawyer in October 2009 that he had lied about his country of origin when he claimed asylum, but that she prepared a statement denying this, which he signed without reading. I find his avoidance of any responsibility for the fact that he continued his deception for over 13 years casts significant doubt on his general credibility. Nevertheless, the appellant's credibility has limited relevance to his appeal.

41. Mr Hodgetts submitted that the appellant met the respondent's current guidance because of his long residence and the fact that he would have qualified under the guidance applicable after his appeal was allowed in May 2014, the respondent having conceded that the decision of March 2013 was defective.

42. The respondents Nationality Instructions, Chapter 55 sets out the guidance in place between 19 October 2012 and 27 July 2017 [A244-260]:

"55.7.2.5. In general the Secretary of State or not to deprive of British citizenship in the following circumstances

...

- If a person has been resident in the United Kingdom for more than 14 years. We will not normally deprive of citizenship".

43. I appreciate that, had the respondent taken account of this guidance in making the decision of 21 March 2013, it would not have availed the appellant, who had resided in the UK since 25 June 1999, less than 14 years at that time. However, the respondent conceded at the appeal hearing on 29 April 2014 [A175-176] that the March 2013 decision was defective [6] and undertook to make a fresh decision [8]. The decision of the First-tier Tribunal Judge was promulgated on 19 May 2014 [A174]. By that time, the appellant had accrued over 14 years residence.

44. Chapter 55 set out aggravating factors, none of which was applicable in the appellant's case. Although they are expressly stated not to be exhaustive, I consider it significant that the appellant did not make any false representations at any point, except in respect of his claimed country of origin; and has no criminal record.

45. Mr Ojo submitted that the current version of Chapter 55 [A209-23] is the appropriate guidance to follow. It provides only three reasons for not depriving someone of citizenship, none of which applies to the appellant; and it states expressly:

"55.7.6 length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship."

46. I agree with Mr Hodgetts that the appellant is entitled to rely on the respondent's failure to make a lawful decision, taking account of the appropriate guidance, in a timely manner. The failure to make a decision

until October 2018, more than four years after withdrawing his March 2013 decision, is a relevant matter, but the respondent did not take account of the guidance applicable during the long period of delay. I also agree with Mr Hodgetts that this is a historic injustice that should have been considered as an additional reason for concluding that the appellant should not be deprived of his citizenship, in addition to the long period of residence.

47. I have considered Mr Ojo's submissions regarding the appellant's lack of good character, but I do not consider that this is a material issue in the circumstances because the guidance is devised specifically for people who have gained some form of status through misrepresentation or fraud. I distinguish this appeal from *Deliallis* because the guidance did not apply in that case.
 48. I therefore conclude that the respondent's decision was not in accordance with the law. I note that it was for this reason that the respondent withdrew the deprivation decisions in two appeals linked with *Deliallis*, which fortifies my conclusion."
13. The Secretary of State sought permission to appeal, which was granted by Upper Tribunal Judge Martin, sitting as a judge for the First-tier Tribunal, on 23 July 2019. The operative part of the grant being in the following terms:
 - "3. It is arguable, as set out in detail in the grounds, that the Judge has erred in applying a policy that was withdrawn in 2014; in conflating the earlier decision that the citizenship was a nullity (withdrawn after the Supreme Court's decision in *Hysaj* [2018] UKSC 82, and the decision under appeal, to deprive him of that citizenship; in finding a historic injustice when none was applicable in this case and in erroneously finding that the Secretary of State had delayed in making the decision under appeal when the Secretary of State has acted properly after the SC had ruled in *Hysaj*."
 14. The Secretary of State relied upon four grounds of appeal together with additional written submissions. Mr Hodgetts filed a skeleton argument which included his Rule 24 reply which was perfected by further pleadings received shortly before the error of law hearing. Both advocates made their oral submissions in support of their pleaded cases before the Upper Tribunal.
 15. It must be recognised that the date of the decision under challenge of the First-tier Tribunal is 1 July 2019, which was before the authorities relied upon before the Upper Tribunal of *Hysaj* [2020] UKUT 00128 and *Begum v Secretary of State for the Home Department* [2021] UKSC 7 which are relevant to the issues in this appeal as they clarified the correct interpretation and application of the law in this complex area.
 16. The Secretary States pleadings, whilst lengthy, warrant been set out in full and are in the following terms (bar the recital of the directions given by the Upper Tribunal and the grant permission):

Background

5. In this matter the Appellant appealed a notice of intention to deprive him of citizenship dated 12 October 2018.

6. The Secretary of State exercised his discretion under s.40(3) of the 1981 BNA, contending that the Appellant falsely claimed to be from Kosovo to obtain leave and citizenship, finding @ RFRL 9 *"if the relevant facts, had they been known at the time of application for citizenship was considered, whatever affected the decision to grant citizenship via naturalisation or registration"* (Chapter 55.7.1) and @RFRL 42 *"Section 6 of the Nationality Staff Instructions deals with deception and dishonesty. You would have been refused the British citizenship under S.6.1 and 6.2 had the nationality caseworker been aware that he had presented a false identity to the Home Office and continued to use that identity throughout all your immigration history (Annex R. Chapter 18D, pg.1-14)."*
7. The Appellant entered the UK in June 1999 as an Albanian national but falsely claimed to be from Kosovo, as a consequence, the Appellant was granted ELR then ILR and finally British citizenship on 29/11/06. The Appellant's fraud came to light when he applied for EC for his Albanian wife on 11/6/09. On 30/9/09 the Appellant was given notice that he was being considered for deprivation on account of his fraud. However, the Appellant continued to maintain the fraud and his innocence under letter from Duncan Lewis dated 15/10/09.
8. On 22/1/13 in response to a request for further evidence the Appellant finally conceded the fraud through Tuckers solicitors.
9. On 21/3/13 the Appellant was given notice that his grant of citizenship was deemed a nullity and on 23/10/13 the Appellants ILR was revoked. The Appellant appealed against the revocation of ILR. The revocation decision was found to be unlawful and remitted back to the Secretary of State on account of a failure to consider Article 8.
10. On 9/6/17 the Appellant served a PAP upon the Secretary of State challenging the decision to revoke ILR.
11. On 27/3/18 the Secretary of State confirmed to the Appellant that it was accepted that he was a British citizen in light of the SC judgement in Hysaj.
12. On 12/10/18 the Appellant was served with a notice of intention to deprive, which is the subject of the instant appeal.

Key findings of FTIJ Flynn

13. FTJI Flynn set out his findings of fact, at paragraphs 39 – 48:
 - @ 40 A is found to be an incredible and unreliable witness. None of the explanations for A's fraud are found to be credible. The Appellant tried to avoid responsibility for his deception for over 13 years, *"Nevertheless, the Appellant's credibility has limited relevance to his appeal"*.
 - @ 41 A submitted that he met the SOS current policy guidance because of his long residence qualified under the policy guidance after his ILR appeal was allowed in May 2014.
 - @ 42 the Chapter 55 Policy Guidance in effect between 19/10/12 - 27/7/17 included under 55.7.2.5 a provision whereby the Secretary of State would not generally Deprive Citizenship where a person has been resident for 14 years.
 - @ 43 had the SOS taken this guidance into account when making the 21/3/13 nullity decision it would not have availed A as he did not

have 14 years at that time. However by the time that the FTT remitted the ILR decision to the SOS on 19/6/14 A had accrued 14 years.

- @ 44 it is *“significant that the Appellant did not make any false representation Except in respect of his claimed country of nationality: and has no criminal record”*
- @ 45 the SOS argued that the Current policy guidance provides 3 reasons not to deprive, none of which applies to the Appellant and it expressly states *“55.7.6 Lengths of Residence in the UK alone will not normally be a reason not to deprive.....”*
- @ 46 *“the appellant is entitled to rely on the respondent’s failure to make a lawful decision, taking account of the appropriate guidance, in a timely manner. The failure to make a decision until October 2018, more than four years after withdrawing his March 2013 decision, is a relevant matter, but the respondent did not take account during the long “have been considered as an additional reason for concluding that the appellant should not be deprived of his citizenship, in addition to the long period of residence.”*
- @ 47 the Appellant’s bad character is not material because the guidance is devised for people who gained status through misrepresentation or fraud.

Summary of the Grounds of Appeal and the Secretary of States Further Submissions

GROUND OF APPEAL

14. It is submitted that it is self-evident @ 40 that the FTIJ finds that A used fraud in his acquisition of British Citizenship, therefore, the condition precedent under s.40(3) is met, notwithstanding the requirement to consider whether the Secretary of State correctly exercised his discretion and whether there are reasonably foreseeable consequences that would render deprivation disproportionate.
15. The FTIJ appears to find @ 46 that the Secretary of State applied his discretion wrongly on the basis that the Secretary of State failed to apply a 14 year policy contained within Chapter 55, which the Appellant should have benefited from. Equally the FTIJ found that the Appellant suffered an historic injustice in this regard. On that basis the FTIJ found the decision to deprive was *“not in accordance with the law”* @ 48.

Ground 1: Mistake of Fact/Inadequate reasoning

16. It is submitted first that the FTIJ’s finding at paragraph 42 that the 14 year policy was in effect until 27/7/17 is a mistake of fact. The 14 year policy was withdrawn on 21/8/14. The FTIJ’s finding @ 46 that the *“the respondent did not take account of the guidance applicable during the long period of delay”* is unsustainable.
17. It is submitted that the Appellant only conceded his fraud on 22/1/13, 3.5 years after the fraud was put to him. A’s citizenship was then deemed a nullity on 21/3/13, on 25/6/13 the Appellant accrued 14 years in the UK and on 21/8/14 the 14 year policy was withdrawn (14 months after A accrued 14 years residence). It is submitted that there was no long delay and in any event, as noted by the FTIJ @43, even if the nullity decision had been a deprivation decision A had not accrued 14 years at that time. It is submitted that the FTIJ’s findings are inadequately reasoned and predicated upon a mistake of fact.

1. **Ground 2: Conflation of Issues/Perversity/Inadequate Reasons/Failure to Take Material Matters into account**

18. It is submitted that the FTIJ in any event, conflates @43 and @46 the decisions to revoke ILR (23/10/13) the Nullity decision (21/3/13) and the decision to deprive A citizenship (12/10/12). At paragraph 46 the FTIJ finds that *“the failure to make a decision until October 2018, more than four years after withdrawing his March 2013 decision, is a relevant matter.”* The March 2013 decision was a nullity decision, this decision was withdrawn on 27/3/18; therefore, not four years before the 12/10/18 deprivation decision under appeal. If it is the case that the FTIJ was instead mistakenly referring to the ILR decision; it was not withdrawn but remitted to the SOS to consider Article 8. Second, in any event, Chapter 55 is specific to deprivation and does not bite upon ILR decision making.
19. With regard to the Nullity decision, it is submitted that *“nullification”* is not a discretion held by the Secretary of State nor does it involve the cancellation of citizenship, it is the recognition of the fact that citizenship was never acquired through the operation of law. As noted by Mr Justice Ousley @39 of *Kaziu [2014] EWHC 832* *“nullification leaves no room for the exercise of any discretion: the grant either is or is not a nullity, with whatever consequences may flow for the individual and for relatives and dependents, innocent or otherwise, and however long after the deceit. @41 of Kaziu HC “... he has not been deprived of “citizenship status obtained as a result of registration or naturalisation”. It is simply being pointed out to him that he never obtained it at all, and that the apparent grant is to him no grant at all.”*
20. It is therefore submitted that the Deprivation, discretionary consideration under the Chapter 55 policy guidance were irrelevant to the 21/3/13 nullity decision.
21. It is submitted, as set out in the RFRL @29, that in light of *R v SSHD ex p Sultan Mahmood* [1981] WB 59, *R v SSHD ex parte Parvak Akhtar* [1981] QB 46, *R v SSHD ex p Ejaz* [1994] QB 496, *R v Secretary of State the Home Department ex p Nahood Ejaz* [1994] QB 496, *Tohura Bibi v Entry Clearance Officer, Dhaka* [2007] EWCA Civ 740 and *R (Kadria) and R (Krasniqi's) v SSHD* [2010] EWHC 3405 (Admin), A's application for naturalisation was deemed a nullity by operation of law until the SC handed down Hysaj in 2018. It is submitted that the Respondent cannot be impugned for not pursuing deprivation in circumstances where the Appellant was deemed to have no citizenship to deprive him of. It is submitted that the FTIJ fails entirely to deal with the Court of Appeal precedent binding the Secretary of State at the material time, despite it being raised in the 2018 decision letter.

2. **Material Misdirection of Law**

22. It is submitted that the FTIJ's application of the 14 year policy, which was withdrawn on 21/8/14 is a material legal error. It is submitted that the Secretary of State was under a duty to apply his policy as at the date of decision in 2018, as noted @14 of *MO (Date of decision: applicable rules) Nigeria* [2007] UKAIT 00057 (which was upheld by the Court of Appeal in *Odelola* [2008] EWCA Civ 308 by the House of Lords in *Odelola* [2009] UKHL 25

“The Secretary of State is entitled and bound to make and operate the United Kingdom’s immigration policy and he is entitled to make decisions about particular cases by reference to the policy in operation at the time the decision is made”.

23. It is submitted that there were no transitional provisions when the 2010 – 2014 or July 2017 policies came into effect and therefore no legitimate expectation that the Appellant would benefit from the pre-August 2014 policy after August 2014. As found @16 of MO:

“16. The appellant can gain nothing by putting his claim in the language of legitimate expectation. His only legitimate expectation is to have his application decided in accordance with the Rules at the time the decision is made. Any other view would entail the conclusion that the Secretary of State’s power to make policy by changing the Rules from time to time is hampered or fettered (see In Re Findlay [1985] AC 318. (It might be thought that R v SSHD ex parte Hargreaves [1997] 1 WLR 906 assist the appellant with its similar view, expressed in terms of the policy in force at the date of the application. It is clear, however, that in Hargreaves no point was taken about any interval of time between application and decision. The court’s view was that the applicant was not entitled to require that the decision be made by reference to any pre-existing policy. Lord Woolf MR’s summary of Hargreaves in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at [75] refers only to the right that applications be “considered individually in the light of whatever policy was in force at the time”. Hargreaves is not authority for the view that the relevant policy is that in force at the time of any application as distinct from that in force at the date of decision.)”

24. Equally, the House of Lords made it abundantly clear in Odelola [2009] UKHL 25 that a statement that governs the exercise of an executive discretion in the absence of transitional provisions has the effect from the date in which it comes into effect. As noted @39,

“39. Standing back, therefore, from the detail and addressing, as Lord Mustill proposed in L’Office Cherifien [1994] 1 AC 486, 525H “a single, indivisible question, to be answered largely as a matter of impression”. I have no doubt that the changes in the immigration rules, unless they specified to the contrary, take effect whenever they say they take effect with regard to all leave applications, those spending no less, than those yet to be made.”

25. It is submitted, as noted by the FTIJ @45, that the reasons contained in the Chapter 55 policy at the date of the 2018 decision under appeal “for not to deprive someone of citizenship” do not bite. The policy was therefore a correctly applied by the Secretary of State.

3. Ground 4: Inadequate Reasoning/Material Misdirection of Law

26. At paragraph 46 the FTIJ finds “I also agree with Mr Hodgetts that this is a historic injustice that should have been considered as an additional reason for concluding that the appellant should not be deprived of his citizenship”. It is submitted that the FTIJ fails to give any reasons or cite any authority for his acceptance that a principle of “historic injustice” applied in this case.

27. It is submitted that if the IJ is referring to the Historic Injustice in Gurkha cases, then there is simply no application of such a principle in the instant appeal. The Gurkha historic injustice principle arose where adult dependent relatives of Gurkha veterans were deprived of the benefit of a later concessionary policy, as noted by the CA in Gurung [2013] EWCA Civ 8 @2.

“For many years, Gurkha veterans were treated less favourably than other comparable non-British Commonwealth soldiers serving in the British Army. Although Commonwealth citizens were subject to immigration control, the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British Armed Forces to obtain on their discharge indefinite leave to enter and remain in the UK. Gurkhas were not included in this policy.”

28. At paragraph 3 of Gurung is set out the SSHD 2004 press release setting out the reasons for the introduction of the discretionary policy:

“I am very keen to ensure that we recognise and the part they have played in protecting us. That is why we have put together the best possible package to enable discharged Gurkhas to apply for settlement and citizenship. I hope that the decision I have made today will make our gratitude clear. Those high military standards have been mirrored by their demeanour in civilian life. Their families, to have shown devotion and commitment by travelling across continents to support the Brigade.”

29. It is submitted that the appellant as a person who committed fraud for over a decade to facilitate his stay in the UK and again an unlawful advantage over genuine asylum seekers and immigrants is incomparable to the situation of Gurkha veterans who had given service to the UK but were treated differently to other non-British Commonwealth soldiers. The principle of historic injustice has no application in the instant appeal.
30. It is of further note that historic injustice was in any event, a matter for the Article 8 proportionality assessment in the Gurkha case law. Historic injustice is not a factor contained within Chapter 55 policy so it cannot form any part of the review of the discretion held under the policy. Even if the FTIJ was correct to take into account historic injustice (which is not accepted). It could only be as part of a proportionality assessment. However the FTIJ fails to have regard to the Public Interest in Deprivation, erroneously finding any countervailing public interest limited or non-existent: @40 A’s fraud was of “limited relevance” and @47 “immaterial”.
31. The FTIJ also seeks to play down A’s fraud @44, on account of the Appellant only changing his country of nationality (without taking into account that this fraud facilitated grants of leave) and not having any criminal convictions. It is submitted that whilst A has no criminal convictions. The fraud in question, which the FTIJ found to exist, is an offence under s46 of the BNA 1981 and s24A of the 1971 Act. It is submitted that A’s character and conduct carry significant adverse weight as expressed in the s40(3) provisions of the BNA 1981. As noted in BA [2018] UKUT 00085 @44:

“The Tribunal will be 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 etc to obtain British citizenship should be deprived of that status. Where statelessness is not in issue, it is likely to be only in a rare case that the ECHR or some very compelling feature will require the Tribunal to allow the appeal.”

Further submissions

32. It is submitted, in light of Hysaj [2020] UKUT 00128 that the Secretary of State’s grounds of appeal are made out. This is because the 14 year policy was not effective at the date of decision, there was no delay in making the decision to deprive, no legitimate expectation that A could rely upon the withdrawn policy at the date of decision, no historic injustice in A’s inability to avail himself of the policy between November 2013 -August 2014 and the Appellant suffered no prejudice or unfairness.
33. It is submitted that the present case falls on all fours with Hysaj in terms of facts and issues. The Appellant in the instant appeal was served with notice on 21/3/13 that his application for citizenship was considered a nullity. The nullity decision was made in line with the precedential decisions of the Higher Courts at that time. However, following the Supreme Court’s decision in Hysaj on 21/12/17 - which clarify the law in respect of nullity - the Appellant was served with a deprivation notice on 12/10/18. In the case of Hysaj [2020] UKUT 00128, the same factual matrix arose, Hysaj was served with a nullity decision on 13/2/13 and following the Supreme Court ruling, he was served with a deprivation notice on 3/7/18.
34. In Hysaj the Appellant argued at paragraph 46 - 63 that there was a delay in serving a deprivation notice, which arose from the Secretary of States erroneous reliance upon the nullity doctrine. A argued the SOS could not rely upon case law before the 2017 Supreme Court ruling to justify such delay. At 64 - 67. The Appellant argued that they had a legitimate expectation that the Secretary of State would consider deprivation in line with the withdrawn 14 year policy. At paragraph 68 - 76 the Appellant argued that the delay created an historic injustice as the appellant was denied the benefit of the 14 year policy and @ 77-80 Appellant argued that A was treated unfairly from the withdrawn 14 year policy. The UT dismissed all of these arguments and found:

Delay (@46-63)

@ 61

We are satisfied that the adoption of such an approach to limit the application of the public interest based on delay alone is unsustainable as it seeks to deny any true engagement with the facts that arise. The respondent was clearly permitted to rely upon legal advice. The starting point in any consideration undertaken by the respondent as to whether to deprive the appellant of British citizenship must be made by reference to the rules and policy in force at the time the decision was taken, and such rules and policy will abide with relevant precedent, as understood. The respondent was entitled to rely upon the then favourable judgment in Kadria from which permission to appeal to the Court of Appeal had been

subsequently refused at an oral hearing, and indeed did so rely before both the High Court and the Court of Appeal. Though Akhtar and subsequent Court of Appeal judgments that relied upon it cannot, with the benefit of hindsight post- the Supreme Court judgment in Hysaj, be considered to have finally and definitively settled the law the respondent and her legal advisors were entitled to observe the application of the doctrine of precedent. The respondent needs to have means of assessing the legality of her actions at a particular time, in order to know what her legal duty is. Rule of law values indicate that the respondent should be entitled to take advice and act in light of the circumstances known to her, and the state of the law, as then known: R. (on the application of MH) v Secretary of State for the Home Department [2009] EWHC 2506 (Admin), per Sales J, at [105]; approved Fardous v. Secretary of State for the Home Department [2015] EWCA Civ 931, at [42] per Lord Thomas CJ. When defending her decision before the Court of Appeal the respondent was reasonably permitted to place reliance upon the principle that the Court of Appeal is obliged to follow one of its previous decisions unless specific exceptions arise, such as the judgment being per incuriam: Young v. Bristol Aeroplane Co. Ltd [1946] AC 163.

@63

“...such delay did not arise from illegality on behalf of the respondent nor did it arise from a dysfunctional system yielding unpredictable and inconsistent outcomes.”

Legitimate Expectation (64-67)

@66

There is no specified period within which an immigration decision, or a decision to deprive, must be made and a decision to deprive a person of their British citizenship, as for any immigration decision, must be made by reference to the rules and policy in force at the time it is made, and not by reference to some earlier law and policy: EB (Kosovo) v. Secretary of State for the Home Department [2008] UKHL 41; [2009] 1 A.C. 1159, at [13]. The respondent is responsible for deciding and formulating policy as to the practice to be followed in naturalisation and deprivation matters and enjoys discretion to reformulate policy, so long as such reformulation is within the constraints which the law imposes.”

@67

“We are satisfied that the provisions in Chapter 55 relied upon by the appellant do not establish a clear and unambiguous promise that by reaching the fourteenth year of residence a person will not be deprived of their citizenship because it is clear that the respondent qualified the identified exceptions where deprivation will not normally occur so as to permit her to weigh the public interest in proceeding to deprive with the individual facts arising. The only legitimate expectation enjoyed by the appellant is that his case would be treated in accordance with the law and policy in place at the time the relevant decision was made. Consequently, the appellant’s submission that he enjoyed a legitimate expectation to be treated in a particular way under an earlier policy must fail.”

Historic Injustice (68-76)

@74

The appellant seeks the intervention of the Tribunal to disapply the policy existing at the date of the decision and to require the respondent to exercise her discretion in accordance with an earlier policy. He seeks to disabuse the usual rule that immigration and nationality decisions are made according to the law and policy in force at the time the decision is taken. We have explained above that the respondent did not unlawfully delay in making her decision and that though in hindsight she erred in relying upon the nullity doctrine she was entitled to rely upon legal advice. She could reasonably, and therefore lawfully, rely upon the High Court judgment in Kadria, as well as previous Court of Appeal precedent as generally understood. Reliance upon existing case-law cannot be categorised as illegality in this matter. The respondent was under no obligation to make a decision between 7 July 2012 and 20 August 2014, when the policy was withdrawn, and if there was an obligation to make a deprivation decision within a reasonable period of time, the failure to do so does not establish an illegal abuse of discretion. Even at their highest, and being mindful of the significant public interest in deprivation where citizenship has been obtained by fraud, the circumstances arising in this matter are not such that illegality was so obvious, and the remedy so plain, that there was only one way in which the respondent could have reasonably exercised her discretion when considering deprivation.

@75

Though the respondent erred in law by initially deciding that the grant of citizenship to the appellant was a nullity, the appellant cannot establish that a decision to deprive under section 40(3) should have been taken under a specific policy within a certain period of time. He is therefore unable to substantiate the alleged prejudice. Rather, he has benefited from the delay, being able to continue to enjoy the benefits of his fraudulently obtained British citizenship from 2007 to the present time, including his present ability to work in this country. We are satisfied that no historic injustice arises in this matter and this ground of appeal must fail.

Unfairness (77 – 80)

@80

The substantive unfairness argument is based upon the appellant being treated by the respondent as a ‘nullity’ case, whilst others were being dealt with differently and, the appellant asserts, more favourably. As we have already held, the respondent was entitled to rely upon legal advice that was based upon an understanding of the law post-Mahmood and the favourable judgment of the High Court in Kadria concerning the application of the nullity doctrine to Albanian nationals who had identified themselves as ‘Kosovan’ when seeking to secure international protection and again when applying to naturalise. In all the circumstances of this case, having already found that the appellant was not subjected to unlawful delay in the consideration of his matter or that he enjoyed a legitimate expectation for his matter to be considered at a certain time and in a particular way, we find that there was no unfairness in the appellant’s matter not being considered under Chapter 55 between 7 July 2012 and 20 August 2014. The appellant is wholly

unable to establish that he was subjected to such unfairness as to amount to irrationality.

Conclusion

35. In light of the above, the Secretary of State respectfully invites the Tribunal to set aside the FTT determination.

17. Mr Hodgetts in his skeleton argument and Rule 24 reply wrote:

IN THE UPPER TRIBUNAL (IAC)

BETWEEN

SECRETARY OF STATE FOR THE HOME DEPARTMENT Appellant
and

LIRIM KOVACI Respondent

SKELETON ARGUMENT FOR THE RESPONDENT
AND RULE 24 REPLY

1.1 Pursuant to directions of the Upper Tribunal dated 22 October 2020 and the anticipated remote oral hearing, the Respondent (appellant before the FTT) [hereinafter, 'LK'] submits:-

- a) that the FTT made no material error of law;
- b) the decision of the FTT should stand;
- c) If, contrary to the above submission the UT finds material error of law, it is submitted that the appeal should be remitted to the FTT to make appropriate findings of fact as necessary in relation to the Article 8 ECHR, and in particular, with regard to the holistic impact and best interests on LK's children (including British child), the extent to which the family can survive economically if a deprivation decision were made including, findings material to the submissions made to the FTT at pages 13 to 15 in the skeleton argument before the FTT. This is because the FTT has made no findings thereon or made a decision under Article 8 ECHR as to the foreseeable consequences of deprivation. These are material to both the submission as to whether the discretion to deprive 'ought' to be made 2 and/or to whether the decision to deprive is contrary to Article 8 ECHR and the best interests of LK's children, one of whom is British.

1.2 The factual background is set out LK's skeleton argument before the FTT and thus is not repeated here. For ease of reference, that factual background, is set out in a separate document in the appendix to this skeleton

Responses to Appellant SSHD's grounds/skeleton by paragraph number

Preface to Grounds

1. Paragraph 14 of SSHD skeleton: It has always been agreed that a condition precedent of the s 40(3) power is made out. The question for the Tribunal was whether the discretion should be exercised differently (see BA (deprivation of citizenship: appeals) [2018] UKUT 85 (IAC)) [at §33-36] – it has the jurisdiction to exercise its own discretion on the merits and/or whether there are reasonably foreseeable consequences that would render deprivation disproportionate under Article 8(2) ECHR.
2. Paragraph 15: What the FTT does at para 46, in accordance with BA, is to find that the discretion to deprive, exercised in 2018, ought to have been exercised differently due to a number of legally material factors, including:-
 - i) The initial making of an unlawful (nullity) decision when considering the legal consequences of the initial fraud discovered in 2009;
 - ii) The “untimely manner” in which the initial decision was made;
 - iii) The “delay” in remaking a decision following the withdrawal of the initial nullity decision in May 2014
 - iv) The historic injustice of not applying the 14 year deprivation policy when considering the legal consequences of the initial fraud at a time when it should and could have been considered;
3. The FTT was correct to conclude at para 48 that the “decision” (assuming that the FTT is here referring to the decision to deprive made in 2018) was “not in accordance with the law” - a decision made without considering a legally material factor would be 3 unlawful in an administrative law grounds; in this case, the historical injustice identified by the FTTJ at para 46.

Ground 1: Mistake of fact as to withdrawal date

4. Paragraph 16: This is immaterial; the FTTJ reasoned that the policy was in place at the date of Tribunal hearing in May 2014 by which time the appellant had built up 14 years residence. The SSHD confirms that the policy was withdrawn after this point, in August 2014 rather than 2017. Accordingly, whether the policy was withdrawn later is immaterial it was still in place at a point in time when, if the SSHD had applied the correct law when considering the legal consequences of the fraud on entry, LK would have been treated as a British Citizen, who, in May 2014 could have benefited from the application of the presumption contained in the 14 year deprivation policy.
5. If, as submitted below, the correction of an historic injustice - the failure to take into account the application of 14 year deprivation policy when considering the legal consequences of the fraud on entry in the decision making process – was a legally relevant factor in the exercise of the discretion to deprive in 2018, the FTTJ was correct to state at para 46 that the respondent did not take that into account in the period of delay from May 2014 onwards (when assessing what the legal consequences of the fraud were on LK’s position) and in exercising in the discretion to deprive – it is the SSHD’s case that it is not a legally relevant factor. In fact, LK built up 14 years residence in June 2013. In October 2013, as a legal concomitant to the unlawful decision to nullify citizenship, the SSHD made a further unlawful decision to revoke ILR which was premised on the earlier unlawful nullification decision.
6. Paragraph 17: There is no material mistake of fact. When considering the legal consequences of the fraud which was discovered by the Respondent in 2009, the FTTJ was entitled to take into account that the decision to nullify citizenship was unlawful. That was a decision which was maintained when

making the October 2013 revocation decision and in the appeal against that when it went before the Tribunal in May 2014; from October 2013 and at appeal in May 2014, the legal consequences of the discovered fraud were clearly in issue. At that time, LK had built up 14 years residence; the only legally applicable decision that R could and should have made at that time, was to accept that the legal consequences of the fraud were to apply the existing deprivation policy and draw the Tribunal's attention to it in May 2014. That was not done - there was no acceptance that the decision to nullify was unlawful before the Tribunal in May 2014 or that the deprivation policy contained a presumption of none-deprivation once 14 years had been accumulated - as it had when the decision to revoke ILR was made and also when it came to the FTT . The FTTJ's reasons are sufficiently clear: see (R (Iran)).

Ground 2: Alleged Conflation of Issues/Perversity/Inadequate Reasons/Failure to Take Material Matters into account

7. Paragraph 18: The FTTJ does not conflate the nullity decision with the deprivation decision. The FTTJ is clearly aware of the distinction between the various decisions and the determination must be read as a whole. Of course the reason why the FTT has to deal with all of these decisions, is that they were each a result of the SSHD's consideration of the legal consequences of the initial fraud discovered as early as 2009 and intimately linked and had causative effect: i) The 2013 nullity decision arose after solicitors for LK pointed out that he had almost reached 14 years residence in their 2013 letter; the decision to revoke ILR on 23rd October 2013 [140-144](by which time LK had built up 14 years residence) arose as a matter of logic, because of the unlawful decision to nullify Citizenship as a result of the same discovered initial fraud; the 2018 decision to deprive Citizenship arose when the SSHD finally accepted that both her earlier decisions made in 2013 and October 2013 (the latter by which time 14 years had already accrued) arising from the legal consequences of fraud, where unlawful.
8. The FTTJ is manifestly aware of the distinctions between the different decisions and the allegation of conflation is disingenuous. See: Para 1 (decision to deprivation of citizenship under Section 40 in 2018); para 6 and 9 (noting that LK's then Representative raised the issue of near 14 years residence as a reason for not depriving citizenship) ; para 10 (nullity decision of 21 March 2013); para 11 (decision to revoke ILR dated 23 October 2013); para 13 (noting the appeal against the decision to revoke ILR was conceded by the respondent on legal grounds); para 18-20 (noting that the nullity decision was accepted as being unlawful due to Hysaj); para 22 (the decision to deprive Citizenship of 12 October 2018 is clearly set out and defined - see also para 1).5
9. In light of the clear explanation noted at para 8 above, the FTTJ does not conflate or mix up the three decisions at para 43 and 46 save that there is a non-material slip in calling the decision under appeal the "March 2013" decision, it was the decision of October 2013. But in the context of the previous description of the decisions this is clearly a slip as to the month of the revocation of ILR decision.
10. One thing is clear, the decision to revoke ILR, which the SSHD conceded was legally flawed at the 2014 Tribunal hearing, was an unlawful decision that

considered the legal consequences of the initial fraud – it was made in October 2013, at a time when LK had built up 14 years residence (he arrived in June 1999).

11. When the FTTJ is correct at para 46 to state, “the failure to make a decision until October 2018, more than four years after withdrawing his March 2013 decision, is a relevant matter.” This sentence does not in terms state that both decisions have the same legal effect. Both the decision to nullify in 2013, the decision remove ILR and the final decision in 2018 all consider the legal consequences of the initial fraud. Had correct consideration been given to those consequences when the SSHD was first considering them, by at least October 2013, the 14 year deprivation policy would have benefited LK from its presumption. That failure, is an historic injustice which is, it is submitted, a legally relevant and material factor in the exercise of the discretion to deprive made in 2018.
12. Even if, as submitted at paragraph 18, the SSHD did not herself “withdraw” the revocation decision, the fact that it was conceded that it was unlawful (albeit for the wrong reason), meant that the October 2013 decision was a decision that was yet to be re-made and considered – this was the effect of the order the FTT. The SSHD was thus under a legal obligation to reconsider it in a reasonably timely manner as a result of the Tribunal’s decision. It was however ultimately withdrawn as a result of Hysaj in 2018.
13. In short, the legal consequences of the initial fraud were considered by the SSHD in 2009, and the first appealable decision on those consequences on October 2013, by 6 which time LK had built up 14 years residence, following which the SSHD was obliged to reconsider it.
14. The submission that Chapter 55 only bites on deprivation decisions and is not relevant to Article 8 is misconceived. When considering the legal consequences flowing from the fraud, the SSHD acted unlawfully in nullifying citizenship then, ipso facto, revoking ILR at a time when the only lawful decision that could be made was to consider whether deprivation of Citizenship was appropriate. Of course, the SSHD was not going to go down the deprivation road in October 2013 as LK’s solicitors had already pointed out in the January 2013 letter in response to the SSHD’s letter of 2009 that she was considering deprivation, that LK would accrue 14 years residence in June 2013.
15. Paragraph 19: For the purposes of argument it is agreed that nullification does not involve a discretion. But the FTTJ does not say that it does. There is no conflation of the decision to nullify with the decision to deprive by the FTTJ. However, they are intimately linked as they have been decisions respectively constituting the SSHD’s assessment of the legal consequences of LK’s fraud.
16. Paragraph 20: The Chapter 55 discretionary considerations were relevant to the position in March 2013 and October 2013, when the SSHD was considering the legal consequences of fraud, as the discretion to deprive was the only lawful route that the SSHD could have taken. By October 2013 the 14 year deprivation policy would have to been taken into account when considering what lawful options the SSHD had to respond to the discovered fraud.
17. Paragraph 21: The SSHD submits. “A’s application for naturalisation was deemed a nullity by operation of law until the SC handed down Hysaj in 2018”. This is wrong. It is accepted that the SSHD unwittingly followed what was thought to be the correct legal position from the cited case law. But the authorities were wrong. The fact that the SSHD acted in good faith, does not

preclude a finding that there has been historic injustice – see *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781, para 41; that is made out by the illegality per se; the SSHD’s good faith and honest belief is immaterial to whether there has been historic injustice, 7 although it might explain why an unlawful decision was made – although one can also draw inferences from the fact that the SSHD initially considered deprivation, then Solicitors’ for LK noted he had almost built up 14 years residence. The failure to cite such historic authority does not in any way vitiate the conclusion of historic injustice. See consideration of what constitutes historic injustice and its legal relevance in *Mousasaoui v SSHD* [2016] EWCA Civ 50 at paragraphs 12, 27 and *TN and MA* [2015] UKSC 40. Applying paragraph 27 in *Mousasaoui*: Here there was historic injustice because:

- i) There was prior illegality when considering the legal consequences of the discovered fraud, both in March 2013, and in October 2013 and before the 2014 Tribunal when the appeal was conceded but on erroneous grounds;
 - ii) When considering the legal consequences of the discovered fraud in October 2013, the only lawful decision would have been to consider deprivation and to apply the 14 year deprivation policy; to this extent, making an unlawful assessment of the legal consequences of initial fraud prejudiced LK as a policy that ought to have been considered as a legal response, was ignored;
 - iii) The unlawfulness of continuing to treat LK’s citizenship as a nullity, and the concomitant unlawfulness of seeking to revoke ILR, impacted on LK’s ability to fight against deprivation – if, which was the only lawful decision that could have been made in October 2013, the SSHD made a deprivation decision rather than the unlawful decision to maintain the nullity decision and the concomitant decision to revoke ILR, LK would have been able to pray in aid the 14 year policy - as did two of the linked successful appellants joined in *Dellialisi* - in a timely deprivation appeal
 - iv) There is clearly sufficient causal connection between the illegality and the historic injustice; had the SSHD not unlawfully considered the incorrect legal route as a response to the consequences of discovered fraud, she would have been ‘bound’ to consider deprivation as the only legal option, and by the October 2013 decision (which in effect maintained the unlawful nullity decision), the applicability of the 14 year deprivation policy. LK thus plainly suffered prejudice by not being able to rely on the said policy due to the illegal decision made in October 2013, if *Mousassoui* is applied correctly.
18. The SSHD submission fails to recognise the legal constituents of historic injustice. Good faith on the part of the SSHD is immaterial.

Ground 3 - Material Misdirection of Law

19. Paragraphs 22-25: Whilst there is a good deal to agree with the premisses of this ground, it is misconceived.
- i) It is accepted that a legally relevant factor to the exercise of discretion to deprive in 2018 was the application of the SoS’s extant Chapter 55 policy as of that date. However, the policy does not dictate all factors to be considered and does not bind either the SSHD or the Tribunal, in

- exercising that discretion, so as to exclude historic injustice as a legally material factor to be considered.
- ii) Whilst the SSHD is obliged to consider and apply the policy, to apply it to the exclusion of all other factors, and in a too rigid fashion, would be fetter the discretion inherent within Section 40A BNA 1981.
 - iii) Indeed, as the UT in BA holds, the Tribunal can exercise its own discretion and has the power to consider for itself, on the merits, whether an exceptional feature exists such that the discretion ought to be exercised differently.
 - iv) But Chapter 55 as it was in 2018, is fairly vague as to how the discretion should operate in any event, it merely highlights some nonexhaustive categories of when deprivation is not appropriate and highlights that length of residence in and of itself, might not be sufficient to protect against deprivation. It does not dictate what happens when there is a lengthy residence combined with other features.
 - v) The extant policy in 2018 does not exclude taking into account historic injustice as a legally relevant factor in the exercise of discretion. Indeed, if it did so, it would be contrary to *Mousasaoui v SSHD* [2016] EWCA Civ 50 at paragraphs 12, 27 and TN and MA [2015] UKSC 40 at [42].
 - vi) The Grounds are correct that following *Odelola* the immigration rules existing at the date decision should apply to decisions made by the SSHD. However, whilst the rules are an expression of policy at any one time, they have taken on the harder quality of law, and are generally prescriptive in detail providing, in the main, clearly defined circumstances. They are wholly distinguished from 9 policy which is vague and non-exhaustive. The discretion in issue was not dictated by the application of any immigration rule.
 - vii) Moreover, as noted in BA (deprivation of citizenship: appeals) [2018] UKUT 85 (IAC) [at §33-36] the statute (Section 40A BNA 1981) provides that the FTT has its own discretion to exercise and can allow an appeal, on its merits, if, due to the existence of an exceptional feature, the discretion ought to have been exercised differently. Neither the statute creating jurisdiction, nor the rather non exhaustive and vague policy in Chapter 55 existing in 2018, could prevent the FTT taking into account, as a legally relevant factor, historic injustice.
 - viii) The grounds are wholly misconceived in reading the FTT decision. The Judge was NOT “applying” the policy existing in 2014 to the decision in 2018, but was taking into account, as a legally material factor, the historic injustice that the Judge found had occurred on the facts. This is clear at paragraph 46 of the decision. The historic injustice is merely one of a number of factors that are taken into account in exercising the discretion inherent in the jurisdiction that Section 40A BNA 1981 provides.
 - ix) The Judge was also mindful of the policy existing in 2018 and also took that into account in her decision (see paragraphs 42 and 45). The 2018 policy was not, as the grounds submit, displaced by consideration of only the policy existing in 2014. Reading para 41 with paragraphs 45 and 46, it is plain that the Judge applied the 2018 policy, and in doing so, found that combined with the lengthy residence, there was another feature (the historic injustice) in line with para 55.7.6 of the 2018 policy quoted at paragraph 45.

- x) The appellant has not, and does not, rely on legitimate expectation as assumed in the grounds - he has no legitimate expectation that the 2014 policy would apply in 2018 and has never argued that. That concept is irrelevant. The Judge was lawfully entitled to take into account the historic injustice in the exercise of a discretion in 2018; the unlawful response to the consequences of discovered fraud underlying the decisions of March 2013 and October 2013 when had a lawful response ensued LK could have prayed in aid the policy in existence at that time. Although the requirements of good administration required the SSHD to consider legally applicable policy when considering the legal consequences of her response to the discovered fraud (see paragraph *Mandalia v. SSHD* [2015] UKSC 59 § [29]).
- xi) The submission on paragraph 45 of the FTT decision is misconceived. The judge correctly found that none of the 3 exceptions to deprivation in the 2018 chapter 55 policy apply. This does not mean, as submitted in the grounds, that “the policy was therefore correctly applied by the SSHD”. As the FTTJ notes at paragraph 45, the 2018 version of Chapter 55 is non exhaustive and creates a wider discretion to be exercised than merely three non-exhaustive categories of none deprivation: The FTTJ was correct to note that lengthy residence in itself might not be normally sufficient on its own.

Ground 4: Inadequate Reasoning/Material Misdirection of Law

- 20. Paragraph 26 of SSHD submission: The FTT was not obliged to cite any authority on historic injustice. That authority was noted in the skeleton before the FTT. The FTT was correct to find historic injustice - see above and below. The Judge gave ample reason for finding historic injustice when reading the determination as a whole. The judge notes that the fraud was discovered in 2009 when the SSHD first indicated her consideration of deprivation. That solicitors in January 2013 submitted deprivation was not appropriate as LK was reaching 14 years residence. That an unlawful decision was made to treat Citizenship as a nullity in March 2013. That an unlawful decision was made to revoke ILR in October 2013 (itself premised on the March unlawful nullity decision) and the only lawful avenue to consider the legal consequences of the discovered fraud, was, when the matter went to appeal in 2014, the application of deprivation policy (which was not considered).
- 21. Paragraph 27: The Judge was apprised of legal authority as to historic injustice in the skeleton argument. Reliance was not placed on Gurung but on those noted above: *TN and MA* [2015] UKSC 40 at [42], *Mousasaoui v SSHD* [2016] EWCA Civ 50 and *R ota FT v. SSHD* (rolling review; challenging leave granted) [2017] UKUT 00331 (IAC). Whilst not citing the authority, it is submitted the FTTJ correctly applied the legal principles arising therefore as noted above.
- 22. Paragraph 29: The grounds incorrectly submit that historic injustice can only be prayed in aid in respect of a decision taken under Article 8 ECHR. Although it is correct to say that historic injustice maybe a legally material factor in the assessment of proportionality under Article 8(2) ECHR, the above noted authorities note that it is also a legally material factor in the exercise of a discretion: see *TN* § [42]; see *R (S) v 11 Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781, para 41 and 46

“However, it was open to the court to determine that a legally material factor in the exercise of that discretion was the correction of injustice. That proposition did not require express statutory authority. It was implicit in the principles of fairness and consistency which underlay the whole statutory scheme. Further, in an extreme case, the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion.”

See *FT v. SSHD* (rolling review; challenging leave granted) [2017] UKUT 00331 (IAC) § 73, 74.

23. The grounds at paragraph 30 are wrong to say that the Judge failed to take into account the fraud as a factor contrary to the public interest in exercising the discretion. The Judge was entitled at para 40 read with 47 and 44, to find that the lack of good character was of limited weight in circumstances where the 2014 policy, had it been correctly applied when first considering the consequences of fraud, was premised on persons who had gained advantage of Citizenship by fraud or misrepresentation and where none of the countervailing factors in that policy applied.
24. Paragraph 31: The Judge’s conclusion that the lengthy residence in addition to the historic unfairness, applying the 2018 policy, meant that the discretion ought to have been exercised differently, is consistent with *BA* [2018] UKUT 0085. – the historic injustice was plainly an exceptional or very compelling feature combined with lengthy residence, in the context of the 2014 policy which was premised on providing presumptive protection from deprivation for those who engaged in fraud or misrepresentation. Application of *Hysaj* [2017] UKUT 00331: *Hysaj* (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC)
25. Paragraph 32-34: It is assumed that the reference in the grounds to *Hysaj* [2017] UKUT 00331 is meant as a reference to *Hysaj* (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC). At the time of writing, whilst the UT has refused 12 permission to appeal to the Court of Appeal in *Hysaj*, there is still a pending application for permission to appeal to the Court of Appeal.
26. In sum, LK submits:
 1. The case can be distinguished on its facts; and/or
 2. Observations about the non-applicability of historic injustice in cases where a nullity decision was taken are strictly obiter; and/or
 3. With the greatest respect, it is wrongly decided on whether, in these circumstances historical injustice arises as a legally material factor to be taken into account in exercising the current discretion to deprive of Citizenship and/or in relation to the proportionality balance under Article 8 ECHR.
27. The following facts distinguish LK from the facts in *Hysaj*
 - I) *Hysaj*, had committed a serious criminal offence which broke the continuity of his residence – accordingly, he had not built up 14 years continuous residence to qualify for presumptive benefit under the 14 year deprivation policy: see para 86 in *Hysaj*. It follows that since *Hysaj* could not pray in aid the 14 year policy in any event, strictly speaking the Tribunal’s holding on whether, if he could do so, there had been historic injustice, is strictly obiter (a decision on historic injustice in

failing to take account of the 14 year deprivation policy was not required to dispose of the case)

- II) The serious criminal offence committed by Hysaj, was another factor which weighed in the balance in favour of deprivation.
 - III) Unlike Hysaj LK was subject to a decision to remove his purported ILR (itself premised on an assumed lawful decision to nullify Citizenship) and which attracted a right of appeal to the Tribunal: The SSHD was thus at that time, obliged to consider the lawfulness of her response to the discovery of fraud, on a lawful basis and to draw to the Tribunal's attention, all relevant law and policy. That 2nd decision, was considered at a time when LK had built up 14 years' continuous residence.
28. Para 61 in Hysaj: It is incontrovertible that both the nullity decision in March 2013 and the decision to revoke ILR (premiered on LK not being British) were unlawful. To the extent that the UT reasons that the respondent's unlawful decision to nullify is irrelevant to the later decision to deprive, as the Respondent was entitled to follow legal precedent, this is contrary to Court of Appeal authority at paragraph 41 in *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781:

"41. I also have doubts about the weight put by the judgments upon the Department's conduct. The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention, and provides the basis for the remedy."

29. Cause of delay: It is accepted, that the cause of some or even a large part of the delay could not be put at the SSHD's door, but delay (i.e. the passage of a lengthy period of time) there has been; apprised of the fraud in 2009, the SSHD took until March 2013 to make a first decision on the legal consequences of the fraud despite informing him on 30th September 2009 [122-123] LK that she was considering depriving him of Citizenship. Whether or not witting, the practical consequences of unlawful decision has been a huge period of time when LK was in a limbo legal situation from 2013 to 2018 and to date. The lengthy passage of time is relevant, regardless of the cause. See *EB (Kosovo)* [2008] UKHL 41 at paras 14 and 15: the Upper Tribunal is wrong to imply at para 63, that delay is only relevant if it is a result of a dysfunctional or inconsistent system – that is only one of the three ways that delay is relevant to either proportionality, or it is submitted, to the exercise of discretion to deprive. It's legal relevance is not necessarily contingent on fault as paragraphs 14 and 15 in *EB (Kosovo)* make clear. But delay is not something which LK places any significant weight upon albeit relevant.

Legitimate expectation

30. The Tribunal in Hysaj hold that because there is no guarantee when a decision is made, there is no legitimate expectation that a decision will be made at any particular time. And that the Respondent can change her policy at any time. All of that is true. LK does not, and has not argued that he has a legitimate expectation that the 2014 policy should be applied to the decision made in 2018 or to replace it.

Historic Injustice

31. However, what the UT fails to address is that the decisions to nullify, and to then purportedly revoke ILR (concomitant on nullification), are both decisions made as legal responses to the discovery of fraud: Whilst the appellant did not have a legitimate expectation that any particular decision would be made at any particular time, once a legal decision was made to address the consequence of the discovery of fraud, the principle of good administration requires the respondent, to give legal responses to the discovery of fraud which were lawful and in accordance with the law. It is reasonable to assume that but for the error of law in treating Citizenship as nullity, which was maintained in further decision in October 2013, that the SSHD would have considered her discretion to deprive Citizenship at that time which was the only lawful route to address the legal consequences of the discovery of fraud. If so, that could only be considered in line with extant policy at that time.
32. Thus once a decision was made at the time, it necessitated a lawful, rather than illegal response - at that time. A fortiori, when the SSHD first indicated that she was considering deprivation, as the legal consequence of the discovered fraud, in her letter of September 2009.
33. The matter is analogous to the situation in *R v DPP ex parte Kebeline* [2000] 2 A.C. 326 . Here the House of Lords had to consider whether the discretion exercised by the DPP to give consent to a prosecution, under a law reversing the burden of proof, which was premised in part on the basis of, it was argued, flawed legal advice, was lawful (in accordance with Article 6(2) ECHR), despite the fact that the HRA 1998 had yet to come into force and its commencement date was uncertain [p17]. Their Lordships rejected the notion that there was a legitimate expectation that Article 6 ECHR had to be considered. However, Lord Bingham, in the Queens Bench, had held that since the DPP had already addressed his mind to the question as to whether the intended prosecution would violate Article 6, the court had the power to review the soundness of the legal advice upon which the discretion was based, in assessing whether the discretion itself was legal flawed (p. 11 per Lord Bingham in the Queens Bench 15 division). The HL overturned this as JR was not appropriate for arguments that could be made in the trial.
34. In LK's case, the SSHD had already indicated that she was addressing her consideration to the legal consequences of the discovered fraud, including whether to exercise the discretion to deprive citizenship (see letter of September 2009)[122-123] and later nullity action, and in light of representations in January 2013 that the 14 year residence mark was close. It follows that the public interest in how that discretion was exercised at that time, should have taken into account existing 14 year deprivation policy which was a legally relevant consideration in how the public interest at that time should be weighed in the exercise of the discretion as to what were the legal consequences of the discovered fraud. Just as the DPP had to consider the legal consequences of K's actions on a lawful basis once he had addressed his mind to them, so too did the SSHD once consideration had been given to the legal consequences of LK's fraud.
35. It is respectfully submitted that the UT in Hysaj errs in law at paragraphs 68-75 in holding, obiter, there is no historic injustice and by failing to properly apply the tests to ascertain whether there has been historic injustice, as

adumbrated in *Mousasaoui v SSHD* [2016] EWCA Civ 50 at paragraphs 12, 27 and R(S):

- I) *Per R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781 at [41], the cause of illegality, whether by maladministration or mistake or whatever, is immaterial;
- II) Applying *Mousasaoui v SSHD* [2016] EWCA Civ 50 at paragraphs 12, 27 there was historic injustice for the reasons set out at paragraph 17 above (pp. 6- 7)..

36. At paragraph 74 the UT reasons that Hysaj was seeking to “disapply” the policy applicable at the date of decision. That is not this case here. The argument put here, and accepted by the FTTJ, was that applying policy in place in 2018, the length of residence plus the historic injustice fell for consideration under the 2018 policy – see paragraphs 16 41, 45 and 46 for the FTT decision. The 2018 policy still placed weight on lengthy residence albeit that in itself was not (normally) sufficient:-

55.7.6 Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship.”

As submitted to the FTT, this means that the policy allows for the length of residence alone to be a sufficient reason for non-deprivation, albeit not normally. And in this particular case, length of residence is now over 21 years. That is a significant period of time in policy terms and is expressly recognised as such in para 276ADE(1)(iii). The FTT was thus entitled, applying policy in 2018, to regard the past historic injustice, as a tipping factor in LK’s favour.

37. Following TN it is submitted that the correction of an historic injustice, was a legally material factor, taken along with the length of residence and taking into account the 2018 policy, in the exercise of the full merits discretion that the Tribunal has under Section 40A BNA 1981. The FTTJ was thus entitled to reach the conclusion she did for the reasons given.

Alternative submission if the UT finds material error of law

38. The UT will see that before the UT LK argued that there were a range of factors that were material to both the exercise of discretion and to the proportionality exercise under Article 8 ECHR. These are set out in the skeleton argument before the FTT at pages 13 to 15 a range of factors, including, inter alia, the foreseeable consequences of deprivation, e.g. those which impacted on his economic ability to sustain himself and his family, the best interests of his two children, one of whom is British, and his prospects of successful reunification with his family whilst retaining his strong private life recognised under para 276ADE(1)(vi). Since the FTTJ allowed the appeal on the principle challenge, in terms of the exercise of discretion, no findings of fact have been made on these additional factors as no consideration has been given to Article 8 ECHR. Some of these factors also go to the issue of whether exceptional features such that the discretion ought to be exercised differently. But there are simply no findings on them
39. Accordingly, it is submitted that if the UT finds material error of law as submitted in the grounds, it would be appropriate to remit to the FTT for a proper fact finding exercise going to the foreseeable consequences of deprivation and for consideration of Article 8 ECHR.

40. Even if Hysaj is correctly decided, it does not preclude, in a suitable case, that an appeal against deprivation cannot be successful under Article 8 ECHR. It follows that findings of fact on matters relevant to Article 8 ECHR need to be made.

Glen Hodgetts 11th November 2020
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Annexe: Factual Background

Factual Background

- 2.1 The Respondent will be referred to as 'LK'. LK, born in Albania on 6/8/1973 [19; 131;47]¹ entered the UK on 25 June 1999 and claimed asylum on the basis of a claimed but false Kosovan nationality with DOB 26/2/1971. He was granted 4 years Exceptional Leave to Remain and later granted settlement (ILR) in September 2005. He naturalised as a British Citizen on 29th November 2006 in the false nationality [112]. [1 Please note the grounds of appeal incorrectly assert that the date of birth is 26/2/1971 - but correctly say that LK gave his true name and date of birth on arrival; LK has never given a date of 26.2.1971 and this is a typographical error]
- 2.2. In June 2009 the Secretary of State ['SSHD'] discovered that the applicant had falsely claimed his nationality on arrival when his wife made an EC application as a spouse. The SSHD first wrote to LK on 30th September 2009 [122-123] stating that he was considering depriving him of his nationality.
- 2.2.2 Without any decision on whether the SSHD was going to deprive him of Citizenship, and wanting now to give a true account, LK sent a chasing letter to the SSHD on 20th December 2012 [127] and again in January 2013, which set out his admission of deception [30-31]
- 2.2.3 After a delay of some 4 years since LK was first notified of the deprivation issue, in 2013, and after LK had admitted his continuing deception made on arrival in 1999, the SSHD purported to nullify the applicant's British citizenship which would have left intact, his ILR (but the fact that he remained a British Citizen in law) [134-137].
- 2.3 On 25th June 2013 LK built up 14 years residence in the UK. The Secretary of State then initially attempted to lawfully revoke the applicant's indefinite leave to remain ['ILR'] by decision dated 23rd October 2013 [140-144]. That decision gave rise to an in country right of appeal pursuant to Section 82(2)(f) of the Nationality Immigration and Asylum Act 2002 (as it was then prior to the amendments made to it by the Immigration Act 2014). At this time, on 30th January 2014, the Secretary of State served on the applicant IS 96 giving him notice of temporary admission and subjected him to conditions of residence, reporting and prohibiting him from employment [170].
- 2.4 However, on appeal against that decision, the First Tier Tribunal [FTT], by determination promulgated 19th May 2014, eventually held that the decision revoking his indefinite leave to remain was invalid as it was "otherwise not in accordance with the law" - as conceded by the Secretary of State at the hearing. Given that holding, the FTT stated that the question as to whether to

revoke the applicant's ILR was outstanding and "awaiting a lawful decision" (see paragraphs 6-9 of the determination) [175-176]. Notwithstanding the FTT decision, (meaning it was thought at that time ILR remained in place), the SSHD continued to impose reporting restrictions on LK - he was given limited permission to work but was unable to change employment as he had no proof of his entitlement to do so as his passport and other status documents had been removed.

- 2.5 The SSHD did not appeal the FTT decision but took no further action until 4th April 2017 when he decided to again try to revoke LK's ILR [187]. By Letter Before Claim dated 9th June 2017 [188-193] LK challenged that decision for failure to consider the ILR revocation policy; the policy is entitled "Revocation of Indefinite Leave to Remain" Version 4.0 published on 19th October 2015. The letter highlights that the policy states that ILR will not normally be revoked where the deception in question occurred more than five years ago whereas in this case, the deception occurred in 1999 and 2005 (when applying for ILR - ILR was granted on 10th September 2005).
- 2.6 Those JR proceedings concluded by consent, after the Supreme Court gave judgment in *Hysaj and others* [2017] UKSC 82. In light of the ratio in *Hysaj*, and the SoS's concession in that case, during the course of the Judicial Review LK made the submission that the nullity decision taken against him in March 2013 was unlawful and that he remained a British Citizen throughout as his was not an 'impersonation' case. The SSHD agreed; the JR was withdrawn on the basis that the SSHD accepted that LK was a British Citizen and that the nullity decision taken in 2013 was unlawful. See letter of 16 March 2013 [196-198] and consent order [199]. The SSHD agreed to pay LK's costs.
- 2.7 From the period during which LK was challenging the nullity decision of 2013 and subsequent decision purporting to remove ILR made in October 2013, the deprivation policy in place in Chapter 55 of the Nationality Guidance, as noted in *Deliallisi* (see paragraph 76 of *Deliallisi*), would have protected LK from deprivation as from June 2013, LK had built up 14 years residence at that point. In short, but for unlawfully pursuing nullity proceedings and attempting to revoke ILR, the SSHD could not have deprived LK of nationality had she made a lawful decision addressing the consequences of his earlier fraud.
- 2.8 Despite having unlawfully treated LK as someone who did not have British Citizenship from 2013 to 2018, and having illegally subjected him to the hostile environment for 5 years (prohibition from work, travel without a passport, and concomitant financial hardship, making it difficult to sustain a livelihood and support his family etc), including subjecting him to monthly reporting conditions, in March 2018 [196-198] the SSHD informed LK that he was considering depriving him of his British Citizenship.
- 2.9 On 6 April 2018 [201-203] solicitors for LK set out why deprivation would be inappropriate and unlawful. 2.10 On 12th October 2018 [1-13], the subject matter of these proceedings, the SSHD decided to deprive LK of his British Citizenship.

END

Discussion

18. This case demonstrates the confusion that existed prior to the decision of the Supreme Court in Hysaj [2017] UKSC 2013 in relation to the correct procedure to be followed if the Secretary of State wished to deprive an individual of British citizenship that had been granted to them as a result of fraud. The chronology shows that Mr Kovaci, as a result of fraudulently claiming to be Kosovan, eventually succeeded in securing British citizenship. The chronology of events is not disputed. As noted in the skeleton arguments and submissions set out above.
19. Following it being discovered that Mr Kovaci is a national of Albania rather than Kosovo, the Secretary of State on 21 March 2013 issued him a nullity decision. It is not disputed that the effect of a nullity decision is to find that a person was never entitled to the benefit of the decision/status that has been annulled. In this case it was clearly the position of the Secretary of State that Mr Kovaci had never been entitled to British citizenship.
20. The Supreme Court in Hysaj considered whether misrepresentations about identity submitted in an application for British citizenship made the grant of citizenship, a nullity rather than rendering those liable to be deprived of that citizenship under section 40 and 40A of the British Nationality 1981. The Supreme Court acknowledged in Hysaj, as in this appeal, that the Secretary of State had issued a nullity decision on the basis of a binding Court of Appeal authorities although found that the decisions of the lower courts were incorrect and were overturned.
21. Mr Kovaci had been granted four years Exceptional Leave to Remain (ELR) on 28 April 2001 as he had produced a psychiatric report in support of his asylum claim stating that he suffered from PTSD and a severe type of depressive illness as a result of his experiences during the war in Kosovo. On the basis of the grant of ELR Mr Kovaci withdrew his asylum appeal. It subsequently transpired that Mr Kovaci is not Kosovan and as this element of his claim was false it is likely any assertions made to the assessing psychiatrist based upon his experiences as a Kosovan are likely to be false too. Even if the clinical decision was correct it was the lack of suitable mental health treatment in Kosovo which was the basis for the grant of ELR which is not relevant as Mr Kovaci is not Kosovan.
22. Following completion of four years leave to remain under the grant of ELR, Mr Kovaci was granted ILR on 10 September 2005 on the basis he was a Kosovan refugee with mental health related problems that were a direct result of the war in his alleged home country of Kosovo.
23. Mr Kovaci's eligibility for naturalisation under section 6(1) British Nationality Act 1981 was approved on the basis he had ILR which had been acquired as a result of the claim to be in need of protection from Kosovo, the mental health issues noted above, resulting in a naturalisation certificate being issued on 29 November 2006.
24. ILR and citizenship are not the same although are often confused in some circles as being so. There are fundamental differences such as the fact that ILR can be lost if a recipient remains out of the UK for more than two years following a grant in their favour, whereas a person with British citizenship cannot lose that citizenship due to time spent outside the UK. ILR is also seen as a steppingstone to British citizenship, not vice versa. Citizenship is also for life, gives the holder the right to

- access a British passport, the right to vote, the right to stand for public office, and may in certain circumstances allow for dual citizenship. The effect of Mr Kovaci acquiring British citizenship on 29 November 2006 must mean that the grant of ILR simultaneously lapsed.
25. The Secretary of States view is clearly that the nullity decision asserting Mr Kovaci was not and had never been entitled to the grant of citizenship meant that the grant of ILR remained in force. This is demonstrated by the fact that following the nullity decision on 23 October 2013 a decision was made to revoke the grant of ILR which are separate proceedings as referred to in the pleadings, although following the decision of the Supreme Court in Hysaj and the acceptance by the Secretary of State that Mr Kovaci was and remained a British citizen by naturalisation and the decision of 21 March 2013 was wrong in law, the decision to revoke the grant of ILR appears to have been legally unnecessary, albeit with hindsight, but that is not the issue in this appeal.
 26. The decision under appeal before the Judge was the Secretary of States decision of 12 October 2018 to deprive Mr Kovaci of his British citizenship for the reasons stated.
 27. Section 40(3) British Nationality Act 1981 reads:
 - (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.
 28. As noted above, the existence of fraud was eventually admitted by Mr Kovaci. The provision is not, however, an absolute provision stating the Secretary of State “may” rather than “must”. That imports into the section an element of discretion to be considered by the decisionmaker. The Secretary of State in the deprivation notice specifically refers to the exercise of discretion, with specific reference to consideration of Chapter 55 of the Nationality Instructions which is applicable to a case of this nature, but concludes that having considered all relevant matters, it is not appropriate to exercise discretion in Mr Kovaci’s favour.
 29. In relation to the dispute between the parties regarding the applicable policy there is merit in the Secretary of State’s argument that the 14-year policy relied up by Mr Kovaci was withdrawn on 21 August 2014 and that the First-tier Tribunal finding that it remained in effect until 27 July 2017 is a mistake of fact.
 30. The Secretary of State’s argument that it is the policy in force at the date of decision, in this case 12 October 2018, which is the applicable policy is supported by a number of authorities.
 31. In R (on the application of Lakaj) [2014] EWHC 4273 it was held that it was a well recognized principle of public law that the decision maker was entitled to apply the policy applicable at the time the decision was taken.
 32. In CW (Jamaica) v Secretary of State for the Home Department [2013] EWCA Civ 915 it was held that the relevant date for determining the application of the policy

- was the date when the deportation order came to be made. In this case the policy in question, DP5/96, had long since been revoked.
33. In R (on the application of Elmi) v Secretary of State for the Home Department [2010] EWHC 2775 (Admin) Mr Justice Ouseley said that it was not the law that, where a decision had not been made or was required to be re-taken, the law or policy governing the application was fixed at what it was at the time of the application if the law or policy had moved on: Odelola v Secretary of State for the Home Department [2009] UKHL 25 and EB (Kosovo) v Secretary of State for the Home Department [2009] UKHL 41 considered. When a decision had to be taken or re-taken, it should be taken by reference to the policy or law in force when the decision was to be taken. There was no principle that, where there had been unreasonable delay, the decision should be made by reference to the policies or circumstances prevailing at the time when the decision should have been made.
 34. In Anwar [2016] CSOH 91 Mr Anwar applied for naturalisation. The Secretary of States policy concerning the assessment of good character changed after the date on which Mr Anwar submitted his application, but before that application was determined. The policy at the date of the application was more favourable to his position than the later policy upon which the Secretary of State based her decisions. It was held that Mr Anwar's only legitimate expectation was that his particular circumstances would be examined in the light of the applicable policy. The relevant (later) policy was specifically drawn to Mr Anwar's attention before the Secretary of State's decision was made when he was invited to provide further information (para 55). His JR application was refused.
 35. In this appeal the chronology record that Mr Kovaci was also invited to make further representations following the withdrawal of the annulment decision and consideration of deprivation post Hysaj.
 36. In R (On the application of MS) IJR [2015] UKUT 000539 it was held that in cases where there has been a delay in making a decision on an in-time application for extension of leave and where, during the period of the delay, the applicable policy for excluded persons who cannot be removed has changed from the DLR policy that was applicable to such persons prior to 2 September 2011 to the Restricted Leave to remain policy applicable since 2 September 2011, an argument based upon "historic injustice" is not available, applying by analogy the judgment of the Supreme Court in TN and MA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40.
 37. It is also relevant in this regard to note that at the date of the nullity decision Mr Kovaci had not established 14 years residence in the United Kingdom. So even if a lawful decision had been made at that date, as had always been contemplated, it is not established Mr Kovaci would have been entitled to the benefit of the 14-year policy at that time.
 38. In relation to legitimate expectation issue raised by Mr Kovaci, in Ex Parte Bibi [2001] EWCA Civ 607 the Court of Appeal said that: "in all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is what has the public authority, whether by practice or promise, committed itself to; the second question is whether the authority has acted or

proposes to act unlawfully in relation to its commitment; the third is what the court should do about it.”

39. In Nadarajah, Abdi [2005] EWCA Civ 1363 Laws LJ in the Court of Appeal said “Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle in this proposition?... It is said to be grounded in fairness....I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.A public body’s promise of practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body’s legal duty or is otherwise... a proportionate response (of which the court is the judge or the last judge) having regard to a legitimate aim pursued by a public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure to refusal to comply is objectively justified as a proportionate measure in the circumstances.... Proportionality will be judged by the respective force of the competing interests arising in a case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where the denial of the expectation is harder to justify as a proportionate measure.On the other hand where the government’s decision maker is concerned to raise wide-ranging or macro political issues of policy, the expectation’s enforcement in the courts will encounter a steeper climb. All these considerations, whatever their directions, are pointers not rules”.
40. In Mehmood (legitimate expectation) [2014] UKUT 00469 (IAC) the Tribunal held that the first question in every case concerning an alleged legitimate expectation is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification.
41. In R (on the application of Ooi and Ors) v Secretary of State for the Home Department [2007] EWHC 3221 Admin Mitting J said that the common law rule of legitimate expectation could not be applied in the claimant’s favour because their expectation that they would be granted ILR after four years continuous residence was not secured in an explicit and unequivocal statement.
42. It is not made out in this case that there was any unambiguous representation, promise or reassurance devoid of any relevant qualification or any statement made by the Secretary of State that satisfies the required legal test that the decision will be made within a specified time period or applying a policy in force at the date of application or that the decision would not be made other than by reference to the policy in force at the date the decision is made.
43. Mr Kovaci fails to establish that he had a legitimate expectation that he will be able to rely upon the earlier policy when the later decision was made.
44. The basis of this claim by Mr Kovaci is had a lawful decision been made on 21 March 2013, or within a reasonable time thereafter, he would have retained his citizenship and, therefore, that the later actions of the Secretary of State are unfair.

45. In Marghia (procedural fairness) [2014] UKUT 00366 (IAC) it was held that the common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively “fair”. The Court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test i.e. that no reasonable decision-maker or public body could have arrived at such a decision. It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal.
46. It cannot be said to be unfair of the Secretary of State, even if her actions were subsequently as a result of a more informed judgement by the Supreme Court found to be unlawful, to have acted in what he believed to have been in a legally correct manner on the basis of binding decisions of the Court of Appeal in making the nullity decision on 21 March 2013. It has not been made out that any delay between the making of this decision and the withdrawal of the same on 27 March 2018, following the handing down of the judgement of the Supreme Court is a period of delay that has been shown to be unlawful per se.
47. The First-tier Tribunal Judge’s finding that the period of any delay of four years is excessive is not made out when the chronology shows the gap between the withdrawal of the decision on 27 March 2018 and the date of the decision giving rise to these proceedings of 12 October 2018 was not at all, manifestly excessive, unfair, or unlawful in all the circumstances. The finding of the Judge in this respect is wrong.
48. Mr Hodgetts argues that the test for unfairness is established by reference to case law such as the Supreme Court decision in TN and MA (Afghanistan) [2015] UKSC 40 at [40] in which is it written:

“40. On Rashid’s application for judicial review, the Court of Appeal held that he was entitled to unconditional leave to remain in the UK. The Secretary of State relied on the Ravichandran principle. The leading judgment was given by Pill LJ, with whom May LJ agreed. He based his decision on the principle that an abuse of power called for the court to “intervene to give such relief as it properly and appropriately Page 15 can” (para 37). He found that there was an abuse of power because there was conspicuous unfairness in Rashid’s treatment. After “startling and prolonged” failures of the Home Office (para 13), the correct policy emerged in the cases of M and A. Rashid’s case had been stacked behind them, the issues were identical and fairness required that the same treatment be given to him as to them. Pill LJ recognised that the court could not declare that Rashid was entitled to be granted refugee status, as M and A had been, because that is a status conferred on the basis of criteria prescribed in an international treaty and should not be conferred if the criteria are not satisfied at the time of the decision. But he held that the court could and should declare that Rashid was entitled to indefinite leave to remain. This, he said, provided a remedy for the unfairness and was the appropriate response in the circumstances.”

49. In the same case, however, at [72] it was found that the Ravichandran principle applies on the hearing of such appeals without exception, and that Rashid should no longer be followed.
50. It is also the case that the policy that was withdrawn in 2014 is discretionary and not absolute. Although Mr Hodgetts refers to a “presumption” that if a person was able to satisfy the 14 requirement their British citizenship would not be taken away from them, a presumption can be rebutted in the appropriate circumstances.
51. Section 40(3) also contains a discretion and it is not disputed that there was an obligation upon the Secretary of State to exercise such discretion lawfully with proper regard to an applicable policy. It was not made out that had such exercise been undertaken in March 2013 that Mr Kovaci would have succeeded in retaining his grant of citizenship in any event, in light of the strong public policy considerations in relation to a person who obtained the same as a result of a deliberate fraudulent act. It is not made out that this is a case in which it was proper to find that Mr Kovaci would have been entitled to unconditionally retain his British citizenship on the facts, or that the First-tier Tribunal was correct in thinking he was by the decision to allow the appeal as a form of relief for an early alleged error or breach of obligation.
52. The task for the Judge was to assess the merits of the appeal at the date of the hearing and it has not been made out that there was any legal obligation upon the Judge to place Mr Kovaci in the position he would have been in had the deprivation decision been taken on 31 March 2013, rather than the nullity decision.
53. In R (on the application of S) v SSHD [2008] EWHC 733 one claimant was from Sierra Leone and two claimed to come from Afghanistan. The first lost out on an ELR policy because his application was initially incorrectly refused on non compliance grounds and the policy changed before it was considered on substantive grounds. The second and third lost out because initially the SSHD did not accept they were Afghans and by the time this was established the policy had changed. Mr Justice Supperstone distinguished Rashid in each case effectively on the ground that there were no legal errors and on the facts the decisions were not conspicuously unfair. On appeal in R (on the application of S, H and Q) v SSHD [2009] EWCA Civ 334 the Court of Appeal said that, if the Secretary of State took a decision after the policy in question had been withdrawn, then the policy did not apply unless there were exceptional circumstances. A previous lawful failure to apply the policy could not give rise to a subsequent intervention by the courts and in those circumstances the Secretary of State was not bound to grant ILR on the basis that he should have taken it into account after it was withdrawn. The courts would not intervene unless the decision was conspicuously unfair or unless proceedings had been brought promptly following a decision not to grant asylum. The Court of Appeal upheld the decisions.
54. In R (on the application of Safi) [2015] EWHC 95 when the claimant applied for asylum in 2002 it was not accepted he was from Afghanistan. At that time there was a policy that all unsuccessful asylum applicants from Afghanistan were normally entitled to for 4 years ELR. On appeal, after the policy was withdrawn, it was held that he was an Afghan but not at risk. On JR of a subsequent decision it was argued that the mistake in failing to apply the policy in 2002 was something

that the Respondent ought to have weighed in balance when making the most recent decision. It was held that there were cases in which ‘present circumstances’ might include a current need to remedy injustice caused by past illegality. However, before the Ravichandran principle that asylum appeals have to be considered on the basis of the facts and circumstances prevailing at the time of the hearing could be displaced or varied, it was necessary to identify illegality in the original decision caused by a failure to apply the correct policy or other legal requirement. The second decision-maker had the discretion to decide whether to take account of the alleged injustice caused by illegality in the first decision. In the instant case, the Court was satisfied that the 2002 decision was not legally flawed. There was no reason to believe that the case-worker who interviewed the Claimant after his arrival did not come to a decision on the evidence before him in a fair minded manner. The conclusion reached was reasonable in the light of the Claimant’s failure to answer questions about Afghanistan.

55. In relation to the historic injustice argument the First-tier Tribunal Judge found that [46]:

“46. I agree with Mr Hodgetts that the appellant is entitled to rely on the respondent’s failure to make a lawful decision, taking into account the appropriate guidance, in a timely manner. The failure to make a decision until October 2018, more than four years after withdrawing his March 2013 decision, is a relevant matter, but the respondent did not take account of the guidance applicable during the long period of delay. I also agree with Mr Hodgetts that this is a historic injustice that should have been considered in addition to the long period of residence.”

56. There are a number of problems with these findings being that the Judge fails to explain what guidance it is asserted the Secretary of State should have taken into account when at the date the decision under appeal was made the policy the appellant is seeking to rely upon had been withdrawn. It is not made out that the Secretary of State’s actions were not conducted in a timely manner in light of the developments in the case law leading to the hearing before the Supreme Court. The finding of four years delay is not made out to be factually correct as noted above. The reference to the respondent failing to take account of guidance applicable during the alleged long period of delay does not specify which guidance is being referred to that would have been relevant following the withdrawal of the early guidance. Mr Kovaci’s assertion of historic justice is not made out for the reasons set out in the application for permission to appeal and the Secretary of State submissions, but also in light of the recent decision of the Upper Tribunal in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC), the had noted which reads:

A. Historic injustice

(1) For the future, the expression “historic injustice”, as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (eg Patel and Others v Entry Clearance Officer

(Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89).

(2) The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as “historical injustice”, the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.

B. Historical injustice

(3) Cases that may be described as involving “historical injustice” are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual’s activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual’s Article 8 ECHR case; but the ways in which this may happen differ from the true “historic injustice” category.

C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls

(4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).

(5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers.

57. On the facts this is a case which falls within those identified in Category B in relation to any historic justice argument forming part of the article 8 ECHR aspects which the Judge in this matter did not consider.
58. In relation to the challenge by Mr Kovaci to the decision of the Upper Tribunal in Hysaj [2020] UKUT 00128 (hereinafter referred to as Hysaj(UT) to avoid confusion with the decision of the Supreme Court of the same name, the fact a party disagrees with or does not like a decision of the Upper Tribunal does not mean it is wrongly decided. The parties in Hysaj (UT) challenged that decision to the Court of Appel and permission was refused. Hysaj (UT) confirmed the correct legal approach to such cases and the decision relied upon by the Judge of Deliallisi

(British citizen: deprivation appeal: Scope) [2013] UKUT 00439(IAC) is an earlier decision. The comment by the Judge at [48] also fails to identify the foundation for the claim that the withdrawal of two other decision fortifies the conclusions reached in this case, especially when applying the current accepted legal framework.

59. The legal principles set out in the judgment of Hysaj (UT) relied upon by the Secretary of State have not been shown to be unsafe and give strong support to the errors of law identified in the application for permission to appeal.
60. The Supreme Court in Begum v Secretary of State for the Home Department [2021] UKSC 7 at [68] also state:

“68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from Edwards (Inspector of Taxes) v Bairstow [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision maker under the Human Rights Act, where such a question arises.”

61. Having considered the merits of the arguments I find the Secretary of State has made out her case in establishing legal errors material to the decision of the Judge to allow the appeal. I set the termination of the First-tier Tribunal Judge aside.
62. In relation to the consequences of that finding, it was submitted on Mr Kovaci’s behalf in the skeleton argument and further submissions:

“Alternative submission if the UT finds material error of law

38. The UT will see that before the UT LK argued that there were a range of factors that were material to both the exercise of discretion and to the proportionality exercise under Article 8 ECHR. These are set out in the skeleton argument before the FTT at pages 13 to 15 a range of factors, including, inter alia, the foreseeable consequences of deprivation, e.g. those which impacted on his economic ability to sustain himself and his family, the best interests of his two children, one of whom is British, and his prospects of successful reunification with his family whilst retaining his strong private life recognised under para 276ADE(1)(vi). Since the FTTJ allowed the appeal on the principle challenge, in terms of the exercise of discretion, no findings of fact have been made on these additional factors as no consideration has been given to Article 8 ECHR. Some of these factors also go to the issue of whether

exceptional features such that the discretion ought to be exercised differently. But there are simply no findings on them

39. Accordingly, it is submitted that if the UT finds material error of law as submitted in the grounds, it would be appropriate to remit to the FTT for a proper fact finding exercise going to the foreseeable consequences of deprivation and for consideration of Article 8 ECHR.
 40. Even if Hysaj is correctly decided, it does not preclude, in a suitable case, that an appeal against deprivation cannot be successful under Article 8 ECHR. It follows that findings of fact on matters relevant to Article 8 ECHR need to be made.”
63. On behalf of the Secretary of State Mrs Pettersen submitted that the Judge had made no findings in relation to article 8 but that this was a deprivation case in which the consequences of the upholding of the deprivation decision would be considered in accordance with article 8 ECHR on the facts within a short period of time. If a decision was taken to remove Mr Kovaci from the United Kingdom, he would have an in-country right of appeal against that decision, which was the correct point in time at which the article 8 aspects of the appeal could be argued. The suggestion for remittal was therefore not accepted as being the appropriate way to proceed.
 64. Mr Hodgetts referred to Begum and the fact it was for the Tribunal to decide the article 8 aspects of the case for itself and sought to differentiate this matter from the Hysaj (UT) on the facts.
 65. In relation to article 8 ECHR the Upper Tribunal found in Hysaj (UT):
 117. Significant weight is to be placed upon the public interest in a person who has obtained British citizenship through fraud, false representation or concealment of a material fact being deprived of that status and the Tribunal is to be mindful that it is the respondent who is primarily responsible for determining and safeguarding the public interest in maintaining the integrity of the rights flowing from British citizenship.
 118. The exercise of discretion is to be approached on the basis that deprivation of citizenship involves interference with a right and that any such interference should be no greater than is necessary to achieve the legitimate aim of the interference. In this matter, the issue is as to deprivation, and whether the appellant will be deported or removed is not determined by the deprivation appeal. Upon the conclusion of the appeal process, he will remain in this country and continue to reside with his family. The appellant will await a further decision as to whether he is to be deported or be permitted to remain in this country, and he will enjoy a further right of appeal to the First-tier Tribunal against a decision to refuse a human rights or protection claim. The children's best interests are in staying in a family unit with their parents, which they will continue to do upon deprivation. That the family unit may have to move accommodation or enjoy more limited financial resources is not such as to come close to defeating the significant public interest in the appellant being deprived of his British citizenship. The Tribunal held in BA that consequent to such weight, where statelessness is not in issue it is likely to be only in a rare case that the ECHR or some very compelling feature will require an appeal to be allowed. The circumstances in such a case would

normally be exceptional in nature. We find that the Judge did not apply the wrong test when considering proportionality and article 8. She was employing exceptionality as a predictive device, rather than a threshold test.

- 66. The issue of statelessness has not been raised in this appeal and as with the appellant in Hysaj (UT), there is no suggestion that the consequence of the deprivation decision will be other than that Mr Kovaci remaining in the United Kingdom with his family awaiting a further decision from the Secretary of State as confirmed by Mrs Pettersen. It is not made out the best interests of any children are other than to remain in the family unit with the parents which they can continue to do upon deprivation and nor was it made out that there will be any impact upon any accommodation or the economic arrangements for the family such as to warrant an early consideration of these issues on the facts.
- 67. It is noted that it was also found in Hysaj (UT) that upon deprivation of British citizenship there is no automatic revival of previously held indefinite leave to remain status which is determinative of this issue too.
- 68. I find in addition to accepting that the First-tier Tribunal has erred in law as it is not established on the evidence that there is arguable legal error established in the decision of the Secretary of States decision to deprive Mr Kovaci of his British citizenship on the facts as found, the article 8 issues will be considered at a later date. On the basis of the matters relevant to the challenge at this point in time the only decision reasonably open to a Tribunal is for the appeal against the Secretary of State’s deprivation of citizenship decision to be dismissed. The decision is not irrational or outside the range of those reasonably open to the decision maker on the facts or in law. I therefore substitute a decision to dismiss the appeal.

Decision

- 69. The First-tier Tribunal Judge has erred in law and that decision shall be set aside.**
- 70. I substitute a decision to dismiss the appeal.**

Anonymity.

- 71. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 29 April 2021